

# **SECTION XI**

## **CONTRACT ADMINISTRATION GUIDELINES**

### **AGENCY AND MATERIALS MANAGEMENT OFFICE CONTRACTS**

# **POST AWARD**

**IMPORTANT NOTICE:** Any guideline or procedure of broad application **CANNOT** address the needs of all possible situations. For this reason, this document is intended to be a general guide and **NOT** a state policy. Procurement personnel at both the Agency and MMO levels are to exercise their judgement in the application of the processes described herein and are expected to modify, omit, or add steps depending on the particular circumstances.

Contractors are **NOT** entitled to rely on, or to expect adherence to, the guidelines or processes outlined in this document. Moreover, this document should **NOT** be construed as obligating the State in any way to follow the guidelines or procedures outlined herein. This document is **NOT** part of any contract documents and is **NOT** intended to create any contractual obligations.

The definitions and statements contained herein are **NOT** an official interpretation of the Consolidated Procurement Code and are intended only for use as a part of this document.

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## Definitions

**Agency Buyer:** Agency procurement personnel responsible for the procurement (either awards the Agency contract, approves the requisition forwarded to MMO for processing, or is otherwise designated as the Agency’s point of contact with MMO). This person will be MMO’s point of contact with the Agency for contracts awarded by MMO on their behalf. Purchasing personnel with titles ranging from Procurement Specialist to Procurement Director may be filling this role. **This person is to be specifically designated on requisitions submitted by the Agency to MMO.**

**Agency Contract Administrator:** Assigned the function of monitoring contract performance. Unless designated otherwise, the Agency Buyer performs this role. However, it is anticipated that this role may be delegated to personnel assigned to the operational area receiving the goods or services.. The person to fulfill this function is designated by Agency Buyers. The “Contract Administration Designation Letter” should clearly identify the administrator and his scope of authority. When MMO is awarding the contract, the information normally found in the designation letter should be incorporated into the “Notice of Intent to Award” in order to inform the contractor of which key Agency personnel are performing what role. A separate letter is not issued by MMO. **Copies of “Contract Administration Designation Letters” should be submitted by the Agency along with requisitions so that the information can be incorporated into the “Award” documents.**

**“Buyer’s Review of Contractor’s Response”:** Formal documentation of the Buyer’s review of a Contractor’s response to a “Contractor Performance Report.” It may be used to accept the Contractor’s response, further negotiate with the Contractor, or as part of the justification to terminate a contract. Its intended purpose is to formally establish agreement of a resolution between the parties involved.

**Change Order (as defined in SC Law § 11-35-310 item 4):** “Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.” **An amendment issued prior to final award is not a “Change Order.”**

**Chief Procurement Officers (as defined in SC Law § 11-35-310 item 5):** “(a) the management officer for information technology, (b) the state engineer for areas of construction, architectural and engineering, construction management, and land surveying services, and (c) the materials management officer for all other procurements.” Referred to as CPO throughout the remainder of this document.

**“Contract Administration Designation Letter”:** Letter issued by Agency Buyers formally designating who will be performing contract administration duties and their scope of authority. Copies of these letters should be provided by the Agency to the Contractor on Agency contracts. **Copies of these letters are submitted with requisitions by the Agency to MMO so that the information can be incorporated into the “Award” documents.**

**“Contract Administration Plan”:** Plan developed during “Pre-Award” phase and adjusted as needed during the “Post-Award” phase of the contract. It describes how the agency will approach contract administration. Also used when developing contract documents to ensure they have effective and enforceable provisions, which produce desired outcomes. **This plan is to be**

**included as an attachment to requisitions submitted by Agencies to MMO.**

**Contract Controversy:** Generally, a dispute between the State and a Contractor in regards to the performance or interpretation of a contract. A “Request for Resolution” of a “Contract Controversy” invokes the CPO’s authority under § 11-35-4230 to conduct an administrative review and resolve the controversy. This process is used when the Contractor and State cannot reconcile differences at a level lower than a Chief Procurement Officer. While this process is a last resort, it is not necessary to wait and use it only when a contract is being terminated. It may be used effectively at any point during the life of the contract to address an issue that must be resolved before the contract can be completed. “Contract Controversy” proceedings may be initiated by an Agency or Contractor. The appropriate CPO presides over the process.

**Contract Modification (as defined in SC Law § 11-35-310 item 9):** “A written order signed by the procurement officer, directing the contractor to make changes which the “Changes Clause” of the contract authorizes the procurement officer to order **without** the consent of the contractor.”

**Contractor (as defined in SC Law § 11-35-310 item 10):** “Any person having a contract with a governmental body.”

**“Contractor Performance Report”:** Report used to provide feedback concerning Contractor performance. It consists of a cover page and 1 of 3 letter formats to be used at the Buyer’s discretion. The **“OPEN FORMAT”** is used to report exceptionally good performance or non-performance that does not yet warrant a “Cure” or “Show Cause” format. It is an appropriate tool to use when a Contractor has substantially performed, but there are minor non-performance issues that have **NOT** been successfully resolved informally. This format is not appropriate for issues that are serious enough (on their own merit) to result in contract termination. The **“CURE FORMAT”** provides notification to the Contractor that, based on the State’s observations, it appears the contractor is not going to perform per the terms and conditions of the contract. This report is used when there is still sufficient time remaining for the Contractor to perform per the terms and conditions of the contract. It is an excellent approach to motivate Contractors to catch-up and stay on schedule when a milestone has been missed. The **“SHOW CAUSE FORMAT”** provides notification to the Contractor that he has failed to perform and is now in default. This report is used when there is **NOT** sufficient time remaining for the Contractor to perform per the terms and conditions of the contract and the State plans to “Terminate for Cause” unless the Contractor has a legally valid excuse for its failure to perform.

**MMO Buyer:** MMO procurement personnel responsible for the contract. Procurement personnel with titles ranging from Procurement Manager to State Procurement Officer may be filling this role. The person filling this role works closely with the Agency, Contractor, MMO Contract Administrator, and State Procurement Officer to resolve non-performance issues. This person is clearly identified on the “Notice of Intent to Award”.

**Partnering:** An ongoing process initiated at the beginning of the performance phase of a contract. It encourages both State and Contractor personnel to work together to achieve the contract objectives. It involves the development of a cooperative management team, representing both parties, which seeks to identify common goals and objectives. Stated another way, it is a process of aligning expectations.

**Perfect Performance (also called “Strict” or “Literal” performance in some references and “Perfect Tender” in others):** All terms and conditions are performed exactly as specified in the contract documents. Any non-performance issue is resolved per the terms and conditions of the contract prior to its completion. When provided for in the contract, “Perfect” or “Near Perfect” performance may be required. When this is the case, the performance standards should be made clear and emphasized in the contract documents. Buyers are cautioned to use these performance level standards sparingly. Their use may be interpreted as restrictive and unreasonable. “Perfect Performance” requirements may drive prices upward and cause unnecessary problems for all parties during the post award phase of the contract.

**State Procurement Officer (SPO):** The manager responsible for the operation of the State Procurement Office. Direct Supervisor of the Manager of Commodities Procurement, Manager of Services Procurement, and MMO Contract Administrator.

**Substantial Performance:** Exists when the contractor has performed all material requirements of the entire contract or a divisible portion thereof, such that the underlying purpose of the contract has not been substantially impaired. Stated another way, a material breach has not occurred. Reference page 8 in the “Key Concepts” section of this document for additional information.

**Termination for Cause:** An exercise of the State’s contractual right to completely or partially terminate a contract because of the Contractor’s failure to perform its contractual obligations. Generally, MMO will only support a “Termination for Cause” if the Contractor has failed to “Substantially Perform.” Contracts are not usually terminated because a Contractor does not completely or perfectly perform (minor non-performance issues remain). Contracts may be “Terminated for Cause” due to minor non-performance issues when the contract documents expressly require “Perfect Performance.”

**Termination for Convenience:** An exercise of the State’s right to terminate or cancel performance of work under contract, in whole or in part, if the State determines that termination is in the State’s best interest. (see “Termination Costs”).

**Termination Costs:** Cost incurred by a Contractor solely attributable to a contract termination. If allowed by contract, a Contractor may recover such costs when a contract is “Terminated for Convenience.” Examples would be restocking fees, transportation costs, amortized capital expenditures, etc.

