

RFP Track 3: Successful Contract Development and Management

May 15 and 16, 2013



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Governor
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Successful Contract Development and Management

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Envision the Outcome Throughout the Process



Effective Contract Management depends on four key elements

- Methods used to select the contractors (procurement provisions)
- Adequacy of contract provisions
- Processes used to establish contract payments (rate setting/reimbursement methods)
- Oversight and processes used to monitor contractor performance



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Risk Mitigation During Contract Development & Management

Risk Mitigation

- Begins with identifying the programmatic needs
- Progresses to the drafting of the solicitation documents
- Continues through contract negotiations and contract implementation, the nature of the risk varies with each phase of the procurement



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Identifying Programmatic Needs

- If programmatic needs are not clearly defined and articulated the agency may not get what it needs through the solicitation.
- Mitigation strategy: establish a team, preferably from program, procurement, and counsel, to collaboratively review and finalize the programmatic needs to ensure the agency has clearly identified these needs.



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Drafting Solicitation Documents



Drafting the solicitation:

- If specifications or terms and conditions are not clear or are missing, the agency is at greater risk with respect to the quantity and quality of bids, and the likelihood of bid protests.
- Mitigation strategy: review the specifications to ensure they are clear and concise so that bidders can provide responsive proposals. Say what you mean; mean what you say.



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Drafting Solicitation Documents (cont'd)

Solicitation process:

- Deviating from the scope of the solicitation in responding to Q&A, extraneous terms, clarifications during evaluation, and contract negotiations, increases the risk of a failed procurement or bid protests.
- Mitigation strategy: review responses to Q&A, extraneous terms, clarifications during evaluation, and contract negotiations to ensure they are consistent with the scope of the solicitation.



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Drafting Solicitation Documents (cont'd)

Substantive Terms and Conditions

- The key to effective substantive terms and conditions is understanding the programmatic needs and establishing them in the drafting of the solicitation.
- The terms and conditions should be set forth in the solicitation for the following reasons:
 - Establishing and maintaining a level playing field
 - Avoiding a second procurement because material changes may not be added afterwards without reissuing the solicitation
 - Informing the bidder pool
 - Providing a framework for responding to Q & A and extraneous terms
 - Obtaining responsive bids
 - Reducing potential for bid protests
 - Expediting contract negotiations



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Drafting Solicitation Documents (cont'd)

Contract Development

- Contract development is a process involving the following steps:
 1. understanding the programmatic needs and drafting the specifications.
 2. responding to Q & A and to extraneous terms.
 3. performing evaluation and clarifications.
 4. issuing tentative award letter.
 5. drafting proposed contract.
 6. engaging in contract negotiations.
- Risk mitigation is involved at each step; we need to consider whether we are consistent with the programmatic needs and the scope of the solicitation, and whether we are maintaining a level playing field.



Drafting Solicitation Documents (cont'd)

Scope of Negotiations/Terms and Conditions

- No obligation to accept proposed changes by tentative awardee; generally should be more beneficial to State.
- Always keep in mind need to meet programmatic needs and be consistent with scope of solicitation.
- Cannot negotiate away mandatory requirements of the solicitation, provisions contained in Appendix A, or any other statutory/executive order provisions that must be included in State contracts, such as the Iran Divestment language.
- Keep an open mind to alternatives but also be mindful that this is a negotiation and vendor may be looking to minimize its responsibilities and risk.
- Program staff and counsel collaboratively review vendor proposed changes to terms and conditions to ensure that they are consistent with programmatic objectives and do not create additional legal risks.



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Drafting Solicitation Documents (cont'd)

Scope of Negotiations/Terms and Conditions

Discussion

- RFP provision: “Parties shall establish a mutually acceptable delivery schedule.”
- Risk mitigation factors to consider:
 - What are we buying?
 - For whom?
 - Any time requirements?
- Negotiation and contract development:
 - Any Q/A on the issue?
 - Any extraneous terms?
 - Any geographic requirements in RFP (e.g., regions; statewide)?



