

815 CMR 8.00: CONTINGENT CONTRACTS FOR NON-TAX REVENUE MAXIMIZATION

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8.01: Application, Purpose, Scope and Authority

(1) The purpose of 815 CMR 8.00 is to assure that the departments of the Commonwealth have access to professional and expert services to promote the efficiency and effectiveness of programs and to determine the necessity, appropriateness and reasonableness of present and future expenditures for operations which qualify for federal financial participation and other reimbursements.

(2) A method to obtain additional professional and expert services is to engage outside assistance, and to pay for such assistance from the proceeds of the additional revenue attributable thereto. Since the ability to pay the contractor is directly related to the accomplishment of increased revenue, the financial exchange is contingent upon the success of the underlying revenue maximization effort.

(3) All departments in all branches of state government using the Commonwealth's enterprise statewide accounting and financial reporting system (Mosaic) may participate in contingency contracts to improve the efficiency and effectiveness of revenue performance. Entities that are component units of the Commonwealth but do not use Mosaic may not participate in contingency contracts authorized under 815 CMR 8.00.

(4) 815 CMR 8.00 is adopted under authority of M.G.L. c. 29, § 29E.

8.02: Definitions

Base Revenue and Maximized Revenue. The term base revenue refers to the amount of revenue, federal or from any other sources, that is estimated or budgeted to occur without any special assistance or advice from outside parties. In most cases the calculation and measurement of base revenue is a function of existing operational plans of the department. The term maximized revenue refers to the increment of revenue, federal or from any other source, that is estimated or budgeted to occur because of special efforts or projects and is to be in addition to the base revenue. Contingency contracts may be employed to promote the accomplishment of both base revenue and maximized revenue.

Office of the Comptroller. The Office established pursuant to M.G.L. c. 7A and authorized to administer contingency contracts to promote the efficiency and effectiveness of federal entitlement and other programs and to determine the necessity, appropriateness and reasonableness of present and future expenditures for operations which qualify for federal financial participation or other reimbursement pursuant to M.G.L. c. 29, § 29E. The Office of the Comptroller is also a department.

Contingency Contract. A contract executed by one or several state departments with other parties pursuant to 815 CMR 8.00. In a contingency contract, the amount of compensation paid to other parties is directly linked to and paid from the attainment of increased revenue. Contracts under 815 CMR 8.00 may have a duration up to but no longer than 36 months.

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Department. An entity of the state government recognized by the Office of the Comptroller as a legally defined component unit of the government. Department recognition is demonstrated by the establishment of department codes and financial accounting records on Mosaic as determined by the Comptroller. Pursuant to its enabling statute and subject to appropriation and other special laws or agreements, a department may operate programs, either directly through its own organization or through other state departments or organizations, in a manner that allows federal financial participation and other reimbursement.

Evaluation Criteria and Selection Committee. These are additional elements of an RFP that demonstrate specific steps to promote competitive interest and result in a contingency contract under terms most beneficial to the Commonwealth.

Federal Revenue or Federal Financial Participation. In the context of 815 CMR 8.00, these terms have the same meaning and refer to the flow of funds from the federal government to the state government. In most cases there are specific federal laws and specific federal regulations with companion operational terms and conditions that must be satisfied by the state in order to qualify for and receive federal revenue. In many cases, the federal revenue represents a portion of the total program cost, and the state may choose to incur originally the entire program cost and subsequently apply the federal revenue as a reimbursement or off set to the total program cost. Under this reimbursement model, the federal revenue is considered to be the federal share of a total program which qualifies for federal financial assistance.

Fiscal Affairs Division (FAD). The Division within the Executive Office of Administration and Finance with the responsibility and authority to plan and direct the statewide budget process. The FAD, also referred to as the Budget Bureau, has a special interest in the design and implementation of programs in a manner that allows opportunity for federal financial participation. The FAD is also a department.

Fiscal Conduit. An arrangement which exhibits the features of supplementation of existing staff or resources to the Department typically provided and controlled through the state budget process. The identification of a fiscal conduit will be based on the judgement of the Office of the Comptroller, and such judgement will include but not be limited to criteria such as:

- (a) intention to circumvent the budget process,
- (b) similarity between resources normally provided in the state budget process and resources provided by the outside party under the contingency contract, and
- (c) length of time that such resources are planned and actually used.

The Office of the Comptroller will take actions as relevant to disapprove and not allow fiscal conduit arrangements under 815 CMR 8.00.

Interdepartmental Service Agreement (ISA). An arrangement between two or more state departments that has many of the features of a contract. All ISA arrangements are governed by the Office of the Comptroller under a separate regulation published as 815 CMR 6.00. It is anticipated that many projects involving contingency contracts may also involve Interdepartmental Service Agreements.

Mosaic. The statewide accounting and financial reporting system for the Commonwealth of Massachusetts.

Measurement Basis for Contingency Contracts. The measurement basis for contingency contracts shall be specified to establish clearly the difference between that revenue which would be received without outside assistance and that revenue expected to be received with outside assistance. A measurement basis for contingency contracts may be defined and applied to base revenue situations, maximized revenue situations, or both situations.