**“Termination Letter”:** Formal notification to a Contractor that a contract has been terminated.

## INTRODUCTION

This document provides guidelines for Contract Administrators and Buyers to use in the “POST AWARD” / “PERFORMANCE” phase of contracts. It applies to contracts awarded by agencies and the Materials Management Office (MMO) with the exception of the Office of the State Engineer (OSE). OSE has established its own guidelines which are structured around the specific aspects of construction and A/E (architectural / engineering services) contracts.

This document addresses contract set-up through completion. One of the primary tools described herein is the “Contractor Performance Report.” It can be used positively to document and report exceptional performance and negatively for non-performance.

While the majority of Contractors endeavor to provide quality performance, it is a given that all buyers will encounter performance problems with Contractors at some point during their careers. Non-performance should be addressed at the lowest level possible. The levels addressed in this guideline, ranked lowest to highest (1 = lowest, 4 = highest), are as follows:

1. Agency Contract Administrator
2. Agency Buyer
3. MMO Buyer
4. Chief Procurement Officer (CPO)

Since various agencies are structured to operate in different ways, the levels addressed throughout this document establish minimums that should work in all size operations. Agencies are empowered to augment the first 2 levels addressed above at their discretion.

This document’s structure is based on the following classifications:

1. Contracts Completed by Agencies
2. Contracts Completed by MMO for a Specific Agency(s)
3. Statewide Term Contracts Completed by MMO

The complete process for each classification is contained within its section of this document. Once the document user classifies the contract and turns to that section, he should only need to leave that section to reference definitions and attachments. The attachments provide detailed information and sample formats for most documents referenced.

**Agency and MMO Procurement Personnel are NOT obligated to follow these guidelines and may modify, add, or omit processes listed in them as circumstances warrant!**

**MMO personnel are available to Agency Buyers (MMO’s Point of Contact) throughout the performance phase of contracts to assist with contract administration issues. The MMO Buyer is the Agency Buyers’ point of contact for contracts awarded by MMO. The Chief Procurement Officers are involved only when an issue(s) cannot be resolved at a lower level.**

## Key Concepts

***PARTNERING:*** An ongoing process, initiated at the beginning of the performance phase of a contract, which encourages both State and Contractor personnel to work together to achieve the contract objectives. This process is essential to the success of various service and other type contracts. It involves the development of a cooperative management team, representing both parties, which seeks to identify common goals and objectives. Stated another way, it is a process of aligning expectations. To be effective, the process brings about a “mutual win” situation and avoids an “us against them” environment. The goal is to avoid litigation that involves unnecessary expense, delay, and disruption. The key elements within this guideline supporting this concept are the “Contract Administration Plan”, identification of key personnel plus their roles (all parties), timely communications that reinforce initial efforts to align expectations, and the use of “Contractor Performance Reports” to recognize exceptional performance. **An argument could be made that, if pursued earnestly, the application of the “Partnering Concept” may potentially save the State more funds (through cost avoidance) than any other contract administration procedure described in this document. All personnel are encouraged to look for ways to establish and strengthen relationships with Contractors through the use of this concept.**

***DOCUMENTATION:*** A critical key to dealing effectively with non-performance issues. It should clearly identify the unsatisfactory performance, associated provisions in the contract documents, remedies sought, and a means that both parties can use to verify successful performance. In all cases the documentation should be specific and stay on point. Introduction of unrelated items is often confusing and counterproductive.

***LIMITED DISCRETIONARY AUTHORITY:*** Throughout the contract administration process, Buyers will function as agents of the State and exercise discretion when dealing with contractual matters. This discretion is limited in at least two ways. First, the authority to change or modify a contract is limited to the buyer (or his designee - in writing) that issued the award. Second, changes and modifications are limited in size and scope so as not to invalidate the original procurement process. This second limitation is determined on a case-by-case basis and will be dependent on things like price break quantities, delivery requirements, specifications, performance requirements, etc.. The Buyer is responsible to determine if a proposed change or modification would have impacted on vendor responses to the original solicitation to the point where either a different vendor may have been awarded the contract or a different set of vendors may have participated.

***CHANGE ORDERS and CONTRACT MODIFICATIONS:*** During the contract administration process, it may be necessary to clarify, change, or modify the contract. It is essential that all state personnel understand that only the Buyer, who awarded the contract (or a designee – authorized in writing), can perform these actions regarding that contract. The legal definitions for “Change Order” and “Contract Modification” can be found on pages 3 and 4. Agency Buyers act on contracts they award and MMO Buyers act on those they award. Once signed, these documents are incorporated into the contract documents.

***SEPARATE OR SUPPLEMENTAL CONTRACTS:*** Generally, the State enters into a contract by accepting a Contractor’s response to a solicitation prepared by a Buyer. The Buyer’s signature on the award qualifies as the State’s authorized signature. Accordingly, separate or

supplemental contract documents (i.e. documents other than the Solicitation, Bid/Proposal, and Notice of Intent to Award) are not usually signed, either before or after award. This is particularly applicable to standard contracts prepared by Contractors and offered to State personnel for signature. Rarely are such documents signed. When they are, the only person authorized to sign such documents on behalf of the State is the Buyer that awarded the contract. Buyers are cautioned to review these additional documents carefully to ensure they do not modify the contract in a way that would invalidate the procurement's evaluation and award process. It is very important that there is a contract provision that indicates which part of the contract documents takes precedence should a conflict exist.

**SUBSTANTIAL PERFORMANCE:** Exists when the contractor has performed all material requirements of the entire contract or a divisible portion thereof, such that the underlying purpose of the contract has not been substantially impaired. Stated another way, a material breach has not occurred.

*General Rules:* If a contractor has substantially performed, termination for cause would not be warranted, but the state would be entitled to recover any damages resulting from the contractor's failure to fully perform. If a contractor has not substantially performed (i.e., has materially breached the contract), the state may terminate for cause. If the state terminates for cause and the contractor's breach is not found to be substantial, the state may be liable for breach of contract.

*Application:* In the absence of an agreement to the contrary, the concept of substantial performance is generally applicable to contracts for either construction, services, or goods mixed with services. Different rules apply to a sale of goods governed by the Uniform Commercial Code. S.C. Code Ann. § 36-2-601.

**TERMINATION FOR CAUSE:** Should the contract administration process NOT be successful, it may become necessary to terminate a contract. Generally, MMO will only support a "Termination for Cause" if the Contractor has failed to "Substantially Perform". Contracts are not usually terminated because a Contractor does not completely or perfectly perform (minor non-performance issues remain). Contracts may be "Terminated for Cause" due to minor non-performance issues when the contract documents expressly require "Perfect Performance". Agencies are expected to pay Contractors based on their performance. Incomplete performance should receive proportionately incomplete payment. **Refer to Attachment #5 (Termination Letter) for details.**

**CONTRACT CONTROVERSY:** Generally, a dispute between the State and a Contractor in regards to the performance or interpretation of a contract. A "Request for Resolution" of a "Contract Controversy" invokes the CPO's authority under § 11-35-4230 to conduct an administrative review and resolve the controversy. This process is used when the Contractor and State cannot reconcile differences at a level lower than a Chief Procurement Officer. While this process is a last resort, it is not necessary to wait and use it only when a contract is being terminated. It may be used effectively at any point during the life of the contract to address an issue that must be resolved before the contract can be completed. "Contract Controversy" proceedings may be initiated by an Agency or Contractor. The appropriate CPO presides over the process. **Refer to Attachment #6 (Contract Controversy) for details.**

## **Contracts Completed By Agencies**

**Basic Approach:** The Agency’s Procurement Office is responsible for administering the contracts awarded by the Agency through completion or termination. This would include initiating or defending “Contract Controversy” proceedings and any associated appeals. MMO Buyers are available to advise on contract administration matters upon the agency’s request.

- Agency Buyer adjusts “Contract Administration Plan” developed during the “Pre-Award” phase as needed. Additional adjustments may be warranted throughout the “Post Award” phase of the contract.

