

**CONSULTANT CONTRACT MANAGEMENT
PENALTY-AWARD ARRANGEMENTS
(SUMMARY)**



**N.J. DEPARTMENT OF TRANSPORTATION
DIVISION OF RESEARCH AND DEVELOPMENT
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CONSULTANT CONTRACT MANAGEMENT
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Assignment:

To undertake a study of consultant contract management as carried out by other governmental units, both at the state and federal levels, with particular emphasis on penalty-award arrangements for both the competency of work and meeting of contractual dates.

Approach:

A request was forwarded to each of the other state transportation/highway departments requesting their cooperation in providing copies of their consultant contracts or specific policies/procedures dealing with the assigned question.

Conclusion:

Many states use consultant services as an extension of their regular staff when a particular expertise is required, or where a sudden temporary increase in the work load justifies such use instead of increasing the staff. Twenty-three states indicated consultants are selected through a committee/board review process; other states may use this process however, the information provided did not address the specific subject.

The selection of a consultant is based on the capability and competence of the consultant to perform as evidenced by past experience. In general most states do not include specific damage clauses in the consultant contract; many states do however include an escape clause in the contract, wherein the contract may be terminated if the work is not progressing satisfactorily; or poor performance on one contract may negate selection of a consultant on future contracts.

State	Responded (Yes/No)	Manner of Selecting Consultant	Provides A Clause Yes/No	Summary of Provisions of Clauses/or Comment
Alabama	Yes	Selection Committee	No	They have been fortunate to obtain competent consultants and have not had too much trouble getting work completed by the time they were in a position to let contracts or carry plan work to the next phase.
Alaska	Yes	Review Board	No	The Department may abandon any part or all of the services herein mentioned by giving the Consultant fifteen (15) days notice in writing. The Consultant shall deliver to the Department all drawings, plans, sketches, sections and models, measurements, specifications, estimates completed or partially completed, and all other data pertaining to the project, and these shall become the property of the Department. The earned value of the work performed shall be determined as the percentage of the services rendered to the total services required under this Agreement. This determination shall be mutually agreed upon by the Department and the Consultant. If at any time the Consultant shall abandon or delay the preparation and completion of plans and specifications more than one week beyond the design schedule herein specified, or beyond such further extension or extensions of time agreed upon, the said Department shall give notice, as herein provided, of such delay or abandonment, and, if the Consultants shall not within twenty (20) calendar days thereafter have essentially returned to the design schedule of this Agreement, then the Department shall have power to terminate this Agreement by a second written notice, either personally delivered to the Consultant or mailed to or left at the address heretofore designated as the address of the Consultant or at such other address as may hereafter be given in writing by the Consultant.

State	Responded (Yes/No)	Manner of Selecting Consultant	Provides A Clause Yes/No	Summary of Provisions of Clauses/or Comment
Arizona	Yes	Recommended by State Highway Engineer - approved by State Highway Commissioner	No	They do not utilize a liquidated damages provision nor have they considered introduction of a penalty and award provision in the contract.
Arkansas	Yes	Not stated	No	Agreements can be renegotiated, postponed or cancelled at any time by the Highway Department, if for example the project exceeds the time limit and/or change in the scope.
California	Yes	Review Board	No	On contracts extending greater than 90 days, a progress pay clause is usually included in the contract which stipulates a withholding of 25% of the consultant fees until final completion of work.
Colorado	Yes	Not stated	No	Colorado Division does not provide penalty-award arrangements for competency of work or meeting contractual dates in their consultant contracts. They usually accept the consultants estimate of time needed for completion if their experience indicates such estimate to be reasonable. Furthermore, they take the position that completion ahead of schedule is incentive award in itself due to the inherent savings in staff time and overhead.
Connecticut	Yes	Not stated	No	They include a schedule in their agreement concerning the work period but they do not have a penalty clause.
Delaware	Yes	Not stated	No	
District of Columbia	Yes	Not stated	No	

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Florida	Yes	Selection Committee	Yes	Penalty or award occurs in terms of the likelihood of future contracts. Florida law limits penalties to an amount not to exceed one-fourth of one percent of the contract value per day or \$300 per day, whichever is less. They are permitted to include incentive provisions on contracts under low bid systems as long as the incentives are available to all bidders. These techniques are employed in construction contracts but not in the consultant contract system. Instead they employ a thorough grading system which provides for a project management grade, quality control grade (competency) and timeliness grade (meeting of contractual dates).
Georgia	Yes	Review Committee	No	Their professional service contracts do not require a performance bond, no liquidated damages are assessed for delays in completion, nor are there any incentive awards for early completion.
Hawaii	Yes	Not stated	No	"In the event that such corrections and interpretations cause the Consultant to perform additional work over and above the original scope of work intended, the Consultant shall be compensated for such additional work.