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Conclusion



- Maintain a level playing field throughout all stages of the agency's procurement.
- Understand the agency's programmatic needs that the solicitation is addressing as well as the marketplace and vendor community that will be bidding on the solicitation before drafting the solicitation.
- Draft the solicitation to address the agency's programmatic needs and define as many deliverable specific terms and conditions as possible in the solicitation.
- Maintain the scope of the solicitation when responding to Q/A, extraneous terms, clarifications, and during contract negotiations.



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Vendor Debriefings

- **What is a debriefing?**

- Right provided in statute: State Finance Law §163(9)(c)
- To “unsuccessful” bidders
- Regarding the reason(s) they were not selected for contract award

- **Solicitation Should:**

- Set forth a bidder’s right to a debriefing in accordance with State Finance Law §163
- Provide a reasonable time for bidders to request a debriefing after notice of non-award
- Instruct how to request a debriefing



Recommended Debriefing Practices

- Ask bidder to submit any questions in advance of debriefing
- OGS practice: all OGS attendees physically present in same room
- Try to accommodate bidder requests for method of debriefing: teleconference, in-person attendance, or combination of both.



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Debriefing: Content and Limitations

- Generally OK to discuss:
 - Strengths and weaknesses of proposal
 - Suggested areas for improvement
 - Scores (Financial, Technical, etc.)
 - Relative ranking information
- Generally should not:
 - Discuss specific contents of other bidder's proposals (consider timing: pre-award vs. post-award)
 - No document production



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Debriefing: Lessons Learned

- Debriefings generally viewed as learning experience for both the bidder and the agency
- Should be treated as an opportunity to educate bidders
- Also an opportunity for agency to learn about common mistakes, problems, issues, etc. to improve upon for future procurements



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Bid Protests

- What is a bid protest?
 - Formal dispute filed by interested party against agency regarding legal or factual basis of solicitation or award
 - Administrative adjudication
- Not a trial; Not a court proceeding
 - Trends: seeing more bid protests (and debriefings) with transitioning of procurement structures (ex. multiple awards to single awards, regional or statewide awards)



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Bid Protests

- Who is an interested party?
 - An actual bidder
 - A prospective bidder whose direct economic interest would be affected by award or failure to award the contract
 - The awarded Contractor



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Bid Protests – Agency Specific

- Some agencies, such as OGS, have their own bid protest/dispute resolution policies
- Agencies without their own process default to the Office of the State Comptroller (OSC) policy (for contracts subject to OSC approval)
- OSC policy provides that agency level policy (if any) should generally be pursued first, then OSC level



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Bid Protests – NYSPRO Contracts

Timing Requirements

- Protests concerning a solicitation
 - Generally must be filed at least 10 business days before bid due date
 - or at least 24 hours before bid due date if less than 10 business days were provided in solicitation



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Bid Protests – NYSPRO Contracts (cont'd)

Timing Requirements (cont'd)

- Protests concerning a pending or awarded contract
 - Must be filed within 10 business days after bidder knew or should have known the facts which form the basis of the dispute
 - But, no later than 10 business days after issuance of contract award(s)
- Protests concerning contract administration
 - Must be filed within 20 business days after Contractor knew or should have known the facts which form the basis of the dispute



Bid Protests – NYSPRO Contracts (cont'd)

Initial Agency Decision

NYSPRO Director Level

- Written decision is issued upholding or denying protest (or a combination thereof)
- Contains legal and factual findings and reasons therefore
- Issued within 30 business days of receipt



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Bid Protests – NYSPro Appeals Process

- If unsatisfied with initial decision, interested party has right to appeal to NYS Chief Procurement Officer
- No new facts or information can be provided on appeal (unless specifically requested)
- Final agency determination issued within 20 business days of receipt
- Decision issued on appeal by Chief Procurement Officer is the final agency determination
 - No further remedies available at the agency level
- Interested Party may seek judicial review by commencing a CPLR Article 78 proceeding in New York State Supreme Court



Bid Protests – How to Avoid

- Adhere to basic principles of State Finance Law
 - Fair, open competition
 - Level playing field
 - Clearly articulated evaluation criteria
 - Avoidance of favoritism, fraud, corruption



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Questions



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Contract Risk Mitigation

What will we cover today?

Overview

- Necessity
- Strategies
- Resources



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Contract Risk Mitigation

Why is contract risk mitigation necessary?

Objectives and resources at stake.