When appropriate, the Agency Buyer arranges and runs a meeting with the Contractor and key agency personnel to discuss their roles and expectations regarding the contract. At this meeting, both parties share their understanding of the contract. Emphasis is placed on specific performance measures of special concern. The processes for completing “Change Orders” and “Contract Modifications” should be addressed. Other topics of discussion may include, but are not limited to, invoicing and payment processing. The Agency Buyer completes adjustments to the “Contract Administration Plan” as needed. The Agency Buyer copies the Contractor and Agency Contract Administrator(s) with the adjusted plan.

- If someone other than the Agency Buyer will perform contract administration duties, a “Contract Administration Designation Letter” is completed. It identifies the person performing contract administration duties and their specific scope of authority. The contract administration plan is referenced and attached. A sample letter is included as Attachment #2. A copy of the letter should be provided to the Contractor.
- Upon initial non-performance, the Agency Contract Administrator or Agency Buyer (depending on agency policy) should:
  1. Identify the specific performance issues and the contract provisions that apply. Remember, it is important to be specific and stay on point.
  2. Review contract provisions with the Agency Buyer if uncertain about the intent of the documents. Agency Contract Administrator does not proceed until agreement is reached with the Buyer .
  3. Contact the Contractor verbally (fax and e-mail are also appropriate) and discuss the specific non-performance issues plus the associated contract provisions. It is important to address what it will take to resolve the matter and how it will be checked. Designated Contract Administrators need to be careful not to exceed their authority. Any interpretation of the contract they provide to the Contractor must not, in effect, be a “Change Order” or “Contract Modification” unless that authority has been expressly provided in their designation letter.
  4. Document the conversation with a “Memorandum for Record” or a letter to the Contractor confirming the conversation. The form of documentation is a judgement call. If the Contractor

appears cooperative, a “Memorandum for Record” may be in order. Memorandums are in-house documents that are not used to correspond with Contractors. They may be used as attachments to other documents being sent to contractors. If the Contractor seems uncooperative or untrustworthy, a letter to the Contractor confirming the conversation is needed. This provides a formal record of notification. In either case, the Agency Buyer should be copied.

- If non-performance continues after initial notification, the agency should:
  1. Prepare a formal “Contractor Performance Report.” The format selected depends on the situation. In most cases the first report should utilize an “OPEN LETTER” or “CURE LETTER” format. Refer to the “Contractor Performance Report” definition on page 6 and the associated Attachment #3 for information on format usage. In either case, the report should specifically address the areas of non-performance and the associated provisions of the contract. Just like with the initial notification, it is important to be specific and stay on point. Any new non-performance issues (related or similar in nature), which have occurred since the original notification to the Contractor, are to be identified as such and included in the report. The content and presentation of the “Contractor Performance Report” is the responsibility of the Agency’s Procurement Office. The report may be prepared by an Agency Contract Administrator, but must be signed by an Agency Buyer. A copy of the “Memorandum for Record” or letter confirming the initial conversation with the Contractor should be attached to the copy of the report .
  2. The “Contractor Performance Report” is to be mailed via **CERTIFIED MAIL (RETURN RECEIPT REQUESTED)** to the Contractor. The Contractor is routinely afforded 10 days **from date of receipt** to respond. The report instructs the Contractor to send copies of their response to the agency.
- If the Contractor does not respond to the “Contractor Performance Report”, the Agency Buyer should:
  1. Follow-up with the Contractor to see if a response will be forthcoming.
  2. If a response is forthcoming, follow the procedures in the next bullet.
  3. If a response will not be forthcoming, issue the Contractor a 2<sup>nd</sup> report utilizing the “SHOW CAUSE LETTER” format. A sample letter is contained in Attachment #3.
  4. If a response is not forthcoming on a “Show Cause Letter” format report, the contract can be terminated, if appropriate (e.g., non-performance is substantial). Contract Termination Letter guidelines and formats are listed in Attachment #5.
- If the Contractor responds to the “Contractor Performance Report”, the Agency Buyer should:
  1. Review the Contractor’s response upon receipt and determine if acceptable.

**Note:** Acceptable Contractor responses will vary based on the level of non-performance and the agency's need. Contractor responses should provide an explanation of the cause(s) for non-performance plus identify how they intend to resolve current problems and prevent recurrences.. If the Contractor's response is substantially acceptable, additional correspondence (also sent via certified mail) may be needed to clarify specifics. If the Contractor's response is substantially unacceptable, the Agency Buyer may issue a separate "Contractor Performance Report" utilizing the "Show Cause Letter" format. Should the Contractor not respond or provide an unacceptable response to the "Show Cause Letter", a "Termination Letter" may be issued, if appropriate. Samples of the various documents can be found in Attachment #'s 3, 4, and 5 respectively.

2. Prepare the Agency's "Buyer's Review of Contractor's Response" per Attachment #4. At the discretion of the Agency Buyer, the determination can be in the form of a letter to the Contractor, "Memorandum for Record", or simply an annotation on the Contractor's response. The method selected should be based on the severity of the performance problem, response by the Contractor, and the working relationship between the Agency and Contractor.

**NOTE:** *The "Buyer's Review of Contractor's Response" document may be used to accept the Contractor's response (as is), further negotiate with the Contractor, or as part of the justification to terminate a contract. Its intended purpose is to formally establish agreement of a resolution between the parties involved.*

3. Monitor compliance with the Contractor's response. The contract may be terminated if the Contractor does not perform as indicated in their response. The contract may also be terminated for future same type or similar non-performance, which establishes a trend. A "Contractor Performance Report - Show Cause Letter Format" should be issued by the Agency Buyer prior to termination providing the Contractor an opportunity to identify causes for non-performance outside their control.
4. Prepare a "Termination Letter" when applicable. The termination documentation should clearly identify any new non-performance problems and the associated contract provisions. It also includes the file documents from the original non-performance resolution process. A sample termination letter is included in Attachment #5.
5. File a "Contract Controversy" with the appropriate Chief Procurement Officer (CPO) when necessary. The agency will use its legal counsel to file a contract controversy when they cannot resolve a disagreement with the Contractor. Often the disagreement involves termination terms. Refer to Attachment #6 for more information. Please note that the Contractor may also file a "Contract Controversy."

**NOTE:** Upon successful resolution of non-performance or termination of a contract, copies of all contract administration documents will be packaged in chronological order by the Agency Buyer and forwarded to MMO Contract Administration. MMO will retain same on file by vendor name. It is only necessary to complete the cover sheet of the performance report one time. It should be used as the cover page for the package sent to MMO.

## **Contracts Completed by MMO for a Specific Agency(s)**

**Basic Approach:** The Agency's Procurement Office is responsible for all aspects of contract administration through at least one written "Contractor Performance Report." When the contract administration process reaches the point where a "Contractor Performance Report – Show Cause Format" is required, MMO personnel assume control of the contract administration process with support from the agency. This would include the issuance of "Show Cause" and "Termination" documents. The Agency and its legal staff are still responsible to initiate and defend "Contract Controversy" proceedings and any associated appeal. The MMO Buyer has the discretion to assume control of contract administration communications with the Contractor at an earlier point in the process.

**NOTE:** **MMO may expressly delegate the additional contract administration authority to Agency Buyers up to and including contract termination.**

- MMO Buyer adjusts contract administration plan developed during the "Pre-Award" phase as needed. Additional adjustments may be warranted throughout the "Post Award" phase of the contract.

When appropriate, the Agency Buyer arranges and runs a meeting with the Contractor and key agency personnel to discuss their roles and expectations regarding the contract. At this meeting, both parties share their understanding of the contract. Emphasis is placed on specific performance measures of special concern. The relationship between the "Agency(s) Purchase Orders" and "MMO Contract" to include the processes for completing "Change Orders" and "Contract Modifications" should be addressed. Other topics of discussion may include, but are not limited to, invoicing and payment processing. The MMO and Agency Buyers discuss whether the MMO Buyer needs to attend the meeting. In either case, the Agency Buyer runs the meeting. The Agency Buyer also completes adjustments to the "Contract Administration Plan" as needed and submits it to the MMO Buyer for approval. Once approved, the Agency Buyer copies the Contractor with the adjusted plan.

**NOTE:** If multiple agencies are involved, they may request the MMO Buyer to arrange and run the meeting. When warranted, the Agency Buyers will submit adjusted plans to the MMO Buyer for approval. Once approved, the Agency Buyers will provide the Contractor a copy of the approved plans.

