

808 CMR: BUREAU OF PURCHASED SERVICES

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NON-TEXT PAGE



808 CMR 1.00: COMPLIANCE, REPORTING AND AUDITING FOR HUMAN AND SOCIAL SERVICES

Section

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1.01: Purpose and Application

(1) Purpose. 808 CMR 1.00 governs contract compliance, financial reporting and auditing requirements applicable to all procurements of Human and Social Services and to M.G.L. c. 71B Approved Private Schools subject to the authority of the Bureau of Purchased Services within the Operational Services Division (OSD). 808 CMR 1.00 also describes the methods used by OSD in authorizing prices for M.G.L. c. 71B Approved Private School special education Programs.

(2) Application. 808 CMR 1.00 applies to Contractors and Subcontractors providing Human and Social Services to any Department and to all Contractors operating Programs approved by the Department of Elementary and Secondary Education (ESE) under M.G.L. c. 71B and to their independent auditors, and to any Executive Office, Department, Agency, Board, Commission or Institution of the Executive Department, but excluding the Legislative and Judicial Branches, the Constitutional Offices, the Public Institutions of Higher Education and independent public authorities. Where a Contractor utilizes a Subcontractor to provide some or all of the Human and Social Services or in a Program approved by ESE under M.G.L. c. 71B, the subcontract between the Contractor and the Subcontractor shall require that all provisions of 808 CMR 1.00 shall apply to the Subcontractor as well. As 808 CMR 1.00 applies to services purchased pursuant to M.G.L. c. 71B, it also applies to Commonwealth Local Education Authorities (LEAs). OSD or its designee shall issue policies, procedures, and forms related to contract compliance, accounting principles, auditing standards, and pricing as may be determined necessary by OSD to implement the provisions of 808 CMR 1.00 and 801 CMR 21.00: *Procurement of Commodities or Services*, which are in addition to the terms of 808 CMR 1.00.

1.02: Definitions

Unless the context requires otherwise, terms used in 808 CMR 1.00 shall have the following meaning:

Administration and Support Costs. Administration and Support Costs (management and general) include expenditures for the overall direction of the organization, general record keeping, business management, budgeting, general board activities, general legal expenses and related purposes. "Overall direction" includes the salaries and expenses of the chief officer of the organization and the chief officer's staff. If such staff spends a portion of its time directly supervising fundraising or Program service activities, such salaries and expenses are considered indirect fundraising or Program costs and should be prorated (allocated) among those functions by position title or type of expense.

Authorized Price. A price which has been:

- (a) agreed upon in a contract;
- (b) established by the Executive Office of Health and Human Services pursuant to St. 2008, c. 257 or, in the case of M.G.L. c. 71B Programs, the price authorized by OSD.

For health care services (including Title XIX), as defined in M.G.L. c. 118E, the Authorized Price shall be set as directed by the Division of Medical Assistance.

Base Year. The Fiscal Year which may be designated by OSD for the purpose of its Program pricing activity under 808 CMR 1.06.

1.02: continued

Bureau of Purchased Services (BPS). The office within the Operational Services Division of the Executive Office for Administration and Finance established by M.G.L. c. 7, § 22N.

Capital Item. A Capital Item is:

- (a) an asset or group of assets of nonexpendable personal property having a useful life of more than one year; or
- (b) a repair, betterment or improvement or a group of repairs, betterments or improvements of non-movable assets, which adds to the permanent value of an asset and prolongs its useful life for more than one year; and which costs the lesser of:
  1. the capitalization level established and certified by the Contractor in accordance with generally accepted accounting principles for financial statement purposes; or
  2. the dollar amount authorized by the Federal Office of Management and Budget Circular A-122 or A-21.

Client. An individual, group of individuals, or the family or other person who provides support to such individuals, who is eligible for or receiving Human and Social Services. Also referred to as a consumer.

Client Resources. Revenue received in cash or in kind from Clients to defray all or a portion of the cost of services. These may include supplemental social security income received by the Contractor to defray the room and board expense of residential Clients, Clients' Supplemental Nutrition Assistance Program (SNAP) or food assistance, or payments made by Clients according to ability to pay, such as a sliding fee scale.

Commercial Fee. A prospectively negotiated earnings allowance derived from a net surplus of Contract Revenue and reimbursable operating costs associated with Human and Social services provided by a for-profit contractor to the Commonwealth pursuant to 808 CMR 1.00. Payments and related expenses received from other governmental payors, allocated administrative revenue and payments from the general public derived from clients, parents or guardians for services rendered to clients not Sponsored by any governmental entity are not considered in the establishment of the for-profit earnings allowance.

Commercial Income. The difference between gross revenues and gross expenses resulting from the production of commercial products and services by Clients.

Contract Revenue. Revenue derived from payments for Human and Social Services furnished in Commonwealth supported programs from the Commonwealth purchasing department, client resources and third party payments made on behalf of the client from Medicaid, Medicare, insurance companies, health maintenance organizations and other payors.

Contractor. An individual or organization which enters into a contract with a Department or the State to provide Human or Social Services or which operates Programs approved by the Department of Elementary and Secondary Education under M.G.L. c. 71B.

Days. Calendar days, unless otherwise specified.

Department. Any Executive Office, Department, Agency, Office, Division, Board, Commission or Institution within the Executive Branch, excluding the Legislative Branch, Judicial Branch, Constitutional Offices, Elected Offices, Public Institutions of Higher Education, the Military Division and Independent Public Authorities. Department also includes Massachusetts Local Education Authorities (LEAs) when purchasing M.G.L. c. 71B Approved Private School Programs.

Department of Early Education and Care (EEC). An office of the Commonwealth established by M.G.L. c. 15D.

Department of Elementary and Secondary Education (ESE). The Massachusetts Department of Elementary and Secondary Education established by M.G.L. c. 15, § 1, including its departments and divisions.

1.02: continued

Executive Office of Health and Human Services (EHS). The Executive Office established by M.G.L. c. 6A, § 2, including its departments and divisions.

Fiscal Year of the Commonwealth. The 12 month period beginning on July 1<sup>st</sup> and ending on June 30<sup>th</sup>.