- Objective:
 - Contractor should timely provide and bill for only those the goods or services that the agency ordered.
- Risks:
 - Substandard/no delivery
 - Overcharges
- Causes:
 - Mistake
 - Intentional

50,000
236,000,000,000
75



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Contract Risk Mitigation

When can we mitigate contract risk?

Pre and post contract execution.

- **Pre** contract execution
 - Specification development
- **Post** contract execution
 - Risk-based contract monitoring
- These strategies **increase the likelihood** the a contractor will timely provide and bill for only those the goods or services the agency has ordered.



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Contract Risk Mitigation

How can we best design the contract?

Pre execution – contract terms development.

- **S**pecific: well-defined, focused and explicit
- **M**easurable: concrete and define such attributes as quantity, quality, and cost
- **A**chievable: feasible and within the contractor's influence, given the available resources and time
- **R**elevant: essential to the contract deliverables
- **T**ime-Bound: specific deadlines by which the contractor must perform



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Contract Risk Mitigation

Who should be involved in developing terms?

Pre execution – staff from multiple disciplines.

- Staff to involve in contract terms development
 - Program
 - Fiscal
 - Legal
 - Audit



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Contract Risk Mitigation

How can we gauge the clarity of the terms?

Try to answer contractor questions.

**Unclear answer?
Revise specification.**

- What is the contractor expected to do?
- When is the contractor to provide the deliverables?
- Where is the contractor to perform required activities?
- How will the contractor communicate to the agency that contract terms have been satisfied?
- How is the contractor to bill the agency for goods or services?
- How much money is the contractor allowed to bill the agency for goods or services?
- What information must be included on the invoice?
- How and to whom should the contractor send the invoice?
- What's at risk if the contractor fails to perform as required?



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Contract Risk Mitigation

How can we gauge the clarity of the terms?

Try to answer agency questions.

**Unclear answer?
Revise specification.**

- How will the agency verify that the contractor did exactly what was expected for the contract term?
- What is the agency's recourse if the contractor does not perform as required?



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Contract Risk Mitigation

How can we maximize the ROI of agency resources?

Post contract execution risk-based monitoring.

- Volume
 - Contracts
 - Staff



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Contract Risk Mitigation

What is risk-based contract monitoring?

Seven-step process for risk-based contract monitoring.

1. Identify a prioritized list of contracts to monitor
2. Understand contract terms and other requirements
3. Identify risks
4. Prioritize risks
5. Determine the agency's response to the risks
6. Design and implement monitoring activities
7. Follow up



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Contract Risk Mitigation

What contracts should be monitored?

1. Identify a prioritized list of contracts to monitor.

- How critical the contract is to achieving the agency's mission
- Likelihood that nonperformance, or underperformance, would jeopardize health or safety
- Dollar value of the contract
- Total number and aggregate dollar value of all contracts with individual contractors at the agency and among all State agencies
- Favorable and unfavorable knowledge of contractors' performance
- Age of the contract
- Length of time the contractor has been doing business with the agency



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Contract Risk Mitigation

What contracts should be monitored?

1. Identify a prioritized list of contracts to monitor.

- Information in the contractor's audited financial statements, including the notes, where available
- State or Federal agency audit findings for: (i) the contractor or (ii) the goods or services under contract
- Available public information about the contractor or type of goods or services under contract
- Availability of alternatives should the contractor be unable to perform
- Extent to which any contractor's activities, payments or other items within a program do not conform to similar contracts within the program
- Impact on public confidence



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Contract Risk Mitigation

What contracts should be monitored?

1. Identify a prioritized list of contracts to monitor.

- Highest risk contracts
- Moderate risk contracts
- Lower risk contracts



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Contract Risk Mitigation

What is required of the contractor?

2. Understand contract terms and other requirements.

- Contract terms
- Laws, rules & regulations
- Guidelines
- Purchase order details
- Intuition
- Conversation

Put it in writing!



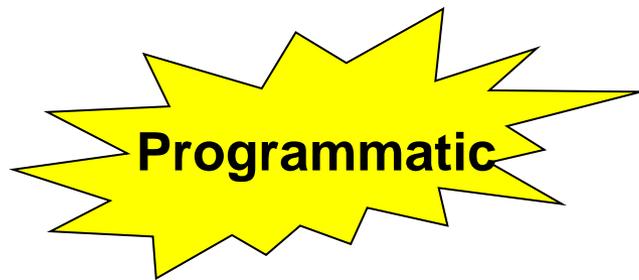
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Contract Risk Mitigation

What can go wrong for each term?