5. If the work called for under the contract is not completed in all parts and requirements within the time set forth above and such delay for the completion of the work is attributable to the Consultant, damages will be sustained by the State. As the amount of the damages are difficult and not possible of definite ascertainment and proof, the Consultant shall pay to the State as liquidated damages, and not by way of penalty, the sum of () for each and every calendar day's delay in finishing the work in excess of the time prescribed above.

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Idaho	Yes	Not stated	No	Their Division of Highways requires errors and omissions insurance covering project design.
Illinois	Yes	Selection Committee	Yes	<p>Penalty award arrangements for both the competency of work and meeting contractual dates are largely dependent upon the particular circumstances of the agreement and the individual contracting units. There is no set provision for a sub-standard performance except, perhaps, termination of the agreement and/or censure of the consultant for future projects. This appears to be an effective way of motivating consultants to be more efficient and complete in discharging their contractual responsibilities.</p> <p>This Department is currently developing an in-house consultant performance reference bank. After the completion of each agreement the contracting unit is required to submit an evaluation of the consultants performance in terms of quality, value of end product, actual cost; and timeliness. This information can then be used in determining those firms most qualified for future projects.</p>
Indiana	No			
Iowa	Yes	Selection Committee	No	If the Commission should desire to suspend or terminate the service to be rendered by the Engineer under this agreement, such suspension or termination may be effected by the Commission giving the Engineer written notice.
Kansas	Yes	Screening and selection by Highway Commission	No	Have had no involvement with a penalty-award arrangement. The competency of the work and the meeting of contract dates are taken into consideration in our prequalification process. This is a factor considered in the selection of consultants for future contracts.

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Kentucky	No			
Louisiana	Yes	Selection Committee	No	
Maine	Yes	Selection by Evaluation of Division Director	No	Does not have the absolute right to terminate the work at any time. A penalty-award arrangement occurs in contracting for aerial photogrammetric services where we do have a liquidated damages provision.
Maryland	Yes	Not stated	No	In the process of establishing rules and regulations for implementation as a result of recently passed legislation.
Massachusetts	Yes	Not stated	No	The Department does not at the time of submission either award or penalize a consultant as to competency or schedule of completing the work. If errors or omissions result in a construction contractor's claim, they do attempt to collect these extra costs from the consultant.
Michigan	Yes	Selection Committee	No	None
Minnesota	Yes		No	Does not presently include in its consultant agreements any penalty-award arrangement per se: They do however, specify and enforce certain requirements and conditions which may touch (if only obliquely) on the main concern of our inquiry such as: 1) A stipulation that the consultant shall perform his work in accordance with all applicable state and federal laws, with penalties for any violations to be as specified in those laws; 2)

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Minnesota (cont'd)				<p>the withholding of a fixed percentage of each payment until satisfactory completion of all work has been demonstrated, and 3) reserving for the Commissioner of Highways the right to cancel an agreement at any time he deems such action to be in the best interest of the state.</p> <p>With regard to competency of work, the Minnesota Highway Department relies heavily upon careful screening of consultants prior to final selection and on past experience whenever possible.</p> <p>Our consultants are reimbursed in strict accordance with the negotiated terms of each agreement. It is felt that once agreed upon, these terms are equitable and demanding of a completely satisfactory performance on the part of the consultant, and that any further compensation based on quality of work would only risk those abuses which we all seek to avoid.</p>
Mississippi	Yes	Review Committee	No	The contracts provide for termination of the contract due to the contractors inability to complete the contract, however, there is no provision for a penalty, such as liquidated damages, for failure to meet the provisions of the contract.
Missouri	Yes	Evaluation Committee	No	
Montana	Yes	Consultant Selection Board	No	They do include a clause in the agreement that holds the consultant responsible to make revisions or corrections in the plans resulting from errors and omissions without additional compensation.
Nebraska	Yes	Not stated	No	Nebraska does not have any formal procedures for penalizing a consultant for either incompetency or undue delays. Their agreements do provide a clause which allows the State to terminate at any