Human and Social Services. Services provided by a Contractor to assist, maintain or improve the personal, mental or physical well-being of Clients. This may include, but is not limited to, social, habilitative, rehabilitative, health, mental health, developmental disability, special education, vocational, employment and training and elder services.

Local Education Authority (LEA). A local school district or public school defined pursuant to M.G.L. c. 71B.

M.G.L. c. 71B Approved Private School. A private day or residential school approved in accordance with 603 CMR 18.00: *Program and Safety Standards for Approved Public or Private Day and Residential Special Education School Programs*. Also referred to as Approved Private School.

Maximum Obligation. The maximum dollar amount of the Department's contract to pay for Human and Social Services.

Off-setting Revenue. The sum of the following revenues and support items. These revenues and support items must be received during the price year and must be dedicated for use in the same Program that also receives Commonwealth funds.

- (a) any Contractor revenues and support (including but not limited to public and private grants, gifts, contributions, bequests, or any income therefrom, income from endowments, funds received from the Massachusetts Department of Elementary and Secondary Education for nutrition programs, or similar funding) to the extent that revenues and support are restricted to use in the Program;
- (b) the amount of unrestricted revenues and support voluntarily designated by the Contractor to defray the cost of Program services to a Department;
- (c) the fair market value of any public employees assigned to work in the Contractor's Program (including salaries, fringe benefits and travel allowances) and/or the occupancy of public facilities to the extent that they are available to the Program without charge or at less than fair market value;
- (d) any revenues and support (including but not limited to Supplemental Social Security Income, SNAP or food assistance, Emergency Aid to the Elderly, Disabled and Children (EAEDC), reimbursements from third-party payers, Client sliding fee scale payments) received by or available to the Contractor on account of Clients;
- (e) the amount of Commercial Income that the Contractor or Department may designate;
- (f) the value of revenues and support used to defray non-reimbursable costs; and
- (g) not-for-profit Contractor surplus revenue retention funds accrued in excess of the limitations of 808 CMR 1.03(7) which may be utilized at the discretion of the Department to reduce the Authorized Price or Maximum Obligation of the Commonwealth.

Program. The delivery of one or more discrete services in an organized and coordinated fashion in order to achieve contract objectives or a M.G.L. c. 71B private special education Program approved by ESE.

Reimbursable Operating Costs. Those costs reasonably incurred in providing the services described in the contract and/or, in the case of a Program approved under the provisions of M.G.L. c. 71B, in providing the services mandated by ESE or specifically included in an Authorized Price, with the exception of costs enumerated in 808 CMR 1.05 and costs excluded in the Authorized Price. Operating costs shall be considered "reasonably incurred" only if they are reasonable and allocable using the standards contained in Federal Office of Management and Budget Circular A-122 or A-21.

1.02: continued

Related Party. Any person or organization satisfying the criteria for a Related Party published by the Financial Accounting Standards Board in Statement of Financial Accounting Standards No. 57 (FASB 57), Codification 850-10-20.

Restricted Funds. Those temporarily and permanently Restricted Funds derived from charitable contributions, as defined in the Uniform Financial Statements and Independent Auditor's Report (UFR), which have been designated to a specific use by their donor. Funds which have been restricted as to application by the Contractor's governing body are not considered restricted.

Sponsored. The financing of the delivery of a program of Human and Social Services or a Human and Social Service to a Client.

Subcontractor. An individual acting as a sole proprietor of an organization or organization which provides some or all of the needed Human or Social Services or operates a Program on behalf of a Contractor, provided, however, that Subcontractor does not include an individual (including a client) or a firm providing personnel services or non-direct client services, unless specifically provided for in the service contract or agreement. Subcontractor also includes sub-Subcontractors. Human and Social Service as used in 808 CMR 1.02: Subcontractor does not include management and business support activities.

Submit or Submission. Unless otherwise provided, to deliver a document electronically, by hand or by depositing it with the US Post Office or other delivery service, postage pre-paid.

Uniform Financial Statements and Independent Auditor's Report (UFR). A uniform reporting system, established by OSD, consisting of basic financial statements prepared and audited in accordance with generally accepted accounting principles (GAAP) and generally accepted governmental auditing standards (GAGAS), supplemental schedules and other information as deemed necessary.

1.03: General Provisions

(1) Client Identification. No documents submitted to OSD shall include information that identifies a Client by name or by other means that includes personally identifiable information. Client identification numbers or another numbering scheme should be utilized.

(2) Waiver of 808 CMR 1.00. Upon request, OSD may consider waiving the applicability of one or more provisions of 808 CMR 1.00, provided that all such requests: are in writing and signed by an authorized signatory; specify the transactions to which such waiver would apply and the specific provisions of 808 CMR 1.00 which are to be waived; and are accompanied by documentation and justification deemed sufficient by OSD to support the need for relief. Waivers do not affect the responsibility of a Department or Contractor to comply with other applicable regulations or statutes.

(3) 808 CMR 1.00 Prohibitions. The failure of a Department or OSD to identify violations of 808 CMR 1.00 in determining or authorizing a price shall not be deemed a waiver of violations of 808 CMR 1.00 which are identified later.

(4) Price Limitations. The Commonwealth cannot be charged a rate or authorized price which is higher than the lowest fee charged to the general public or third party payor for human and social services except as follows:

- (a) Where a client receiving Sponsored services from the Department is charged a fee that the Contractor has collected and the fee is calculated based upon that Department's approved sliding fee scale; or
- (b) Where a provider has sufficient restricted charitable contributions designated by their donor to be used to offset the difference between the fee charged to a private paying client and the rate charged to the Commonwealth.

## 1.03: continued

(5) Reimbursement as Full Payment. Each Contractor shall, as a condition of accepting payment made by one or more Departments for services provided, accept the Authorized Price as full payment and discharge of all obligations for the services provided. There shall be no duplication or supplementation of payment from sources other than those expressly recognized or anticipated in the determination of the Authorized Price. Any Client Resources or third party payments made on behalf of a Client, not expressly recognized or anticipated in the computation of the Authorized Price, shall reduce the amount of the appropriate Department's obligation for payment.