3. Identify risks.

- Events or actions that may prevent the contractor from meeting the **terms** and **other requirements**
- Actions the contractor may take to receive payment that the contractor did not earn under the contract.



Staff from multiple disciplines!



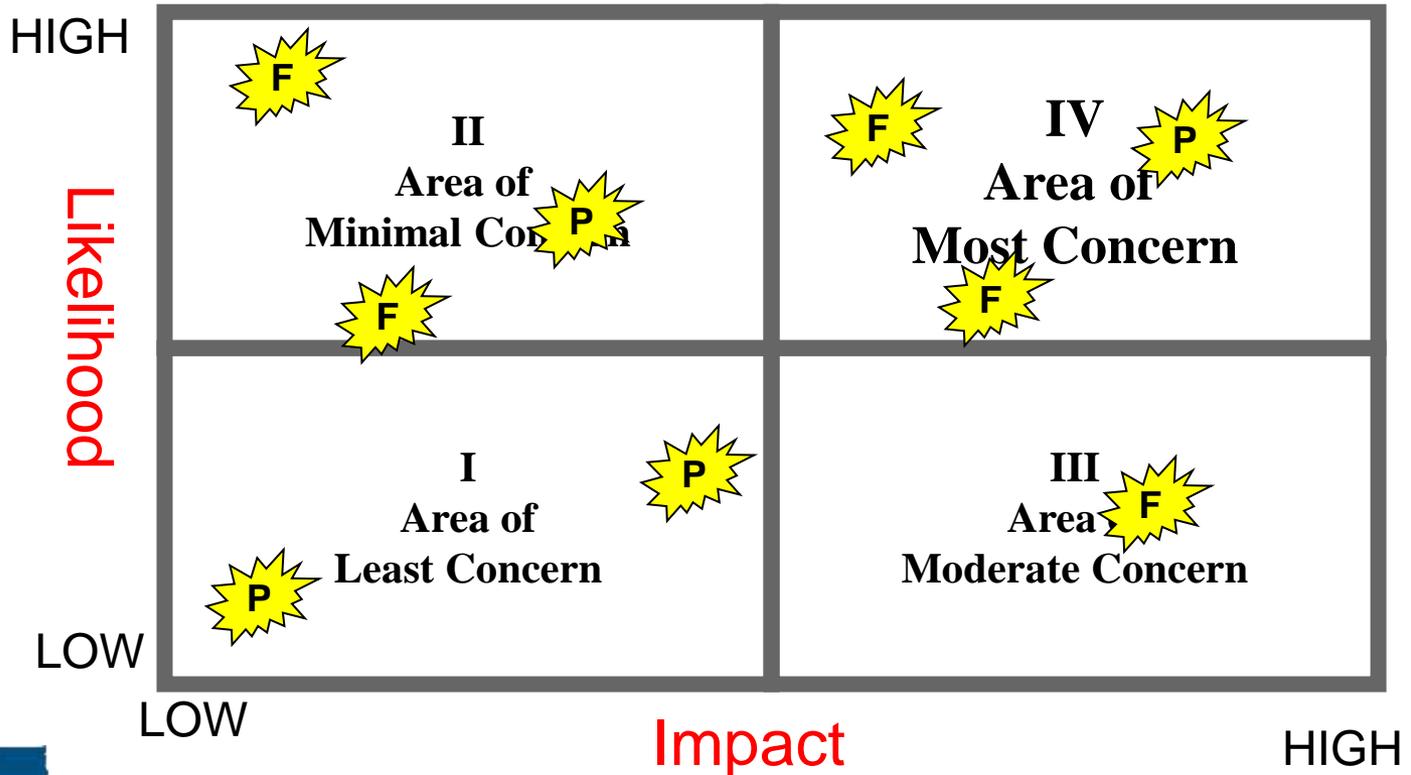
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Contract Risk Mitigation

How might these risks affect our agency?