- MMO Buyer incorporates the content of the "Contract Administration Designation Letter(s)" into the "Contract Award" documents. The Agency will designate the Agency Buyer directly on requisitions submitted to MMO. This person will be MMO's point of contact with the Agency for the procurement and resulting contract. The "Contract Administration Designation Letter(s)" and "Contract Administration plan should be submitted along with the requisition as attachments. If an Agency Contract Administrator(s) is not identified, MMO assumes the Agency Buyer will perform that function. MMO personnel should communicate directly with the Agency Buyer throughout the life of the contract. The Agency Buyer will be responsible to keep appropriate agency personnel informed (examples: Agency Director, Purchasing Director, Agency Contract Administrator,

Department Head, etc.). It is anticipated that agency personnel will know better “who” should receive “what” information within their agency. A different Agency Buyer may assume the “Point of Contact” role upon formal (written) notification to MMO from the Agency Procurement Director.

***NOTE: The Agency Buyer may delegate contract administration duties to another person within the agency by issuing a “Contract Administration Designation Letter.” It identifies the person performing contract administration duties and their specific scope of authority. The “Contract Administration Plan” is referenced and attached. Only Buyers CAN designate Contract Administrators. A sample letter can be found in Attachment #2. If there will be so many Agency contract users that it would be impractical to issue designation letters, a copy of the “Contract Administration Plan” should be posted where the potential contract users access the contract information.***

- Upon initial Contractor non-performance, the Agency Buyer should:
  1. Identify the specific performance issues and the contract provisions that apply. Remember, it is important to be specific and stay on point.
  2. Review provisions with the MMO Buyer if uncertain about the intent of the contract documents. Do not proceed until agreement is reached with the MMO Buyer. Designated Agency Contract Administrators and Buyers need to be careful not to exceed their authority. Any interpretation of the contract they provide to the Contractor must not, in effect, be a “Change Order” or “Contract Modification.”
  3. Contact the Contractor verbally (fax and e-mail are also appropriate) and discuss the specific non-performance issues plus the associated contract provisions. Be sure to address what it will take to resolve the matter and how it will be checked.
  4. Document the conversation with a “Memorandum for Record” or a letter to the Contractor confirming the conversation. The form of documentation is a judgement call. If the Contractor appears cooperative, a “Memorandum for Record” may be in order. If the Contractor seems uncooperative or untrustworthy, a letter to the Contractor confirming the conversation is needed. This provides a formal record of notification.
  
- If non-performance continues after initial notification:
  1. The Agency Buyer should prepare a formal “Contractor Performance Report.” The format selected depends on the situation. The first report should utilize either an “OPEN LETTER” or “CURE LETTER” format. Refer to the “Contractor Performance Report” definition on page 6 and the associated Attachment #3 for information on format usage. In either case, the report should specifically address the areas of non-performance and the associated provisions of the contract. Just like with the initial notification, it is important to be specific and stay on point. Any new non-performance issues (related or similar in nature), which have occurred since the original notification to the Contractor, are to be identified as such and included in the report. The content and presentation of the “Contractor Performance Report” is the responsibility of

the Agency's Procurement Office. The report may be prepared by an Agency Contract Administrator, but must be signed by the Agency Buyer. A copy of the “Memorandum for Record” or letter confirming the initial conversation with the Contractor should be attached to the report.

2. The “Contractor Performance Report” is to be mailed via **CERTIFIED MAIL (RETURN RECEIPT REQUESTED)** to the Contractor and a copy submitted to the MMO Contract Administrator. The Contractor is routinely afforded 10 days **from date of receipt** to respond. The report instructs the Contractor to send copies of their response to the agency.
  3. Upon request by the Agency Buyer, the MMO Buyer should review the “Contractor Performance Report” to ensure it is complete and appropriate. If the report needs improvement, the MMO Buyer should work with the Agency to revise and disseminate as outlined in paragraph 2 above.
- If the Contractor does not respond to the “Contractor Performance Report”:
    1. Agency Buyer should follow-up with the Contractor to see if a response will be forthcoming.
    2. If a response is forthcoming, follow the procedures in the next bullet.
    3. If a response will not be forthcoming, the MMO Buyer should issue the Contractor a 2<sup>nd</sup> report utilizing the “SHOW CAUSE LETTER” format. A sample letter is contained in Attachment #3.
    4. If a response is not forthcoming on a “SHOW CAUSE LETTER” format report, the contract may be terminated, if appropriate (e.g., non-performance is substantial). Contract “Termination Letter” instructions and formats are in Attachment #5.
  - If the Contractor responds to the “Contractor Performance Report”:
    1. The Agency Buyer should review the Contractor’s response upon receipt and determine if acceptable.

**Note: Acceptable Contractor responses will vary based on the level of non-performance and the agency’s need. Contractor responses should provide an explanation of the cause(s) for non-performance plus identify how they intend to resolve current problems and prevent recurrences. If the Contractor’s response is substantially acceptable, additional correspondence (also sent via certified mail) may be needed to clarify specifics. If the Contractor’s response is substantially unacceptable, the MMO Buyer may issue a separate “Contractor Performance Report” utilizing the “Show Cause Letter” format. Should the Contractor not respond or provide an unacceptable response to the “Show Cause Letter”, a “Termination Letter” may be issued, if appropriate. Samples of the various documents can be found in Attachments 3, 4, and 5 respectively.**

2. The Agency Buyer will also prepare a “Buyer’s Review of Contractor’s Response” per Attachment #4. The determination can be in the form of a letter to the Contractor, “Memorandum for Record”, or simply an annotation on the Contractor’s response, at the discretion of the MMO Buyer. The method selected should be based on the severity of the performance problem, response by the Contractor, and the working relationship between the agency and Contractor.

***NOTE: The “Buyer’s Review of Contractor’s Response” document may be used to accept the Contractor’s response (as is), further negotiate with the Contractor, or as part of the justification to terminate a contract. Its intended purpose is to formally establish agreement of a resolution between the parties involved.***

3. The Agency Buyer monitors compliance with the Contractor’s response through the Agency Contract Administrator and Contractor Representative. If the Contractor does not perform as indicated in their response or when a trend is established through future non-performance, a “Contractor Performance Report - Show Cause Letter Format” should be drafted by the Agency Buyer and forwarded to the MMO Buyer. The MMO Buyer will prepare the final draft and issue the letter to the Contractor.
4. The MMO Buyer will prepare a “Termination Letter” when applicable. The termination documentation should clearly identify any new non-performance problems and the associated contract provisions. It also includes (as attachments) the file documents from the original non-performance resolution process. The Agency Buyer should receive a copy of the letter. A sample “Termination Letter” is included in Attachment #5.
5. When warranted, the MMO Buyer will advise the Agency Buyer of his option to file a “Contract Controversy” with the appropriate Chief Procurement Officer (CPO). The agency should use its legal counsel to file a contract controversy when a disagreement with the Contractor cannot be resolved by personnel below the CPO level. Refer to Attachment #6 for more information. Please note that the Contractor may also file a “Contract Controversy.”

**NOTE: Upon successful resolution of non-performance or termination of a contract, copies of all contract administration documents will be packaged in chronological order by the Agency Buyer and forwarded to MMO Contract Administration in cases when the Agency handled the contract administration. The package will be sent to the MMO Buyer in cases when contract administration was handled jointly. The MMO Buyer will add any additional documents generated by MMO that are not included in the Agency Buyer’s package/report and forward the package to MMO Contract Administration to be filed. MMO will retain same on file by vendor name. It is only necessary to complete the cover sheet of the performance report one time. It should be used as the cover page for the package sent to MMO.**

## **Statewide Term Contracts Completed by MMO**

**Basic Approach:** The Agency Procurement Offices should complete the initial informal contract administration processes. MMO should complete all formal contract administration actions with support from the agencies. This would include the issuance of all types of “Contractor Performance Reports”, and “Termination” documents. Additionally, MMO (with support from the agencies) will represent the State in “Contract Controversy Proceedings” and associated appeals when non-performance involves purchase orders from several agencies. This is especially true if termination of the statewide contract is being considered. Each individual Agency and its legal staff will represent the state (with support from MMO) when non-performance is limited to purchase orders issued by that Agency. The SPO will decide how to proceed when non-performance involves purchase orders issued by 2-6 different agencies.