(6) Commercial Fee. For-profit contractors with authorized prices furnished via all compensation structures in all types of contracts are to be reimbursed in an amount not to exceed the contract reimbursable operating costs incurred by the contractor for the services provided to the Department pursuant to 808 CMR 1.00. Departments are permitted to prospectively negotiate a for-profit earnings allowance for the purpose of furnishing a Commercial Fee to for-profit contractors, which is in excess of the contract reimbursable operating costs for the services being procured. Departments are not required or expected to furnish a Commercial Fee, which is in excess of contract reimbursable operating costs to for-profit Contractors. Each contract executed between a department and a for-profit contractor must either:

- (a) explicitly indicate when a Commercial Fee has not been established by indicating that the earnings allowance is zero; or
- (b) clearly indicate the amount of the negotiated earnings allowance, by percentage or dollar amount, in the contract.

In the event a contract does not specify a commercial fee, the amount authorized shall be assumed to equal the current annual surplus revenue retention limit. For contracts subject to 808 CMR 1.00, the contracting department may authorize a for-profit contractor to retain a Commercial Fee from such a contract not to exceed the amount then-authorized for annual surplus revenue retention. In addition, the for-profit contractor may not retain a Commercial Fee from a contract with deficit results of operations or from a cost reimbursement contract. Departments shall consider several approaches in developing a reasonable for-profit earning allowance in accordance with OSD policies and procedures issued pursuant to 808 CMR 1.00 and 801 CMR 21.00: *Procurement of Commodities or Services*. The provisions of this language also apply to M.G.L. c. 71B approved private special education Programs and contracts that utilize non-negotiated unit rates established by Departments and the Executive Office for Health and Human Services. OSD shall determine the Commercial Fee, if any, prospectively for M.G.L. c. 71B approved private special education Programs. Departments shall monitor the amount of Commercial Fee from the net surplus from Contract Revenues (or revenues received by M.G.L. c. 71B private special education Programs) and reimbursable costs retained by each for-profit Contractor in any given year and recoup funds or reduce future prices when appropriate in accordance with 808 CMR 1.03(6) and other guidance issued by OSD.

(7) Not-for-profit Contractor Surplus Revenue Retention. If, through cost savings initiatives implemented consistent with programmatic and contractual obligations, a non-profit Contractor accrues an annual net surplus from the revenues and expenses associated with services provided to Departments which are subject to 808 CMR 1.00, the Contractor may retain, for future use, a portion of that annual surplus not to exceed 20% of said revenues. Surpluses may be used by the Contractor for any of its established charitable purposes, provided that no portion of the surplus may be used for any non-reimbursable cost set forth in 808 CMR 1.05, the free care prohibition excepted. OSD shall be responsible for determining the amount of surplus that may be retained by each Contractor in any given year and may determine whether any excess surplus shall be used to reduce future prices or be recouped.

(8) Procurement of Contractor Furnishings, Equipment and Other Goods and Services. All procurements of furnishings, equipment and other goods and services by or on behalf of a Contractor shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Capital Items, as defined in 808 CMR 1.02, shall be acquired through solicitation of bids and proposals consistent with generally accepted accounting principles.

## 1.03: continued

(9) Fiscal Conduits Prohibited. No procuring Department or contractor providing social, rehabilitative, health or M.G.L. c. 71B approved private special education services for the Commonwealth shall enter into any written or verbal agreement to award a contract or to use or modify the terms or intent of an existing contract:

- (a) to acquire any goods for the Procuring Department's use;
- (b) to defray the expenses of services rendered by individuals hired or supervised in the daily performance of their work by personnel in the classified service of the Commonwealth; or
- (c) solely to acquire payroll or fiscal management for a Program of Client services operated by the Commonwealth or any third party. This third party exclusion shall not apply to entities that provide payroll or fiscal management to programs directly operated by the Contractor.

OSD may refer matters concerning departments, contractors or individuals determined to be responsible for entering into such agreements for investigation pursuant to M.G.L. c. 266, § 67A.

1.04: Recordkeeping and Reporting Requirements

(1) Recordkeeping. The Contractor and its Subcontractors shall keep on file all data necessary to satisfy applicable reporting requirements of the Commonwealth (including EHS, OSD, the Center for Health Information and Analysis and Departments), and financial books, supporting documents, statistical records, and all other records which reflect revenues associated with and costs incurred in or allocated to any Program of services rendered under the Contract. The Contractor and its Subcontractors shall maintain records of all types of expenses and income or other funds pertaining to the Program paid to the Contractor by every source, including from each Client. Books and records shall be maintained in accordance with generally accepted accounting principles as set forth by the American Institute of Certified Public Accountants (AICPA); which for not-for-profit Contractors shall be the Industry Audit Guide for Audits of Voluntary Health and Welfare Organizations, unless otherwise provided in the UFR. In addition, personnel records shall be maintained for each employee in accordance with generally accepted accounting principles recommended by the AICPA and sufficient to meet the requirements of M.G.L. c. 151, the Fair Labor Standards Act of 1938 and contract terms. If the Contractor or a Subcontractor receives any federal funds from the Commonwealth, directly or through subcontracts, the Contractor or Subcontractor shall also keep data necessary to satisfy Federal Office of Management and Budget (OMB) Circular A-133, or successor provision and shall also maintain books and records in accordance with OMB Circular A-110 and OMB Circular A-122, or successor provisions.

(2) Annual Audit. Each Contractor and Subcontractor shall, on or before the 15<sup>th</sup> day of the fifth month after the end of its fiscal year, Submit electronically to OSD a UFR or a certification of exemption, in accordance with the standards and instructions contained in the UFR. The UFR and related materials submitted by a Contractor to OSD shall be certified under pains and penalties of perjury as true, correct and accurate by a Massachusetts independent public accountant engaged by the Contractor or by an authorized signatory for the Board of Directors or officers of the corporation, the Executive Director, or Chief Financial Officer of the Contractor.

(3) Other Reporting Requirements. In addition to reports required by contract, secretariats are authorized to develop and implement procedures and reporting requirements for Contractor qualification and risk management purposes.

(4) Related Party Transactions. Notice of all Related Party transactions (including the relationship of the Related Party and a description of the nature and amount of the transaction) shall be made in writing to OSD and the Department(s) prior to their execution. In the case of an M.G.L. c. 71B Approved Private School Program, notification shall be given to OSD and ESE. If disclosure was made through a response to a Request for Response pursuant to 801 CMR 21.00: *Procurement of Commodities or Services*, within an executed contract, or through other formal means, such disclosure will satisfy the requirements of 808 CMR 1.04(4). Prior written disclosure shall not be required where the total value of transactions with a Related Party is less than \$100 within the year, and shall not be required where the transaction is a gift to the Contractor from an official, administrator or manager of the Contractor.