4. Prioritize risks.

- Assess likelihood and impact **using judgment**



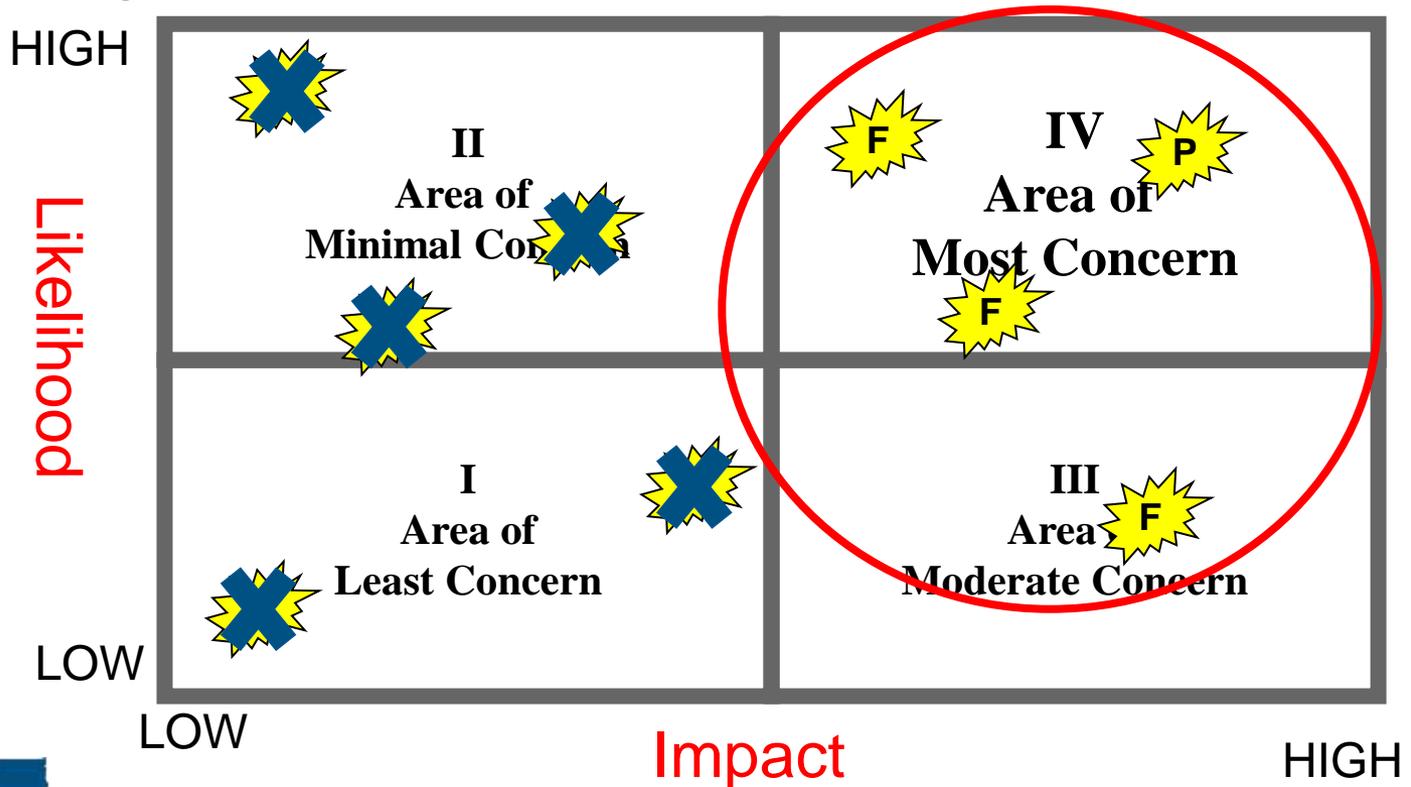
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Contract Risk Mitigation

What will we do in light of the risks?

5. Determine agency's response to risks.

- Accept or mitigate



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Contract Risk Mitigation

What will we do in light of the risks?

5. Determine agency's response to risks.

- Mitigate
 - Revise administrative procedures
 - Improve control systems
 - Increase auditing
 - Other
- Accept
 - Acknowledgement of exposure



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Contract Risk Mitigation

How can we determine contractor compliance with terms?