- MMO Buyer develops a basic “Contract Administration Plan” for procurements resulting from requisitions generated by MMO. He should adjust plans submitted with an agency requisition on an “As Needed” basis. Adjustments may be warranted throughout the “Post Award” phase of the contract. The current plan is to be posted on the MMO web site along with the contract information. Agency Buyers can make adjustments to basic plans to better fit their operation. The adjustments should be communicated to the Contractor.

When appropriate, the MMO Buyer will arrange and run a meeting with the Contractor to discuss the roles of key personnel and expectations regarding the contract. The involvement of Agency(s) personnel is at the discretion of the MMO Buyer. At this meeting, all parties share their understanding of the contract. Emphasis is placed on specific performance measures of special concern. The relationship between the “Agency Purchase Orders” and “Statewide Term Contract” to include the processes for completing “Change Orders” and “Contract Modifications” should be addressed. Other topics of discussion may include, but are not limited to, invoicing and payment processing. The MMO Buyer completes adjustments to the “Contract Administration Plan” as needed, copies the vendor, and posts it on the web site with the contract information for agencies to access.

- When practicable, the MMO Buyer should incorporate the contents of a “Contract Administration Designation Letter(s)” into the “Contract Award” document. It is not practicable for a MMO Buyer to incorporate this information into “Contract Award” documents on Statewide Term Contracts with multiple users. MMO assumes each Agency’s Procurement Director (unless otherwise specified) is filling the role of the Agency Buyer and is MMO’s point-of-contact with the agency for all issues associated with statewide term contracts. MMO personnel should communicate directly with the Agency Buyer throughout the life of the contract. In turn, the Agency Buyer will be responsible to keep appropriate agency personnel informed (examples: Agency Director, Agency Procurement Officers, Agency Contract Administrators, Department Heads, etc.). It is anticipated that agency personnel will know better “who” should receive “what” information within their agency.

***NOTE: When feasible, the Agency Buyer may choose to delegate contract administration duties to one or more personnel within the agency by issuing “Contract Administration Designation Letters.” When used, each letter identifies the person performing contract administration duties and their specific scope of authority. The contract administration plan is referenced and attached. Only Procurement Personnel CAN designate Contract Administrators. A sample letter can be found in Attachment #2. This approach may not be practical in large agencies for statewide term contracts with multiple Agency contract users. At a minimum, the Agency is responsible to ensure the published contract information and administration plan is made available to all Agency Buyers and Contract Administrators. A possible approach could be to post the “Contract Administration Plan” with the term contract information. The Contractor could be notified who is fulfilling the roles of the Agency Buyer and Contract Administrator (if someone other than buyer) by listing their names and phone numbers on the Agency purchase order.***

- Upon initial Contractor non-performance, the Agency Buyer or his designee should:
  1. Identify the specific performance issues and the contract provisions that apply. Remember, it is important to be specific and stay on point.
  2. Review provisions with the MMO Buyer if uncertain about the intent of the contract documents. Do not proceed until agreement is reached with the MMO Buyer. Designated Agency Contract Administrators and Buyers need to be careful not to exceed their authority. Any interpretation of the contract they provide to the Contractor must not in effect be a “Change Order” or “Contract Modification” unless that authority has been expressly provided in their designation letter.
  3. Contact the Contractor verbally (fax and e-mail are also appropriate) and discuss the specific non-performance issues plus the associated contract provisions. Be sure to address what it will take to resolve the matter and how it will be checked.
  4. Document the conversation with a “Memorandum for Record” or a letter to the Contractor confirming the conversation. The form of documentation is a judgement call. If the Contractor appears cooperative, a “Memorandum for Record” may be in order. If the Contractor seems uncooperative or untrustworthy, a letter to the Contractor confirming the conversation is needed. This provides a formal record of notification.
  
- If non-performance continues after initial notification:
  1. The Agency Buyer should prepare a formal “Contractor Performance Report.” **THIS REPORT IS NOT SENT TO THE CONTRACTOR. IT IS SENT TO THE MMO BUYER.** The first report should utilize an “OPEN” format. Refer to the “Contractor Performance Report” definition on page 6 and attachment #3 for information on format usage. The report should specifically address the areas of non-performance and the associated provisions of the contract. Just like with the initial notification, it is important to be specific and stay on point. Any new non-performance issues (related or similar in nature), which have occurred since the original notification to the Contractor, are to be identified as such and included in the report. The content and presentation of the “Contractor Performance Report” is

the responsibility of the Agency's Procurement Office. The report may be prepared by an Agency Contract Administrator, but must be signed by the Agency Buyer. A copy of the "Memorandum for Record" or letter confirming the initial conversation with the Contractor should be attached to the agency's and MMO's file copy of the report.

2. The MMO Buyer should review the "Contractor Performance Report" and choose one of the two options listed below:
  - a. Attempt to resolve the matter informally with the Contractor and agency
  - b. Prepare and issue a "Contractor Performance Report" to the Contractor (copying the agency)

- If the MMO Buyer opts to address the matter informally, he should:

1. Contact the Contractor verbally (fax and e-mail are also appropriate) and discuss the specific non-performance issues plus the associated contract provisions. Be sure to address what it will take to resolve the matter and how it will be checked.
2. Document the conversation with a "Memorandum for Record" or a letter to the Contractor confirming the conversation. The form of documentation is a judgement call. If the Contractor appears cooperative, a "Memorandum for Record" may be in order. If the Contractor seems uncooperative or untrustworthy, a letter to the Contractor confirming the conversation is needed. This provides a formal record of notification. In either case, the Agency Buyer(s) should be copied.

- If the MMO Buyer opts to issue a "Contractor Performance Report", he should:

1. Prepare a formal "Contractor Performance Report." The format selected depends on the situation. The first report should utilize either an "OPEN" or "CURE LETTER" format. Refer to the "Contractor Performance Report" definition on page 6 and attachment #3 for information on format usage. In either case, the report should specifically address the areas of non-performance and the associated provisions of the contract. Just like with the initial notification, it is important to be specific and stay on point. The content and presentation of the "Contractor Performance Report" is the responsibility of the MMO Buyer.
2. The "Contractor Performance Report" along with appropriate enclosures are to be mailed via **CERTIFIED MAIL (RETURN RECEIPT REQUESTED)** to the Contractor and a copy submitted to the MMO Contract Administrator. The Contractor is routinely afforded 10 days **from date of receipt** to respond. The report instructs the Contractor to send copies of their response to the MMO Buyer.

- If the Contractor does not respond to the "Contractor Performance Report", the MMO Buyer should:

1. Follow-up with the Contractor to see if a response will be forthcoming.

2. If a response is forthcoming, follow the procedures in the next bullet.
  3. If a response will not be forthcoming, issue the Contractor a 2<sup>nd</sup> report utilizing the “SHOW CAUSE LETTER” format. The agency(s) are to receive copies of the 2<sup>nd</sup> report. A sample letter and the remaining procedures to follow are listed in Attachment #3.
- If the Contractor responds to the “Contractor Performance Report”, the MMO Buyer should:
    1. Review the Contractor’s response upon receipt and determine if acceptable. Agency involvement in the review is solicited at the MMO Buyer’s discretion.

**Note: Acceptable Contractor responses will vary based on the level of non-performance and the agency’s need. Contractor responses should provide an explanation of the cause(s) for non-performance plus identify how they intend to resolve current problems and prevent recurrences.. If the Contractor’s response is substantially acceptable, additional correspondence (also sent via certified mail) may be needed to clarify specifics. If the Contractor’s response is substantially unacceptable, the MMO Buyer may issue a separate “Contractor Performance Report” utilizing the “Show Cause Letter” format. Should the Contractor not respond or provide an unacceptable response to the “Show Cause Letter”, a “Termination Letter” may be issued, if appropriate. Samples of the various documents can be found in Attachments 3, 4, and 5 respectively.**

2. Prepare a “Buyer’s Review of Contractor’s Response.” At the discretion of the MMO Buyer, the determination can be in the form of a letter to the Contractor, “Memorandum for Record”, or simply an annotation on the Contractor’s response. The method selected should be based on the severity of the performance problem, response by the Contractor, and the working relationship between the parties involved. A copy of the “Buyer’s Review of Contractor’s Response” is to be provided to the agency(s).