## 1.04: continued

- (5) Inventory of Equipment and Furnishings and Other Goods. Any Contractor in possession of Capital Items, as defined in 808 CMR 1.02 shall label, maintain and keep on file a written inventory of the property in accordance with generally accepted accounting principles. The Department may specify additional inventory requirements for Capital Items acquired with funds from the Commonwealth. Upon termination of the Contractor's contracts with the Department, Capital Items acquired with Commonwealth funds under a capital budget shall be subject to the following disposal standards:
- (a) if the Department holds title, the item shall be returned to the Department or transferred to another Contractor, as directed by the Department;
  - (b) if the Contractor holds title and the item has been fully depreciated it shall be retained by the Contractor; or
  - (c) if the Contractor holds title and the item has not been fully depreciated, the item and its title shall be returned to the Department, or transferred to another Contractor, or the item may be retained or sold by the Contractor after paying the Commonwealth for the remaining value of the item not fully depreciated or the proceeds of the sale, as determined by the Department.
- (6) Requests for Additional Information. Each Contractor and Department shall Submit such additional information as OSD may require, no later than 21 Days after the date of the postmark of a written request or the date an electronic request is sent.
- (7) Extensions. At its discretion, OSD may in exceptional circumstances grant one extension of the filing deadline for Submission of the reporting requirements contained in 808 CMR 1.04(2) or (6). Extension requests for 808 CMR 1.04(2) must be received electronically. All requests for extensions must be received by OSD prior to the original due date. An extension is deemed to be denied if not granted in writing by OSD prior to the original due date.
- (8) Access and Examination of Records. A Contractor shall make available for review, inspection and audit all records relating to its operations and those of its affiliates, subsidiaries and Related Parties and shall permit timely and reasonable access to its appropriate personnel for the purpose of interview and discussion related to those records and associated policies to any contracting Department, Executive Office, OSD, the Office of the State Auditor, the Office of Attorney General, the Office of the Inspector General, the federal government or their representatives. Audit of records by OSD or Departments shall be conducted according to the *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions*, as published by the United States General Accounting Office.
- (9) Field Audits and Quality Control Reviews. OSD may coordinate and conduct field audits of Contractors and quality control reviews of auditor's reports and work papers in the possession of the Contractor or its independent auditor. OSD may photocopy work papers and related documents, as deemed necessary.
- (10) Audit Resolution Policy. OSD will maintain an audit resolution policy in accordance with generally accepted government auditing standards.
- (11) Penalties.
- (a) Application. OSD, Secretariats and Departments have authority to pursue remedial measures and assess penalties under the provisions of 808 CMR 1.04(11). In addition, OSD or Secretariats may require Departments or the Office of the Comptroller to take action necessary to carry out any penalty assessed by OSD or Secretariats. The availability of penalties under 808 CMR 1.04 shall not limit the Commonwealth's rights to pursue other remedies available by law, regulation, contract or the audit resolution policy.

## 1.04: continued

(b) Failure to Comply with 808 CMR 1.04(1), (2), (3), (6), (8), (9) or (10). If a Contractor fails to comply with 808 CMR 1.04(1), including correction of deficiencies, 808 CMR 1.04(2), (3), (6), (7), (8), (9) or (10) in a timely manner, regardless of the stated reason, the Contractor may be subject to penalties up to and including: delay of payment, disallowance of payment of expenses relative to which documentation sufficient to meet the governmental agencies' inspection or auditing standards is not provided, restriction on bidding for new contracts, restriction from receiving additional funds or price increases, determination that the Contractor is ineligible for the ready payment system under 815 CMR 3.00, or debarment from doing business with the State. In addition, Contractors of special education services shall be deemed ineligible for an increase to prices authorized pursuant to the provisions of 808 CMR 1.06.

(c) Failure to Comply with 808 CMR 1.04(4) or (5) or 1.05. If, after a hearing, OSD finds a violation of 808 CMR 1.04(4) or (5) or 1.05, OSD may order that the contract(s) directly affected by such violation be terminated or may assess a civil penalty of not more than \$2,000 or 10% of the Contractor's annual Maximum Obligation under such contract(s), whichever is greater. If OSD determines after a hearing that a Contractor has committed repeated willful violations of 808 CMR 1.04(4) or (5) or 1.05, OSD may debar the Contractor for a period not to exceed five years.

1.05: Non-reimbursable Costs

Funds received from Departments may only be used for Reimbursable Operating Costs as defined in 808 CMR 1.02. In addition, funds may not be used for costs specifically identified in 808 CMR 1.05 as non-reimbursable. Expenditures not in accordance with 808 CMR 1.05 are subject to recoupment, intercept, offset, and where appropriate, the Authorized Price is subject to adjustment, as determined by the Commonwealth.

(1) Unreasonable Costs. Any costs not determined to be Reimbursable Operating Costs as defined in 808 CMR 1.02 or any amount paid for goods or services which is greater than either the market price or the amount paid by comparable Departments or other governmental units within or outside of the Commonwealth.

(2) Certain Depreciation.

(a) Depreciation for assets to the extent that the assets have previously been depreciated by the Contractor.

(b) Depreciation which is computed by a method other than the following: an historical cost basis with a straight line method; using a schedule of asset service lives pursuant to OSD policy; and charging one half of the annual depreciation expense in each of the years of acquisition and disposal.

(c) Depreciation on idle, excess, or donated assets or on that portion of an asset's historical cost basis which was paid for from Restricted Funds.

(d) Depreciation on assets acquired under a capital budget approved by a Department and held in trust for the Commonwealth of Massachusetts or depreciation on assets acquired under a capital budget approved by a Department to which the Contractor holds title under the terms of a contract.

(3) Certain Interest.

(a) Any interest paid or accrued upon funds advanced or borrowed from any owner, partner, officer, stockholder, Related Party, or affiliated or parent organization which exceeds the prime rate plus 1% as published in The Wall Street Journal for similar obligations issued at the same time and for the same amount of time.