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Nebraska (cont'd)				time for these reasons. Such action would be a definite factor in consultant selection for future agreements.
Nevada	Yes	Not stated	No	Liquidated damages shall be fifty dollars per calendar day should the consultant fail to complete all required work. If the contract is terminated the consultant or surety shall be responsible for reimbursing the State for all costs and charges incurred in such termination and the cost of completing the work by others.
New Hampshire	Yes	Consultant Selection Committee	No	
New Mexico	Yes	Not stated	No	Their Third Party Contract Administration Procedural Manual does not have any provisions for penalty-award arrangements for both competency of work and the meeting of contractual dates.
New York	No			
North Carolina	Yes	Not stated	No	Does not require performance bonds nor are any provisions made to assess liquidated damages for failure to complete work with a specified time. The consultant warrants that he has not employed or retained any company or person, other than a bona fide employee working solely for the Consultant. For breach or violation of this warranty, the State shall have the right to annul this contract without liability. Should the State for any reason whatsoever decide to cancel or to terminate the use of the Consultant's services, it will furnish thirty (30) days written

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North Carolina (cont'd)				notice thereof to the Consultant who will immediately terminate work, but shall bring to a reasonable stage of completion those items whose value would be otherwise lost without such necessary further work, as may be directed by the State, and will turn over to the State all data, charts, survey notes, figures, drawings, and other records or information collected or secured herein, whether partial or complete.
North Dakota	Yes	Not stated	No	For the very few contracts we have had in force no penalty-award provisions in regard to competency of work or meeting contractual dates have been indicated.
Ohio	No			
Oklahoma	Yes	Qualification Committee	No	No penalties in their contracts involving monetary damages. They do have a provision whereby the consultant must establish a work schedule and satisfactorily execute the work based on scheduled completion dates of various tasks in the contract. Consultants, when used, are considered for work on a rotation basis. Consultant contracts contain specific cost data and contract termination date, any change or alteration requires a supplemental agreement.
Oregon	Yes	Consultant Selection Committee	No	
Pennsylvania	Yes	Not stated	No	
Puerto Rico	Yes	Committee for Evaluation and Selection of Consultants	No	

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Rhode Island	No			
South Carolina	Yes	Not stated	No	They fail to see how such a penalty award arrangement could be applied to competency of work.
South Dakota	Yes	Consultant Services Engineer		No direct penalties or awards for competency of work or for meeting contractual dates.
Tennessee	Yes	Selection Committee	No	No penalty or bonus clause; they do have an abandonment provision which the Department seldom uses. Conduct close monthly audits on consultants.
Texas	Yes	Engineering Contracts Committee	No	District Engineer closely monitors the consultant contract.
Utah	No			
Vermont	Yes	Not stated	No	They do not use penalty clauses for small contracts of short duration. Consultant must post Performance Bond equal to 100% of the contract. Has established liquidated damages of \$100/day if contract date is not met. State reserves the right to terminate the contract, on written notice, for non-performance.
Virginia	Yes	Not stated	Yes	No provision for bonus or award for work competency or meeting contractual date. Our contracts specify that the engineers are responsible for any errors in all computations, notes or drawings. Acceptance of the work does not relieve the engineers of the responsibility for such errors, or damages incurred during construction as a result of these errors.

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Virginia (cont'd)				Our consultant agreements specify a date of completion for a particular project. The consultant is also required to furnish an anticipated work schedule conforming to the date of completion, and an actual progress report accompany each request for monthly payments. Payments are withheld if progress is not in accordance with the work schedule, unless the delay is caused by conditions not under the control of the consultant.
Washington	Yes	Consultant Selection Board	No	Does not use penalty-award arrangements considering such arrangements as being detrimental to the completion of the projects requiring professional services.
West Virginia	Yes		No	The West Virginia Department of Highways has no penalty for inferior work or timing of consultant services other than verbal or written chastisement, and denial of future work assignments.
Wisconsin	No			
Wyoming	Yes	Not stated	No	The Wyoming State Highway Department has had limited experience with consultant contracts as most all regular highway design is accomplished with highway department employees and consultants are mostly employed for special types of projects only. Their agreements stipulate the required completion time but that no penalty is stipulated for overruns in completion time.