6. Design and implement monitoring procedures.

- The name and or title of the individuals(s) who will perform monitoring activities
- The activities the monitor(s) will perform, including the type of **evidence** the monitor(s) will obtain to determine whether the contractor complied with the contract terms



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Contract Risk Mitigation

What is the value of different evidence?

Evidence

Degree of Reliability	Evidence Type	More Reliable	Less Reliable
More Reliable ↑	Physical	Obtained through direct examination, observation, computation and inspection	Obtained through indirect means.
	Documentary	Original documentation received from independent parties	Photocopies of documents, documents received from the contractor
↓ Less Reliable	Testimonial	Statements obtained from unbiased persons with direct knowledge under conditions in which the persons may speak freely	Statements obtained from persons who are biased, have only indirect knowledge, and/or may feel intimidated



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Contract Risk Mitigation

How can we determine contractor compliance with terms?

6. Design and implement monitoring procedures.

- Where the monitor(s) should complete the activities
- How often the monitor(s) should complete the activities
- How the monitor(s) should document the outcome of the monitoring activities
- Who should received the documentation
- Where the documentation will be stored



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Contract Risk Mitigation

What do we do based on the evidence?

7. Follow up.

- High compliance with contract terms
 - Re-evaluate and possibly reduce monitoring frequency
- Moderate compliance with contract terms
 - Direct the contractor to correct identified deficiencies
 - Facilitate development of a corrective action plan
 - Advise accounts payable employees
 - Identify and recover any overpayments
 - Increase scrutiny of contractor reports and invoices
 - Increase frequency of follow-up monitoring activities



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Contract Risk Mitigation

What do we do based on the evidence?

7. Follow up.

- Low compliance with contract terms
 - Facilitate development of a corrective action plan (where practical) and increase the frequency of follow-up monitoring activities
 - Increase scrutiny of contractor reports and invoices
 - Terminate contract where corrective action is not practical
 - Advise accounts payable employees
 - Identify and recover any overpayments
 - Consider referral for prosecution



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Contract Risk Mitigation

How can we ensure successful contract risk mitigation?

Ensure three key factors.

1. Executive support
2. Well-defined contract terms
3. Employees with appropriate KSAs
 - **K**nowledge: degree of familiarity with contract terms, applicable legal requirements, relevant agency policies and guidelines, and potential fraud schemes.
 - **S**kill: the level of competence and expertise in programmatic and fiscal contract monitoring, observation, analysis, written and oral communication, judgment, problem solving, conflict management and interpersonal skills.
 - **A**bility: the demonstrated performance of effectively applying the knowledge and skills when needed.



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Contract Risk Mitigation

Where can we find helpful tools?

Resources

- [Guide to Financial Operations, Chapter XI.11.F Contract Monitoring](#)

Step 2	Step 3		Step 4			Step 5			
Understand Contract Terms and Other Requirements	Identify Risks		Prioritize Risks			Determine the agency's response to the risks			
Contract Terms and Other Requirement	Risks	Programmatic?	Fiscal?	Likelihood the Risk Will Occur: e.g., High Medium Low	Adverse Impact if the Risk Occurs: e.g., High Medium Low	Risk Priority	AGENCY Response to Risk: 1. Mitigate Risk 2. Accept Risk	Specific activities the monitor will perform and the type of evidence the monitor will obtain	The specific person who will be the MONITOR
List each contract term and other legal requirements.	Events that prevent compliance with contract terms and other requirements.	Check one: This can help identify the ideal monitor.		Management's judgment: likelihood of risk absent any controls.	Management's judgment: Effect on the agency if risk occurs.	Management's judgment of overall risk.	Decision to mitigate or accept risk.	Activities to perform, evidence to collect.	Monitor's name or title.



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Contract Risk Mitigation

Who can help us?

Resources

- If you have questions concerning contract monitoring or want to share information with the Bureau of State Expenditures, please contact the Customer Service Help Desk at (518) 474-4868.
- If you are interested in training for [contract monitoring](#) or [fraud](#), please contact OSC's Office of Operations Agency Outreach Training Program at outreach@osc.state.ny.us.
- If you have questions for the instructor, please contact Roslyn Watrobski, CFE, CIA, CGAP at rwatrobski@osc.state.ny.us.



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