***NOTE: The “Buyer’s Review of Contractor’s Response” document may be used to accept the Contractor’s response (as is), further negotiate with the Contractor, or as part of the justification to terminate a contract. Its intended purpose is to formally establish agreement of a resolution between the parties involved.***

3. Monitor compliance with the Contractor’s response through the Agency Buyer(s) and Contractor Representative. When multiple Contract Users are involved, it may be necessary for the MMO Buyer to require the Contractor to produce a report outlining the corrective action taken. The respective Agencies could then verify the contents of the report. A “Contractor Performance Report - Show Cause Letter Format” may be issued by the MMO Buyer when the Contractor either does not perform as indicated in their response or when a trend is established through future non-performance. The Agency Buyer(s) should be copied.
4. Prepare “Termination Letter” when applicable. The termination documentation should clearly identify the new non-performance problems and the associated contract provisions. It also includes (as attachments) the file documents from the original non-performance

resolution process. The Agency Buyer(s) should receive copies of the letter. A sample termination letter is included in Attachment #5.

5. “Contract Controversy” procedures should be initiated and completed when a disagreement with the Contractor cannot be resolved by personnel below the CPO level. The MMO Buyer should work with MMO legal counsel and Agency Buyer to determine the appropriate roles for MMO and Agency personnel to play throughout the process. Refer to Attachment #6 for more information. Please note that the Contractor may also file a “Contract Controversy.”

**NOTE: Upon successful resolution of non-performance or termination of a contract, copies of all contract administration documents will be packaged in chronological order by the Agency Buyer and forwarded to the MMO Buyer. The MMO Buyer will add any additional documents generated by MMO that are not included in the Agency Buyer’s package/report. The package will be retained on file by vendor name. It is only necessary to complete the cover sheet of the performance report one time. It should be used as the cover page for the package sent to MMO Contract Administration.**

## **“Contract Administration Plan Review – Post Award” Attachment #1**

This review of the “Contract Administration Plan” is completed when contract award has been determined. The Buyer awarding the contract completes the review. The steps will vary from one contract to the next; therefore, they are at the reviewer’s discretion. An initial meeting with the Contractor to review the contract and the associated “Contract Administration Plan” may prove helpful to all parties. The specific aspects of this meeting are addressed toward the beginning of the sections for each contract type.

**Suggestion:** Agencies may opt to develop one or more standard approaches to the “Contract Administration Plan.” Then they need only specify deviations from the standard and incorporate the remainder by reference.

The process may include, but is not limited to the following:

1. Review to ensure critical clauses and requirements related to administration (such as milestones) have been incorporated.
2. Review the Contractor’s Performance Plan (when available) and incorporate key administration elements.
3. Identify from previous contract files (when applicable) issues and problems with the same contractor or contracts with similar requirements. Include approaches (proactive when possible) to monitor for the issues and problems identified.
4. Meet with end users to discuss performance monitoring. Identify and rank performance criteria.
5. Outline plan for key processes such as receiving, inspecting, testing, accepting, and paying.
6. Fine tune or develop a surveillance plan. **This is strongly recommended on service contracts.** It may consist of daily, weekly, monthly, quarterly, and/or annual checklists. It is important to identify how the agency and Contractor will participate. It is equally important on certain types of services and commodities to specify the time of day the checklist will be completed. A series of reports may augment or replace certain checklists.
7. List key Agency and Contractor contract administration personnel and their roles.

## **“Contract Administration Designation Letter” Attachment #2**

“**Contract Administration Designation Letter**” is issued by the Agency Buyer formally designating who will be performing contract administration duties and their scope of authority. A sample letter is located on the next page. A copy of the “Contract Administration Plan” is included as an attachment. Only procurement personnel can issue this type letter.

### **Contracts Issued by Agencies**

If someone other than the Agency Buyer will perform contract administration duties, a “Contract Administration Designation Letter” is completed by the Agency Buyer. It identifies the person and their specific scope of authority.

### **Contracts Issued by MMO**

MMO Buyer should “**NOT**” issue a “Contract Administration Designation” letter. Unless the agency formally specifies otherwise, the Agency Buyer that approves and forwards the requisition to MMO should serve as the point of contact with MMO on “Contracts for a Specific Agency(s).” The Agency Procurement Director fills this role on “Statewide Term Contracts.” The Agency Buyer may delegate contract administration duties to another person within the agency by issuing a “Contract Administration Designation Letter.”

***NOTE:*** *The Agency Buyer or their designee as outlined in the bullet above should serve as the agency’s point-of-contact with MMO for the specified contract. MMO should communicate directly with the Agency Buyer throughout the life of the contract. The Agency Buyer will be responsible to keep appropriate agency personnel informed (examples: Agency Director, Purchasing Director, Department Head, etc.). It is anticipated that agency personnel will know better “who” should receive “what” information.*

**Sample Letter on Next Page**

**Sample “Contract Administration Designation Letter” Format**

[Letterhead]

**[date]**[ name, title and  
address of designee]

RE: Contract Administration Designation for [contract # and description]

Dear [name of designee]

Congratulations, you are hereby designated as the Agency Contract Administrator for the above referenced contract. In this capacity you have the critical task of monitoring the performance of the above referenced contract for compliance with the contract documents. The contract administration plan (attached) is provided to assist in this effort. Under this delegation of authority, you are authorized to perform the following:

[enter the specific functions being delegated – (examples: 1. Monitoring the contractor’s performance to assure compliance with the technical requirements of the contract;  
2. Reviewing and approving progress reports, technical reports, and other items required for approval; 3. Recommending to the Buyer, in writing, desired contract changes with justification for the proposed changes.)]

This designation **DOES NOT** authorize you to take any other actions including, but not limited to, the following:

[enter specific functions not being delegated – (examples: 1. Making changes to contract provisions. This includes changes involving increase/decrease in the contract price as well as no cost changes; 2. Making contract scope changes; 3. Requiring extras; 4. Terminating the contract in whole or in part.)]

**When the subject contract is completed, all records maintained by you shall be forwarded to this office for retention in the contract file.**

Should you need additional information or technical support, I can be reached at [enter Buyer’s phone, fax, and e-mail address]. **DO NOT** assume that the contract has been extended or otherwise renewed unless you are formally informed to that affect by this office.

Sincerely,

[Buyer’s signature block]

cc: Contractor (if appropriate)

### **“Contractor Performance Report” Attachment #3**

**“Contractor Performance Report”:** Report used to provide feedback of Contractor performance. There are 3 formats to use as needed. These formats are “OPEN”, “CURE”, “SHOW CAUSE.” The uses of each format are described below.

**NOTE: Any report issued for non-performance is to be sent via certified mail with return receipt requested. The report needs to clearly identify the unsatisfactory performance, associated provisions in the contract documents, remedies sought, and a means that both parties can use to verify successful performance. In all cases the documentation should be specific and stay on point. Introduction of unrelated items is often confusing and counterproductive.**

**“Open” Format:** Used to report either positive (excellent performance) or negative (non-performance) contract performance when a “Cure Letter” or “Show Cause Letter” format is not warranted. The Contractor is not required to respond to positive reports. When a negative report is issued, they are generally given 10 days (**from date of receipt**) to correct the problem(s) plus respond with the reasons for the non-performance and how they plan to prevent it from happening again. The Buyer has the discretion to increase the numbers of days when warranted.

**“Cure” Format:** Used to report that it appears the Contractor is in danger of not performing per the terms and conditions of the contract. This format is used **ONLY** when there is sufficient time for the Contractor to cure/correct their performance as specified in the contract documents. The Contractor is generally given 10 days (**from date of receipt**) to correct the problem(s) plus respond with the reasons for the non-performance and how they plan to prevent it from happening again. The Buyer has the discretion to increase the numbers of days when warranted.

**“Show Cause” Format:** Used to report that the Contractor has **NOT** performed per the terms and conditions of the contract and is in default. This letter is also used should a Contractor fail to cure performance as agreed in a “Cure Letter” process or simply does not substantially perform (regardless of whether a “Cure Letter” was sent). It generally allows 10 days (**from date of receipt**) for the Contractor to provide an explanation for non-performance and propose a remedy(s). The Buyer has the discretion to allow more than 10 days when appropriate.