(b) Any interest paid or accrued to inter-fund borrowing.

(c) Any interest paid or accrued during the reporting year which is not supported by documentation and certification to demonstrate that payment of interest and repayment of principal are required under a definite schedule, or upon demand, pursuant to a written contract.

(d) Any interest or penalties incurred because of late payment of loans or other indebtedness, late filing or payment of federal and state tax returns, municipal taxes, unemployment taxes, social security, and the like.

1.05: continued

(e) Any interest paid or accrued upon funds advanced or borrowed to the extent of income received or accrued from the investment of Restricted Funds which were available to defray all or a portion of the expenses to which borrowed or advanced funds were applied.

(4) Current Expensing of Capital Items. All costs attributable to the current expensing of a Capital Item.

(5) Certain Salaries and Consultant Compensation. Those salaries, wages, and consultant compensation considered to be excessive by OSD, in light of salaries, wages and consultant compensation of other comparable Contractors.

(6) Bad Debts. Those amounts (whether estimated or actual) which represent the portion of an account or note receivable that proves to be entirely uncollectible despite collection efforts including legal action, and any related legal costs.

(7) Taxes. Federal corporate income taxes and the income related portion of the Massachusetts corporate excise tax.

(8) Related Party Transaction Costs. Costs which are associated with a Related Party transaction are reimbursable only to the extent that the costs do not exceed the lower of either the market price or the Related Party's actual costs. Notwithstanding the above provision, Related Party transaction costs are reimbursable up to market price when the following conditions are satisfied:

(a) the transaction is for a good or service which the Related Party sells to the general public;

(b) the Related Party's transactions with the Contractor in the reporting year comprise less than 10% of the Related Party's annual sales of that good or service to the general public (excluding sales to other parties also related to the Related Party under FASB 57); and

(c) the Contractor has approved the transaction by vote of independent directors, or a committee of independent directors, following full disclosure of the Related Party's interests.

Further, costs associated with a Related Party transaction which would not be Reimbursable Operating Costs to a Contractor under 808 CMR 1.02 and 1.05 are non-reimbursable. Transactions with a Related Party totaling less than \$100 annually may be reimbursed at market prices.

(9) Certain Fringe Benefits.

(a) Fringe benefits determined to be excessive in light of salary levels and benefits of other comparable Contractors and fringe benefits to the extent that they are not available to all employees under an established policy of the Contractor. Disparities in benefits among employees attributable to length of service, collective bargaining agreements or regular hours of employment shall not result in the exclusion of such costs.

(b) Employer contributions to pension, annuity, and retirement plans which have been denied approval by the Internal Revenue Service.

(10) Fundraising Expense. The cost of activities which have as their primary purpose the raising of capital or obtaining contributions, including the costs associated with financial campaigns, endowment drives, and solicitation of gifts and bequests. However, if a Program which receives Commonwealth funds does not, or cannot be reasonably expected to, receive federal funds, the fundraising expenses specifically for raising capital or obtaining contributions for that Program may be off-set against the revenue generated by the fundraising activity except no loss will be reimbursable. In those circumstances, the Contractor must maintain and make available for review, subject to donor restrictions on confidentiality, accounting systems which adequately document and segregate those fundraising activity expenses and revenues associated with Programs which receive Commonwealth funds from other Contractor Programs in accordance with generally accepted accounting principles.

(11) Travel Allowances. Any amount advanced, paid, or accrued to reimburse the Contractor's employees for the use of a private motor vehicle on official agency business in excess of the amount allowed under the United States Internal Revenue Code §§ 61 and 62.

1.05: continued

(12) Non-program Expenses. Expenses of the Contractor which are not directly related to the social service Program purposes of the Contractor.

(13) Security Deposits. Money deposited by the Contractor with a lessor of real property as security for full and faithful performance of the terms of a Contractor's lease.

(14) Free Care. Costs associated with free service and use.

(15) Research. The costs related to the conduct of grants, contracts, investigations, or Programs directed at the understanding, cause or alleviation of physical, mental or behavioral conditions. All costs of salaries, supplies, equipment, and overhead which are directly related to research are to be excluded. Data gathering and Program analysis are not considered to be research.

(16) Management Agency Fees. Fees charged to the Contractor by a management agency which exceed the costs the Contractor would have incurred had it not entered into a management agreement.

(17) Costs Resulting from a Change of Assets.

(a) Any costs related to a change of Program ownership that has not been recognized by the Commonwealth because of one or more of the following conditions:

1. The transfer of Program ownership occurred between Related Parties;
2. The transfer of Program ownership was not made for reasonable compensation;
3. The transfer of Program ownership was not a genuine transfer of all the powers and rights of ownership;
4. The transfer of Program ownership did not show an intent to sell the assets or the transfer increased the cost basis of either the transferor or transferee; or
5. In the case of a financing agreement between the transferor and the transferee, the agreement was not designed to bring about a complete transfer of Program ownership or there was not compliance with the terms of the agreement.

(b) When a change of Program ownership has been recognized by the Commonwealth, as follows:

1. For land, costs that exceed the lower of the acquisition cost or the basis allowed the immediate prior owner.
2. For furnishings and fixtures and equipment, costs that exceed the lower of the acquisition cost or the basis allowed the immediate prior owner, reduced by the amount of actual depreciation (or principal payments in lieu of depreciation) included as a Reimbursable Operating Cost.
3. For buildings, costs that exceed the lower of the acquisition cost, 100% of the most recent 100% property valuation reduced by the amount of actual depreciation (or principal payments in lieu of depreciation) included as Reimbursable Operating Costs to the immediate prior owner, or an independent appraisal made by a qualified appraiser. Appraisals using the income approach to establish value will not be recognized.

(c) Where there has been an exchange of assets by a Related Party, costs in excess of the cost previously allowed to the Contractor with the Related Party relationship for the exchanged assets.

(d) Where there has been an exchange of assets between Contractors and such exchange results in a sale-lease back, costs in excess of the transferor's allowable costs for the exchanged assets.