8.02: continued

Object Code T09. An expenditure classification category established by the Office of the Comptroller in Mosaic. Object Code T09 will be used for accounting and reporting of all contingency contracts executed pursuant to 815 CMR 8.00.

Request for Proposals. The Request for Proposals (RFP) is a solicitation process organized to stimulate competitive interest in the award of a contingency contract.

Revenue. Income earned by the Commonwealth for services provided. Only revenue actually received and confirmed by a Treasury cash receipt is available for measuring revenue for contingency payments.

Secretariat. The executive office in the executive branch of government established pursuant to M.G.L. chs. 6A and 7 with responsibility and authority to direct and coordinate the activities of specified departments. Many, but not all, departments in the executive branch are organized under the supervision of secretariats. In those instances where a cognizant secretariat does exist, the secretariat has a special interest in the design and implementation of programs in a manner that allows opportunity for federal financial participation and other reimbursement. A secretariat is also a department.

Single State Agency. A department formally designated by the Governor to the federal government as the one cognizant department on behalf of the state in the management of specified federally assisted programs. In a few instances there is allowed under the law a designation of two "single state agencies". The single state agency has authority and responsibility to operate programs, either directly through its own organizations or through other state departments or organizations, in a manner that complies with both state and federal law.

8.03: Procurement

(1) All contingency contracts executed pursuant to 815 CMR 8.00 shall be awarded based on an RFP that evidences competitive procurement, unless there is a specific written exception made by the Comptroller.

(2) The Comptroller may determine that it is in the best interests of the Commonwealth to make an exception to the normal RFP and competitive procurement process. In rendering this judgment, the Comptroller will rely on criteria such as:

- (a) the unique qualification of the proposed vendor for the contingency contract,
- (b) an extension or addition to work underway so that a substantial economy is accomplished.

(3) All RFPs for contingency contracts must be authorized by the Office of the Comptroller. Management of the procurement process can take several forms:

- (a) Directly by OSC.
- (b) Jointly issued by OSC and one or more operating departments.
- (c) Directly by an operating Department which has specific written authorization from the Comptroller.

(4) Each RFP process will expressly indicate in writing the evaluation criteria and the names of the members of the selection committee. When the Office of the Comptroller expressly authorizes in writing an RFP to be initiated and completed by other departments, it will specifically approve in writing the evaluation criteria and the members of the selection committee prior to RFP issuance. When the Comptroller's office is issuing the RFP under its own authority or as a member of a joint venture, such separate written approvals will not be required.

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(5) No contingency contract shall constitute legal obligation of the Commonwealth unless it complies with procurement requirements as established in 815 CMR 8.00.

(6) In the RFP process, specific attention will be given to evaluation and selection criteria that are designed to promote participation by small business enterprises, minority business enterprises, women owned business enterprises, and business enterprises primarily located in Massachusetts. Each RFP should strive to promote reasonable and maximum participation by such enterprises.

8.04: Contract Terms and Conditions

(1) The Office of the Comptroller will furnish "standard" contract terms and conditions to be used for all contingency contracts. Also the Comptroller's office will furnish "standard" terms and conditions to be used in each Interdepartmental Service Agreement required to support a contingency contract. Any modification to such standard terms and conditions requires the prior written approval of the Comptroller.

(2) Contingency contracts, or Interdepartmental Service Agreements relating to contingency contracts, must be personally signed by the Comptroller. In a situation where the Comptroller's office is a party to a joint venture, the Comptroller will co-sign the contract after the signatures of relevant department heads, as members of the joint venture, are obtained. In a situation where the Comptroller's office had delegated in writing the authority to issue an RFP to other departments, the Comptroller will evidence final approval to such contracts by personally signing the documents prepared by those parties. It is expected that a typical contingency contract may thus demonstrate multi-party participation and have requisite signatures from departments and the Comptroller's office.

(3) All contingency contracts will specify the maximum obligation of the Commonwealth to the outside party. In addition to maximum obligation, contingency contracts may specify compensation as a percent of the increase of federal financial participation or other reimbursement only over the measurement basis. It is expected that most contingency contracts will be structured as a percent of the increase of federal financial participation or other reimbursement only over the measurement basis not to exceed the maximum obligation; however in some cases fee for service arrangements may be appropriate. Within the compensation structure, a differential set of percentages related to differential increments over the measurement basis is allowable.

(4) All contingency contracts, including multi-year contracts will specify additional elements including but not limited to:

- (a) the time period for which the project or engagement will be undertaken,
- (b) the time period against which the measurement basis used to calculate the increased revenue associated with the contingency contract is applied,
- (c) an explicit (and if possible quantified) definition of the measurement basis for the contingency contract,
- (d) an explicit (and if possible quantified) reference to the expectations for base revenues and maximized revenues associated with the program for which the contingency engagement is being undertaken,
- (e) specific performance criteria and definitions and timing of deliverables by the outside party,
- (f) specific criteria to determine the acceptance by the department of each deliverable,
- (g) an estimate of the increased revenue by source,
- (h) assignments of key personnel to be made by the vendor, and
- (i) procedures for resolving future period disallowances.

