

OFFICE OF THE COMPTROLLER
M.G.L. c. 29, s. 9C CONTRACT
REDUCTIONS GUIDANCE



Scope of Guidance 9C Contracting

- This guidance does not address 9C guidance related to Reduction in staff/personnel which is provided separately by the Human Resource Division (HRD) with the Office of Employee Relations (OER).



Scope of 9C Contracting

- Any questions related to reduction in staff should be carefully coordinated with HR, CFO, Legal staff and management in accordance with the HRD/OER and ANF guidance provided.
- Reduction in staffing plans require review and approval by HRD/OER, and consideration of collective bargaining agreement (CBA) notice and reduction compliance prior to notification to employees. Please ensure the appropriate staff have access to the HRD/OER guidance.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Although CTR is not the ultimate authority on M.G.L. c. 29, section 9C, CTR provides guidance as part of our customer service to departments, to enable departments to efficiently “implement” 9C related Department decisions, including contract and payroll reductions, in compliance with state finance law, and to reduce the risk of unnecessary litigation and costs.
- To this end, CTR consults with the Executive Office of Administration and Finance (ANF), the Office of the Attorney General (AGO), the Office of the Treasurer (TRE), the Human Resources Division (HRD/OER), the Operational Services Division (OSD) and other agencies to identify key areas of risk and to solicit recommendations to assist affected agencies.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- This document is prepared as a working document that can be shared with your Department management and contract/fiscal staff to identify issues and recommendations related to Contract reductions.
- Please feel free to add any specific Department recommendations to this document to customize it for your Department.



9C Guidance Format

- Legal Background information for M.G.L. c. 29, s. 9C Allotment reductions
- Comptroller Guidance on 9C Contract Reductions
- Comments from AGO and ANF
- QUESTIONS



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Historically, the two most frequent challenges to M.G.L. c. 29, s. 9C allotment reduction authority included:
 - Whether or not the line-item appropriation in question was subject to the Governor's authority under 9C; and
 - To what extent could the Governor direct the 9C allotment cuts to be made?
 - For example, could the Governor or ANF withhold a specific earmarks within an appropriation?



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Appropriations subject to M.G.L. c. 29, s. 9C allotment reductions include appropriations to
 - *state agencies under the control of the governor or a secretary,*
 - *but not including the courts, the office of the governor, or the office of the lieutenant governor...” [M.G.L. c. 29, s. 9B.](#)*
- If your Department is subject to 9C you have been contacted by ANF. If you are unsure, please contact your CFO or legal counsel or your ANF Budget analyst.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- The **Supreme Judicial Court (SJC)** has recognized the Comptroller's unique role in administering M.G.L. c. 29, s. 9C reductions in the state accounting system (MMARS), rather than making the 9C allotment reduction decisions (authority which resides with the Governor, the Secretary for Administration and Finance and Department Heads).
 - ANF implements allotment reductions (spending limits) in the state accounting system to support 9C spending cuts to align with reduced revenues
 - CTR implements Department decisions (encumbrances, payments etc.) in the state accounting system MMARS as the official record, *subject to appropriation and allotment reductions implemented by ANF.*



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- The SJC has stated that “*The Governor is the “supreme executive magistrate” of the Commonwealth.* Part II, c. 2, s 1, art. 1, of the Constitution of the Commonwealth.
 - “*The nature of such an office requires that the Governor have authority to use discretion in applying the energies of the executive branch and the resources of the Commonwealth, as such resources are made available by the Legislature, to achieve the purposes or objectives of the laws.*” See Opinion of the Justices, 375 Mass. 827, 833, 376 N.E.2d 1217, 1221 (1978).



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- When there are sufficient revenues to support appropriations,
 - “...it is for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit. It is not within the Governor's official competence to decide that the objectives of any validly enacted law are unwise and, therefore, that no effort will be made to accomplish such objectives. To the contrary, the Governor is bound to apply his full energy and resources, in the exercise of his best judgment and ability, to ensure that the intended goals of legislation are effectuated.” Id. at 833-834.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- In addition, *“The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, provided that he has determined reasonably that **such a decision will not compromise the achievement of underlying legislative purposes and goals.**”* Id. at 836.



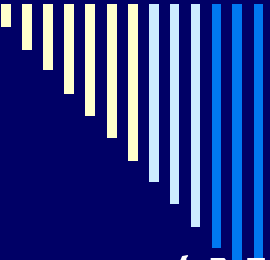
Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- However, the SJC has ruled that under M.G.L. c. 29, s. 9C when the Commonwealth is faced with *insufficient revenues* to support appropriations:
 - ANF's reduction of allotments (payments) is MANDATED, and
 - the reduction of earmarks (in full or in part) is constitutional and proper.
 - See New England Div. of American Cancer Soc. v. Commissioner of Admin. 437 Mass. 172, 184-185, 769 N.E.2d 1248, 1257 (2002).