(18) Lobbying Costs. Funds used to compensate or reward lobbyists, consultants or staff to promote, oppose, or influence legislation, or influence the governor's approval or veto thereof or to influence the decision of any member of the Executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto, and any costs associated with lobbying activities. This prohibition shall apply where the lobbyists, consultants or staff, as any part of their regular and usual employment and not simply incidental thereto, attempt to promote, oppose or influence legislation, approval or veto, or regulations, whether or not any compensation in addition to the salary for such employment is received for such services.

1.05: continued

- (19) Certain Reporting Year Expenditures. Reporting year expenditures in the operating fund for which Restricted Funds were available but not used.
- (20) Itemized Deductions. All expenses not qualifying as itemized business deductions under the United States Internal Revenue Code.
- (21) Litigation Costs. All costs incurred in connection with the prosecution or defense of claims against the State or any of its subdivisions, including, but not limited to, legal, accounting, and consulting costs. Reasonable expenses of a successful price appeal under 808 CMR 1.06(6) will not be considered non-reimbursable.
- (22) Unallowable Costs under OMB Circular A-122 and A-21. Costs which are not allowable under OMB Circular A-122 and A-21 are non-reimbursable to Programs which receive federal financial assistance.
- (23) Luxury Items. All costs associated with luxury items including, but not limited to luxury passenger automobiles as defined in the Internal Revenue Code, §§ 4001 or 4002, airplanes, boats, vacation homes, alcoholic beverages, charitable contributions and donations, and all non-Program entertainment expenses.
- (24) Salaries of Officers and Managers. Salaries of officers and managers to the extent they exceed the rate paid to state managers in job group M-XII, step seven.
- (25) Mortgage Principal. Mortgage principal on an amortized or other basis: no Department shall reimburse a Contractor for the principal portion of any note secured by a mortgage on property owned directly or indirectly by the Contractor.
- (26) Undocumented Expenses. Costs which are not adequately documented in the light of the American Institute of Certified Public Accountants statements on auditing standards for evidential matters.
- (27) Administration and Support Costs. Costs which are otherwise non-reimbursable under the provisions of 808 CMR 1.05 may not be reimbursed through Administration and Support Costs.
- (28) Payments by the State for Contracted Services in Support of or in Opposition to Unions or Employee Organizations. Pursuant to M.G.L. c. 7, § 56, costs associated with any attorney, consultant or other person to advise, consult or provide any other service to such contracting person or entity relative to persuading employees thereof to support or oppose any organization of said employees or any other employee self-organization or concerted activity for mutual aid or protection. 808 CMR 1.05 shall not apply to the costs of attorneys or consultants to assist in collective bargaining with a union or other employee organization recognized as said employees' bargaining agent or to administer a collective bargaining agreement.

1.06: Price Authorization for M.G.L. c. 71B Approved Private School Programs

808 CMR 1.06 sets forth the eligibility and procedural requirements applicable to M.G.L. c. 71B Approved Private School Programs seeking Massachusetts approved prices. 808 CMR 1.06 does not limit the prices a Contractor may charge to other purchasers of a Program, however, pursuant to 808 CMR 1.03(4) no price authorized under 808 CMR 1.06 may exceed the lowest price charged by a Contractor to other purchasers of the Program. In the calculation of an Authorized Price for an M.G.L. c. 71B Approved Private School Program, OSD shall not apply unrestricted funds or unrestricted revenue not specifically designated for such calculation by the Contractor. Any voluntary use of unrestricted funds or unrestricted revenues shall be governed by an annual written agreement between the Contractor and OSD. Any price authorization made as a result of such a written agreement shall not extend beyond June 30<sup>th</sup> of the Fiscal Year for which the price is authorized.

1.06: continued

(1) Annual Price Authorization for Approved Private School Programs Located within the Commonwealth.

(a) Eligibility for a Price Increase. In order for an Approved Private School Program to be eligible for an increase to its currently Authorized Price, the Contractor must have filed a UFR or appropriate documentation of exemption for the designated Base Year in accordance with 808 CMR 1.04 or predecessor regulation and the instructions to the UFR.

(b) Price Determination for Eligible Programs. If a Program has been determined to be eligible for a price increase in accordance with 808 CMR 1.06(1)(a), OSD may establish a subsequent year price for the Program by adding a per student annual adjustment amount to the current Authorized Price as follows:

1. Where the Program's Authorized Price has been calculated pursuant to 808 CMR 1.06(3) or recalculated pursuant to 808 CMR 1.06(4) or predecessor regulation as a result of a revision by ESE of the Programs approved staffing and other components since the Base Year, the per student annual adjustment amount will be determined by multiplying the current Authorized Price by a percentage factor, as determined on an annual basis by OSD, which reflects adjustments to employee compensation.

2. Except as provided in 808 CMR 1.06(1)(b)1., the per student annual adjustment amount will be determined by multiplying the current Authorized Price by a percentage factor, as determined on an annual basis by OSD.

3. Unless otherwise provided in 808 CMR 1.06, the price as determined in 808 CMR 1.06(1)(b)1. or 2. will be the annual price authorized for the subsequent Fiscal Year.

(c) Price Determination for Other Programs. If a Program does not satisfy the criteria for a price adjustment under 808 CMR 1.06(1)(a), OSD will authorize a price for the Program equal to the current Program price, unless otherwise provided in 808 CMR 1.06.

(d) Additional Price Adjustments.

1. Adjustments to Account for Surplus Revenues and Audit Findings. Where a Contractor has accumulated a surplus in the Base Year in excess of the limitations contained in 808 CMR 1.03(7), or an audit of the Program by the Office of the State Auditor has determined that Program funds are subject to recoupment or OSD has determined that Department funds have been expended by the Program on non-reimbursable costs, OSD may adjust the Program price to recoup such excess surplus or inappropriate expenditures. Such adjustments may reduce the base upon which future years' prices are determined.

2. Adjustments for Failure to Comply with Audit Requirements. OSD will rescind any price increase authorized under 808 CMR 1.06 and will adjust the Authorized Price accordingly if, by June 1<sup>st</sup>:

- a. the Contractor has failed to correct UFR filing deficiencies identified by OSD; or
- b. OSD has not received a corrective action plan incorporated into an administrative agreement which has been prepared and signed in accordance with the OSD Audit Resolution Policy relative to material and reportable internal control and compliance findings contained in its UFR for the Base Year.