8.04: continued

- (5) Each contingency contract can include as a deliverable:
- (a) the study of a program to evaluate and identify possible situations for federal or other revenue maximization,
 - (b) a project to implement results of such studies, and
 - (c) a combination of studies and implementation projects. All implementation projects must follow a study as described in 815 CMR 8.04(5)(a).
- (6) Contingency contracts determined by the Comptroller to be fiscal conduits are prohibited. Decisions as to the applicability of the prohibition to fiscal conduits shall be made by the Comptroller and the determination of the Comptroller in this matter will be conclusive. The Comptroller's Office may also issue supplementary guidance and individual interpretations in this matter.
- (7) Compensation will be paid to the outside party under a contingency contract or related interdepartmental service agreement after certification by the department, and approval by the Comptroller's Office, of both of the following steps:
- (a) it is determined that increased revenue over the measurement basis has been collected and such collection is confirmed through deposit to a bank account with the State Treasury, and
 - (b) it is determined that a specified deliverable in the contract has been accepted. The amount of compensation to be paid after accomplishment of these steps will be governed by contractual terms.
- (8) Each contingency contract will contain explicit written directives to be applied in those circumstances, if any, when action outside the contracted time frame causes a change to the amount calculated under the measurement base. It is recognized that actions in a future period, may be applied retroactively and thus cause a change to amounts previously calculated under the measurement basis. An example of a possible future change that would decrease the initial measurement basis is the retroactive application of an audit disallowance; an example of a possible future change that would increase the initial measurement basis is the retroactive application of a rate increase. Each contingency contract must have written directives that will govern the effect of such changes on the measurement basis and thus on the compensation to the outside party.

8.05: Contract and Project Management and Supervision

- (1) The Office of the Comptroller may provide detail contract and project management and supervision to projects performed pursuant to contingency contracts.
- (2) The Comptroller may also delegate in writing the authority and responsibility for contract and project management and supervision to any other signatory to a contingency contract. This delegation may not be made to an entity that is not a state department and not a signatory to the contingency contract. Criteria to be used by the Comptroller to delegate contract management and supervision include but are not limited to:
- (a) efficiency of operations,
 - (b) complexity of program and policy implications, and
 - (c) encouragement of interdepartmental cooperation.
- (3) Any department performing contract and project management and supervision will provide progress and status reports in a form and at intervals as specified by the Comptroller. These specifications may be tailored by the Comptroller to suit the requirements of individual contingency contracts. Non-performance by a department of the specified requirements for such reporting will be grounds for the Comptroller to revoke the delegation of contract and project management and supervision. If this circumstance arises, the Comptroller may delegate responsibility to another signatory to the contract or assume the responsibility directly to the Comptroller's Office. The Comptroller shall determine satisfactory performance and such determination shall be conclusive.

8.06: Accounting Procedures

(1) The Office of the Comptroller will establish all funds, subfunds, revenue accounts, and expenditure accounts, including retained revenue accounts, to implement each contingency contract executed pursuant to 815 CMR 8.00. The Office of the Comptroller may establish new accounts or other accounting mechanisms as necessary in order to assure proper distinction between revenue and expense operations associated with contingency contracts and revenue and expense operations not associated with contingency contracts.

(2) Approval of the Office of the Comptroller will be required for all specific transactions by which revenues over the measurement basis associated with contingency contracts are accounted to specified accounts. This approval may be done on an item by item basis, summarized basis, or by other method as determined by the Comptroller.

(3) Approval of the Office of the Comptroller will be required for all specific disbursement transacting to any party from any account which includes deposits pursuant to the prior section. This approval may be done on an item by item basis, summarized basis, or by other method as determined by the Comptroller.

(4) At the conclusion of each fiscal year, the Comptroller shall report to the Legislature, the Fiscal Affairs Division, and each department which is a party to a contingency contract, the status of revenues and expenses associated with contingency contracts. Such reports will also include any additional comments or suggestions that the Comptroller finds relevant to the contingency contracts. Such additional comments will include but not be limited to:

- (a) vendors with whom the Commonwealth has engaged in contingency contracts operative during that fiscal year,
- (b) summarized amounts of revenues received and expenses paid as a result of such contingency contracts in that fiscal year and
- (c) recommendations for the disposition of residual balances, if any, of revenues in excess of expenses associated with contingency contract.

8.07: Appeals Process

(1) Appeals may be made by a Contractor to the Office of the General Counsel relative to a Department's application of the measurement basis.

(2) The Contractor shall forward a letter outlining the basis for the appeal and all relevant supporting documentation.

(3) The Office of the General Counsel, following review of the file submitted by the Contractor and the Department's response, shall within 15 days notify the Contractor and the Department of the decision on the appeal.

(4) Any party aggrieved by that decision may, within ten days appeal it to the Comptroller who shall within ten days, render the final agency decision which shall not be subject to administrative appeal.

REGULATORY AUTHORITY

815 CMR 8.00: M.G.L. c. 29, § 29E.