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**Key Paragraph:** The following paragraph should be included in all communications with Contractors concerning non-performance:

***“Any assistance given to you on this contract or any acceptance by the State of either delinquent or non-conforming goods or services will be solely for the purpose of mitigating damages. It is not the intention of the State to condone any failure to fully perform or to waive any rights the State has under the contract.”***

# CONTRACTOR PERFORMANCE REPORT COVER PAGE

**PURPOSE:** This report is used to document positive and negative Contractor performance. It provides a mechanism to inform appropriate parties and document contract files as needed. The report consists of this cover page plus an “Open”, “Cure”, or “Show Cause” letter and attachments. The cover page identifies the contract and key parties. **It is NOT mailed to the Contractor.** The letters and attachments, which are mailed to the Contractor, identify the specific issues, associated contract provisions, remedies sought, and a means by which all parties can verify successful performance. This cover page need only be completed 1 time for each set of documentation (identification of non-performance through resolution or termination).

**CONTRACTOR RESPONSE:** Contractors do **NOT** need to respond to positive reports. Contractors are required to respond to negative reports within the time frame specified in the attachment. Contractor’s are to address each issue listed in the report to include how and when performance will be corrected plus what steps will be taken to prevent a recurrence.

-----  
**CONTRACT INFORMATION:**

Contract #: \_\_\_\_\_ Effective Dates: \_\_\_\_\_ to \_\_\_\_\_ Date of Award: \_\_\_\_\_

Solicitation #: \_\_\_\_\_ Commodity Description: \_\_\_\_\_

\_\_\_\_\_ Commodity Code: \_\_\_\_\_  
(5 digits – class + sub-class)

Agency Name: \_\_\_\_\_ Contract Type: \_\_\_\_\_  
(Agency / MMO Specific Agency / Statewide Term)

Agency Buyer: \_\_\_\_\_ (name) MMO Buyer: \_\_\_\_\_ (name)

\_\_\_\_\_ (phone number)

\_\_\_\_\_ (phone number)

\_\_\_\_\_ (FAX number)

\_\_\_\_\_ (FAX number)

\_\_\_\_\_ (e-mail address)

\_\_\_\_\_ (e-mail address)

-----  
**CONTRACTOR INFORMATION:**

MMO Contractor #: \_\_\_\_\_ FEIN/SSN #: \_\_\_\_\_

Contractor’s  
Bus. Name: \_\_\_\_\_

Contractor Rep.’s Name: \_\_\_\_\_

\_\_\_\_\_ (street address line 1)

Phone #: \_\_\_\_\_

\_\_\_\_\_ (street address line 2)

FAX #: \_\_\_\_\_

\_\_\_\_\_ (city / state / zip code)

e-mail: \_\_\_\_\_

## Contractor Performance Report

### “Open Letter” Format

(Letterhead)

Date: \_\_\_\_\_  
(date report mailed to Contractor)

Contractor: Representatives Name and Title  
Name  
Street Address  
City / State / Zip Code

RE: PO # / Contract # - Description – Contractor Performance

Dear \_\_\_\_\_ or Gentlemen:

You are notified that the State is concerned about your performance of the above referenced contract (or finds your performance of the above referenced contract deficient, etc.) in the following areas:

1. Description of Performance Concern (Deficiency, etc.):  
Contract Reference (description and page location):  
Remedy:  
Method of Verification:
  
2. Description of Performance Concern (Deficiency, etc.):  
Contract Reference (description and page location):  
Remedy:  
Method of Verification:

(continue with same format until all areas are addressed)

Unless corrective action is taken, your continued non-performance may lead to a finding of “default” and result in contract termination for cause. Therefore, you have up to 10 days after receipt of this notice [or insert any other time that the Procurement Officer may consider reasonably necessary] to:

1. correct this condition (these conditions), plus
2. provide this office a written explanation of the cause(s) and measures taken to prevent a recurrence.

Responses to this Contractor performance report are to be sent to:

[Agency Procurement Officer’s

or

MMO Buyer’s Name & Address]

***Any assistance given to you on this contract or any acceptance by the State of either delinquent or non-conforming goods or services will be solely for the purpose of mitigating damages. It is not the intention of the State to condone any failure to fully perform or to waive any rights the State has under the contract.***

Sincerely,

Buyer’s Signature Block

## Contractor Performance Report

### “Cure Letter” Format

(Letterhead)

Date: \_\_\_\_\_  
(date report mailed to Contractor)

Contractor: Representatives Name and Title  
Name  
Street Address  
City / State / Zip Code

RE: PO # / Contract # - Description – “Cure Letter”

Dear \_\_\_\_\_ or Gentlemen:

You are notified that the State considers your ...[specify the Contractor’s failure(s)]... a condition that is endangering performance of the contract. The applicable contract provision(s), remedy(s) sought, and verification method(s) can be referenced in our letter dated \_\_\_\_\_. (If this information has not been formally provided to the Contractor, incorporate some of the “Open Letter” format). Therefore, unless within 10 days after receipt of this notice [or insert any longer time that the Procurement Officer may consider reasonably necessary]:

1. this condition is cured, plus
2. a written explanation of the cause and measures taken to prevent a recurrence is received by the Procurement Officer

the State may terminate for cause per the ...[insert title of clause and page number location]... in the contract.

Responses to this “Cure Letter” are to be sent to:

[Agency Procurement Officer’s

or

MMO Buyer’s Name & Address]

Any assistance given to you on this contract or any acceptance by the State of either delinquent or non-conforming goods or services will be solely for the purpose of mitigating damages. It is not the intention of the State to condone any failure to fully perform or to waive any rights the State has under the contract.

Sincerely,

Buyer’s Signature Block

## Contractor Performance Report

### “Show Cause Letter” Format:

(Letterhead)

Date:\_(date mailed to Contractor)\_

Contractor: Representatives Name and Title  
Name  
Street Address  
City / State / Zip Code

RE: PO # / Contract # - Description – “Show Cause Letter”

Dear \_\_\_\_\_ or Gentlemen:

Since you have failed to [insert “perform Contract NO. \_\_\_\_\_ within the time required by its terms”, or “cure the conditions endangering performance under Contract No. \_\_\_\_\_ as described in the State’s letter (date)”], the State is considering termination of the contract under the provisions for default. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to:

[Agency Procurement Officer’s

or

MMO Buyer’s Name & Address]

Your response is to be received no later than 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered an admission that none exist. Your attention is invited to the respective rights of the Contractor and State and the liabilities that may be invoked if a decision is made to terminate for cause.

Any assistance given to you on this contract or any acceptance by the State of either delinquent or non-conforming goods or services will be solely for the purpose of mitigating damages. It is not the intention of the State to condone any failure to fully perform or to waive any rights the State has under the contract.

Sincerely

Buyer’s Signature Block

## **“Buyer’s Review of Contractor’s Response Letter” Attachment #4**

This instrument is used by the Buyer, who submitted the “Contractor Performance Report,” to formally document their review of the Contractor’s response. It may be in the form of a letter to the Contractor (sample on next page), “Memorandum for Record”, or simply an annotation on the Contractor’s response. All correspondence with the Contractor should specify a time requirement for their response and be sent VIA CERTIFIED MAIL.

**Note: The acceptability of Contractor responses will vary based on the level of non-performance and the agency’s need. Contractor responses to “Contractor Performance Reports” should provide an explanation of the cause(s) for non-performance plus identify how they intend to resolve current problems and prevent recurrences..**

There may be three types of determinations:

1. **“Acceptable”**– Indicates that the Contractor’s response is acceptable as submitted.
2. **“Conditional”** – Indicates that the Contractor’s response is acceptable contingent upon certain additions, deletions, or changes. It generally requires follow-up correspondence by both parties to arrive at a final resolution. Used when the majority of the Contractor’s response is acceptable.
3. **“Unacceptable”** – Indicates that the Contractor’s response is too far out of line with expectations or they are unwilling to negotiate. At this point it has been determined that additional negotiations are not likely to result in resolution.