(e) Adjustments to Reflect Price Increases Due to Extraordinary Circumstances. The Program price authorized under 808 CMR 1.06(1) may be prospectively adjusted for increases subsequently granted under 808 CMR 1.06(4), however any adjusted price shall not exceed the greater of the price authorized under 808 CMR 1.06(1), or that granted under 808 CMR 1.06(4).

(f) Annual Adjustment Limitation. No price authorized under 808 CMR 1.06(1) except a price authorized under 808 CMR 1.06(1)(e) may exceed the price in effect for the current Fiscal Year plus the annual adjustment percentage determined annually by OSD.

(g) Prices authorized pursuant to 808 CMR 1.06(1) will be authorized on or before the first Wednesday in February of each year and shall become effective on July 1<sup>st</sup> following authorization.

(2) Annual Price Authorization for M.G.L. c. 71B Approved Private Schools Located Outside the Commonwealth of Massachusetts. Any price authorized pursuant to 808 CMR 1.06(2) shall be effective on the date of authorization by OSD, or the effective date as determined by the state in which the Program is located, whichever is later. Prices authorized by OSD under 808 CMR 1.06(2) shall remain in effect until superseded by OSD.

## 1.06: continued

(a) If an Approved Private School Program is located outside of the Commonwealth of Massachusetts in a state which has an established state rate or price setting mechanism, OSD will authorize as the price to be paid by Commonwealth Departments the price established, authorized or approved by the state in which the Program is located, provided that the price is the lowest charged by the Contractor for the Program. In order for OSD to authorize a price, the following must be submitted to OSD by the Contractor:

1. A UFR or certificate of exemption for the most recent reporting year, in accordance with the UFR instructions;
2. A certification from the Contractor that the price requested to be authorized is the lowest charged by the Contractor for the Program; and
3. A copy of the price authorization or approval by the state in which the Program is located, including the effective dates of the price.
4. If the requested price is not the lowest charged by the Contractor for the Program, the Contractor must identify the amount of the lowest price charged, which will then be authorized by OSD.

(b) If an Approved Private School is located outside the Commonwealth of Massachusetts in a state where there is no established state rate or price setting mechanism, OSD will determine and authorize a Program price pursuant to the provisions of 808 CMR 1.06(1) or (3), as applicable.

(3) Price Authorization For New or Reconstructed M.G.L. c. 71B Approved Private School Programs.

(a) Upon the request and recommendation of ESE, OSD will review a proposed Program price for a new or reconstructed M.G.L. c. 71B Approved Private School Program. A new Program is one approved by ESE for the first time as such. A reconstructed Program is one currently approved by ESE but the service configuration of which has been altered and those alterations have been approved by ESE. OSD may require that information sufficient for its review, including format of the information, be submitted with the ESE request and recommendation. After review, OSD may authorize the proposed price, authorize an adjusted price, or suspend action pending the receipt of additional information.

If the proposed price is for a reconstructed M.G.L. c. 71B Approved Private School Program, the school must notify all entities, including state departments and superintendents of Local Education Authorities, which currently purchase the Program, that it will be requesting an increase, including the amount of the requested price, by October 1<sup>st</sup>. OSD will authorize an adjusted price no earlier than July 1<sup>st</sup> of the following fiscal year upon receipt of DOE approval and a completed application from the Approved Private School program. If the application process continues into a subsequent fiscal year(s) and the reconstruction includes changes which result in a price higher than the original requested tuition price, an additional notification process to all entities named above must occur by October 1<sup>st</sup> for each subsequent year until the price is authorized by OSD.

(b) A price authorized under the provisions of 808 CMR 1.06(3) for a new M.G.L. c. 71B Approved Private School Program is subject to review and adjustment after six months based upon a review and analysis of the Contractor's actual expenditures. Within 60 days of the last day following the sixth month of the effective date of the price, or the date that the Program becomes operational, whichever is later, the Contractor must submit, in UFR format, actual expenditure and revenue reports according to the instructions in the UFR, including an accountant's review report (AICPA Professional Standards Statement on Auditing Standards No. 71 (SAS No. 71)). Within 60 days of the receipt of the required materials, OSD shall notify the Contractor of any adjustments to be made to the Authorized Price.

(4) Price Adjustment for M.G.L. c. 71B Approved Private School Programs - Extraordinary Relief.

(a) Conditions for Consideration of Extraordinary Relief. Where an Approved Private School experiences additional expenses for its Program during the price year which are necessary for the provision of the mandated program of services and which it cannot absorb within its Authorized Price, the Contractor may apply to OSD for a price adjustment for the Program during the price year if the expenses are necessary to:

1.06: continued

1. meet federal or state statutory, or local regulatory requirements, including ESE or EEC regulations and licensing requirements not currently included in the Authorized Price, or
  2. account for unanticipated emergencies beyond the reasonable control of the Contractor.
- (b) To be eligible for consideration for extraordinary relief the conditions described in 808 CMR 1.06(4)(a) must have resulted from unforeseen events occurring after July 1<sup>st</sup> of the current Fiscal Year.
- (c) Required Documentation. To be eligible for consideration for extraordinary relief, the Contractor's request must include the following:
1. a detailed description of the situation which has caused the Contractor to seek extraordinary relief;
  2. price year income and expenses to date for the Approved Private School Program(s) for which extraordinary relief is being sought;
  3. a copy of the Contractor's most recently completed fiscal year UFR;
  4. a copy of the Approved Private School Program budget(s) for the current fiscal year using the components contained in the UFR and instructions thereto;
  5. a listing of the Approved Private School Program purchasers for the current Fiscal Year, including the number of students for each purchaser;
  6. the average enrollment, by month, of the Approved Private School Program(s) for the most recently completed 12 month period;
  7. substantial evidence that the Contractor's resources are insufficient to cover the expenses for which extraordinary relief is sought, including substantial evidence that the Contractor has exhausted all programmatic and financial resources. For the purposes of 808 CMR 1.06(4)(c)7., "programmatic and financial resources" shall not include unrestricted funds or revenues as defined in the instructions to the UFR which have not been specifically designated for use by the Approved Private School Program by the Contractor, but shall include, and not be limited to, surplus revenues as determined by OSD under 808 CMR 1.03(7).
  8. evidence, for each cost for which extraordinary relief is sought, that the Contractor acted prudently, reasonably and in compliance with the law;
  9. citations or notices of violations of federal, state or local statute or regulation supporting the request, or a statement from the appropriate authority that it requires the expense or item for which extraordinary relief is being sought;
  10. documentation that the current operating expenses are in compliance with the reimbursable cost standards contained in 808 CMR 1.02 and 1.05;
  11. the Contractor's requested price;
  12. documentation that the Contractor has notified all entities which currently purchase the Approved Private School Program that it has requested extraordinary relief, and the amount of the requested price; and
  13. where a Contractor's request includes expenses for additional Approved Private School Program staff, a staff listing, prepared using position titles contained in the instructions to the UFR and containing the number of proposed full time equivalents for each position title. Such a staff listing shall include a statement, signed by an authorized representative of ESE and/or EEC indicating that the agency's regulation requires the listed staffing level and the number of students the staffing is intended to serve.
- (d) Submission. The Contractor shall Submit its request, together with all the required documentation under 808 CMR 1.06(4)(c)1. through 13. to OSD, with a copy to ESE. A request will be deemed incomplete until all of the required documentation is submitted, and no action will be taken by OSD on an incomplete application. OSD may request additional or clarifying information from the Contractor. Should these requests not be satisfied within 21 Days of the postmark of such request, extraordinary relief shall not be granted.
- (e) Adjusted Price. OSD will take action on a complete request within 60 Days of the receipt of materials required under 808 CMR 1.06(4)(d). Should OSD determine that the Contractor's request meets the requirements of 808 CMR 1.06(4)(a) through (c) and that extraordinary relief should be granted, OSD will develop and authorize a price subject to the following conditions:
1. any requested expenses which do not qualify under 808 CMR 1.06(4)(a)1. or 2. will not be included;



1.06: continued

2. any requested expenses which are deemed to be non-reimbursable by OSD using the criteria contained in 808 CMR 1.05 will not be included;
3. any requested adjustments to administrative expenses will not be included;
4. the additional amount included in any adjusted price for any given item will not exceed the amount of the difference between the Contractor's expense for the item in the most recently completed Fiscal Year, and the current year's anticipated expense, on a per student basis; and
5. no adjusted price will be effective prior to the date of authorization, and no price shall include expenses incurred prior to the date of authorization.

(5) Administrative Review.

- (a) OSD may conduct a review of Approved Private School Programs and/or Authorized Prices for good cause, including but not limited to the following reasons: failure to incur costs for items included in the initial price authorization process or later adjustments, failure to provide the approved or required Program services, failure to implement approved or required programmatic or non-programmatic changes included in the price year Reimbursable Operating Costs, or use of Department funds on non-reimbursable costs as defined in 808 CMR 1.05, as determined by OSD.
- (b) OSD shall initiate administrative review by notifying the Contractor that it intends to conduct an administrative review and the reason(s) for the review. OSD may require the Contractor and/or Department(s) to Submit books, records and other information it deems necessary for its review. Such requests shall be in writing, and requested materials shall be submitted to OSD within 21 Days of the request.
- (c) OSD shall notify the Contractor and the Department(s) of the results of the administrative review. The review may result in an amendment to an Authorized Price.

(6) Contractor Right to Appeal.

- (a) Any Contractor aggrieved by the action of OSD relative to action taken under 808 CMR 1.06(1), (2), (3), (4) or (5)(c), who desires a review thereof, may file an appeal with the Division of Administrative Law Appeals within 30 Days of notice of OSD's action. The question on appeal shall be whether OSD, in taking the challenged action, has properly applied its regulations.
- (b) The pendency of an appeal under 808 CMR 1.06(6) does not limit OSD's right to undertake an administrative review of any Authorized Price or to take any other corrective action.

(7) Price Authorization in Special Cases.

- (a) Individual Prices. OSD will develop, issue, and amend, as necessary, instructions for the authorization of individual prices for services to students enrolled in Approved Private School Programs when that student has a need for additional or unique services which are not provided by the Approved Private School Program.
- (b) Specialized Placement Price Authorization. OSD will develop, issue and amend, as necessary, instructions for the development and authorization of prices for individual students who are placed, after approval by ESE pursuant to 603 CMR 28.00: *Special Education*, by a Department in a private school which has not been approved under M.G.L. c. 71B. These placements are also referred to as "sole source" placements.
- (c) Special Circumstances. With the consent of ESE and the Contractor, OSD may authorize a price determined in any manner consistent with St. 1993, c. 110, § 274, as amended, should OSD determine that price determination methods under 808 CMR 1.06 are inapplicable to the private school or produce a result which is inconsistent with St. 1993, c. 110, § 274.
- (d) Critical Direct Care Positions for M.G.L. c. 71B Approved Private School Programs. Upon application to OSD by an Approved Private School Program, OSD may adjust the current Authorized Price to accommodate compensation adjustments for the following direct care positions, as defined in the Fiscal Year 1999 UFR Audit and Preparation Manual:
  - Direct Care/Program Staff I;
  - Direct Care/Program Staff II;
  - Direct Care/Program Staff Supervisor;
  - Teacher; and
  - Special Education Teacher.

1.06: continued

All Authorized Price adjustments will be governed by the OSD Critical Direct Care Staff Compensation Policy for M.G.L. c. 71B Approved Private School Programs. All requests for Authorized Price adjustments under 808 CMR 1.06(7)(d) will include a statement, signed by an authorized representative of ESE, indicating that the number of staff in each position for which an adjustment in compensation is sought is consistent with ESE approval.

Any funds received pursuant to an adjustment in the Authorized Price made under 808 CMR 1.06(7)(d) will be used for the purpose requested. Any such funds not so used, as determined by OSD through the Administrative Review process set forth in 808 CMR 1.06(5), will be subject to recoupment.

1.07: Severability

The provisions of 808 CMR 1.00 are severable. If any provision of 808 CMR 1.00 or its application is held to be illegal, unenforceable or void, Departments and Contractors shall be relieved of the obligations under that provision and all other provisions shall remain in full force and effect. Such invalidity shall not be construed to affect the application of the provision under circumstances other than those held invalid.

REGULATORY AUTHORITY

808 CMR 1.00: M.G.L. c. 29, § 29B and St. 1993, c. 110, § 274.