“Acceptable” Contractor responses are confirmed in writing. The confirmation does not solicit a response from the Contractor. When Contractor responses are determined to be “Conditional”, the Buyer should negotiate with the Contractor until an “Acceptable” or “Unacceptable” determination is made. All negotiations are confirmed in writing. If appropriate, a “Termination Letter” is generated by the Buyer and sent to the Contractor when their response is “Unacceptable”. **If a MMO contract is involved, Agencies forward their “Unacceptable” determinations (in report format) to the MMO Buyer. Only MMO personnel can terminate MMO contracts.**

A copy of all correspondence associated with this process is to be included in the documentation package provided to [MMO Contract Administration](#).

**Caution:** This process may, by its nature, move beyond merely interpreting the existing contract. Buyers are cautioned to remain within their scope of authority. Should the process in effect result in a “Change Order” or “Contract Modification”, the appropriate Buyer should prepare and execute the respective documents in accordance with their organizations procedures. This letter or report cannot be substituted for the appropriate contract documents.

## **“Buyer’s Review of Contractor’s Response Letter” Format on Next Page**

(Letterhead)

Date: (date mailed to Contractor)\_

Contractor: Representatives Name and Title  
Name  
Street Address  
City / State / Zip Code

RE: PO # / Contract # - Description – **“Buyer’s Review of Contractor’s Response”**

Dear \_\_\_\_\_ or Gentlemen:

Thank you for your response dated \_\_\_\_\_, to our letter dated \_\_\_\_\_, concerning the above referenced contract. Our review has resulted in a (“Acceptable”, or “Conditional”) determination.

“Acceptable” determinations should contain a 2<sup>nd</sup> paragraph cautioning the Contractor that deviations from what has been agreed upon or future non-performance may result in termination. Finally it should state that any acceptance or assistance given in this specific case of non-performance will not relieve the contractor from future performance requirements as specified in the contract documents.

“Conditional” determinations should have a 2<sup>nd</sup> paragraph specifically identifying the changes, additions, or deletions necessary to come to agreement. Finally, a 3<sup>rd</sup> paragraph should be included specifying a deadline for response plus a disclaimer that any acceptance or assistance given in this specific case of non-performance will not relieve the contractor from future performance requirements as specified in the contract documents.

Sincerely,

Buyer’s Signature Block

***NOTE: “Unacceptable” determinations should be completed in a report, as opposed to letter, format. The specific unacceptable elements are listed. The report states that it appears future negotiations will not result in agreement. The Contractor receives the report as an attachment to a termination letter.***

## **“Termination Letter” Attachment #5**

**“Termination” Letter:** Formal notification to a Contractor from the Buyer that a contract has been terminated. The contract administration processes outlined in this document address non-performance that may result in **“Termination for Cause”**. The Buyer that awarded the contract prepares and signs this letter. Agencies terminate contracts they award and MMO terminates contracts it awards unless an agency has been expressly delegated the authority to terminate a MMO contract..

It is critical that State personnel understand the different termination types and the impact on the parties involved. They are as follows:

**Termination for Cause:** An exercise of the State’s contractual right to completely or partially terminate a contract because of the Contractor’s failure to perform its contractual obligations. Normally, MMO will not terminate a contract for “Cause” unless there is substantial or material non-performance. A contract may be terminated for minor non-performance if the contract documents clearly specify the higher performance standard. Termination costs are **NOT** incurred by the State with this type termination.

**Termination for Convenience:** An exercise of the State’s right to terminate or cancel performance of work under contract, in whole or in part, if the State determines that termination is in the State’s best interest. (see “Termination Costs”).

**Termination Costs:** Cost incurred by a Contractor solely attributable to a contract termination. If allowed by contract, a Contractor may recover such costs when a contract is “Terminated for Convenience.” Examples would be restocking fees, transportation costs, amortized capital expenditures, etc.

## **“Termination Letter” Format on Next Page**

(Letterhead)

Date

Contractor: Representatives Name and Title  
 Name  
 Street Address  
 City / State / Zip Code

RE: PO # / Contract # - Description – **“Termination Letter”**

Dear \_\_\_\_\_ or Gentlemen:

Termination for Cause :

- 1<sup>st</sup> Paragraph: States the above referenced contract is being terminated for cause, effective (date), based on the following unresolved non-performance issues. List the issues. A disclaimer should be included that states the list may not be comprehensive and additional issues may be identified at a later date.
- 2<sup>nd</sup> Paragraph: References the previous notifications to the Contractor (include as attachments) and the “Unacceptable” determination to their most recent response (also attached).
- 3<sup>rd</sup> Paragraph: Provides notification of need to reprocure and the possibility of the agency requesting the Chief Procurement Officer to suspend or debar the Contractor until they have reimbursed the State for any cost exceeding the original contract amount (optional – Buyer’s discretion).
- 4<sup>th</sup> Paragraph: Provides contact information for the Contractor to use to discuss the termination and any outstanding claims associated with the contract.

Termination for Convenience:

- 1<sup>st</sup> Paragraph: Thanks the Contractor for their performance of the above referenced contract to date. States the contract is being terminated for convenience, effective (date).
- 2<sup>nd</sup> Paragraph: *“If you have any remaining claims pursuant to this contract, please make those claims within \_\_\_\_ days\* of receipt of this letter. Any claim should state a finite amount not subject to qualification or conditions (“sum certain”) plus include adequate documentation.”*
- 3<sup>rd</sup> Paragraph: Provides contact information.

Sincerely,

Buyer’s Signature Block

**\*The # days allowed for the Contractor to make claims is at the discretion of the buyer. A number of factors (examples: contract size and complexity, agency’s need to know budget impact, etc.) enter into the buyer’s decision. In an effort to be reasonable, it is likely that discussions with the Contractor will be necessary. As a general rule, Contractor’s should be afforded a minimum of 30 days when the termination costs are easily determined. Proportionately more time should be afforded as the determination of costs grows in complexity. It may be reasonable to allow 60, 90, 120, or 180 days.**

## **“Contract Controversy” Attachment #6**

**Contract Controversy:** Generally, a dispute between the State and a Contractor in regards to the performance or interpretation of a contract. A “Request for Resolution” of a “Contract Controversy” invokes the CPO’s authority under § 11-35-4230 to conduct an administrative review and resolve the controversy. This process is used when the Contractor and State cannot reconcile differences at a level lower than a Chief Procurement Officer. While this process is a last resort, it is not necessary to wait and use it only when a contract is being terminated. It may be used effectively at any point during the life of the contract to address an issue that must be resolved before the contract can be completed.

“Contract Controversy” proceedings may be initiated by an agency or Contractor. The appropriate CPO presides over the process. . Agency Buyers work with Agency legal staff to prepare and submit a “Request for Resolution” as outlined in the code for contracts completed by the agency, contracts completed specifically for the agency by MMO Buyers, and controversies concerning their Agency’s purchase orders based on a statewide term contract. MMO Buyers should do likewise with MMO legal Staff for statewide term contracts when termination of the term contract (as opposed to orders placed by agencies) may be considered. The Chief Procurement Officer’s ruling is final unless it is fraudulent or appealed within 10 days by the adversely affected party.

**Appropriate Chief Procurement Officer** (as defined in SC Law 11-35-310 item 5): “(a) the management officer for information technology, (b) the state engineer for areas of construction, architectural and engineering, construction management, and land surveying services, and (c) the materials management officer for all other procurements.” Stated another way, there are 3 CPO’s with separate jurisdictions over contracts as follow:

1. Information Technology Contracts – Information Technology Officer
2. Construction Contracts (including A/E, Contract Management, and Survey services) – State Engineer
3. All Other Contracts for Goods and Services – Materials Management Officer

**“Request for Resolution Letter” Format on Next Page**

**“Request for Resolution Letter” Format:**

(Letterhead)

Date: (date mailed)\_

Appropriate Chief Procurement Officer’s Name & Title  
“ “ “ “ Address

RE: PO # / Contract # - Description – “Request for Resolution”

Dear \_\_\_\_\_ :

[enter Agency Name] request resolution of a contract controversy concerning the above referenced contract. Despite our best efforts, the agency and Contractor have not been able to come to agreement on the following:

*List the general nature of the controversy and the relief requested with enough particularity to give notice of the issues to be decided. It is helpful to reference the applicable portions of the contract documents with page locations or indicate they are silent on the issue. Any attachments should be referenced and listed as enclosures.*

Should any additional or clarification information be needed, I can be reached at [enter phone, fax, and e-mail information]. Thank you for your consideration.

Sincerely,

Buyer’s Signature Block