QUESTION: *Can any earmark be reduced in whole or in part to comply with 9C allotment reductions?*

- Examples of line-items that may be targeted for 9C reductions:
 - Fully earmarked (entire line-item is divided into specified earmarks)
 - Partially earmarked (line-item has one or more specified earmarks)
 - Contains earmarks requiring “not less than \$___” to be spent on a particular program, for a specified recipient, etc.
 - Contains language requiring the department to maintain the same level of performance (for example vouchers) as in the previous fiscal year.



Any earmark can be reduced in whole or in part to comply with 9C allotment reductions.

□ ANSWER: Yes.

- The SJC has ruled that allotments may be cut, including earmarks in whole or in part (since these are seen as limits to expenditures) provided the underlying goals of the appropriations are met.
- In the SJC decision, many of the earmarks that were reduced contained “not less than \$_____” language.
 - See New England Div. of American Cancer Soc. v. Commissioner of Admin. 437 Mass. 172, 184-185, 769 N.E.2d 1248, 1257 (2002).



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- The SJC also confirmed that there was no requirement to make reductions on a pro rata basis or with uniform allotment reductions.
 - “*We reject the plaintiffs' summary argument that we should limit the Governor's authority under G.L. c. 29, § 9C, to make only "pro rata reductions across all line item appropriations to be paid out of a particular fund," or, alternatively, across all expenditures subject to allotment under § 9B. A requirement that a budget shortfall must be addressed with uniform allotment reductions is noticeably absent from the statute and, in our opinion, could produce arbitrary results. Id., See also, Opinion of the Justices, 375 Mass. 827, 836, 376 N.E.2d 1217 (1978).*”



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Rather, the SJC acknowledged that the Executive Branch has the expertise to make these decisions in a manner that fulfills the goals of the appropriations. Id.
 - *“It is an expression of the Legislature's recognition that the executive branch has the “detailed and contemporaneous knowledge regarding spending decisions” to enable necessary reductions to be made on an expedited basis, and the Legislature's confidence that they will be made in a manner that will not compromise the achievement of underlying legislative purposes and goals. See Opinion of the Justices, 375 Mass. at 836, 376 N.E.2d 1217.”*



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- *The SJC stated that:*
 - *“the General Court in the exercise of its legislative power of appropriation has a broad scope for determining whether it will prescribe in detail the particular purposes for which money appropriated shall be expended or, on the other hand, it will permit executive or administrative officers or boards to exercise judgment and discretion within a wide field in the expenditure of money appropriated for a given object to accomplish the general purposes of the appropriation.” See Opinion of the Justices, 302 Mass. at 615, 19 N.E.2d at 815.*



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- In order to **incur an obligation** a department must have an *appropriation* or other legislative authority with:
 - sufficient *authority* for the purpose of the obligation, and
 - sufficient *appropriated or other available funds* (obligation ceiling) to support the obligation.
- This spending authority is recorded in MMARS and Departments may not incur obligations in excess of the appropriation or other authorization.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Pursuant to M.G.L. c. 29, s. 9B, the Governor divides annual **appropriations** into *periodic allotments* which represent the total amount of available cash that the state agency may *spend during the allotment periods.*
- Since revenues are received through out a fiscal year, *periodic allotments* are necessary to align spending with the available cash flow during a fiscal year.
 - *"In this way, it is generally expected that an appropriation will be expended proportionately over the course of a fiscal year."* Brookline v. The Governor, 407 Mass. 377, 381, 553 N.E.2d 1277 (1990)



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Appropriations are divided into periodic *allotments* or installments of available cash (often 2/12 of the appropriation) to manage a reasonable cash flow for expenditures based upon tax collections during the 12 months of the fiscal year.
- Departments are required to manage “obligations incurred” within the limits of an appropriation (obligation ceiling) *and* the amounts expended (payments) within the limits of the periodic allotments.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- When revenues are projected to fall short of the amounts necessary to support appropriations, *ANF is mandated to direct M.G.L. c. 9C “allotment” reductions (spending limits) to prevent “expenditures” (payments) above the projected revenues.*
- Allotment reductions also operate to reduce a department’s authority to obligate funds up to the levels identified in an appropriation so that obligations may not be incurred in excess of the 9C spending limits until sufficient revenues are received/projected to support the full appropriation.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Therefore, in a 9C situation, just because a Department has an appropriation, or has executed a contract with a maximum obligation, *will not guarantee or authorize* the Department or the Contractor to incur obligations up to those limits
- M.G.L. c. 29, s. 9C spending limits *act as a reduction in spending authority*, which in turn reduces the “authority” for the Department to incur obligations in excess of imposed spending limits.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- Departments notified of 9C reductions must take the necessary steps to reduce projected **obligations** and **expenditures** to match the allotment spending limits established by ANF.
 - Departments are currently identifying spending plan adjustments to operate within spending limits which may impact operational expenses, capital expenses, contracts and personnel.



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions - EARMARKS

- The SJC has ruled that allotments may be cut, including earmarks in whole or in part (since these are seen as limits to expenditures) provided the underlying goals of the appropriations are met.
 - See New England Div. of American Cancer Soc. v. Commissioner of Admin. 437 Mass. 172, 184-185, 769 N.E.2d 1248, 1257 (2002).



Legal Background M.G.L. c. 29, s. 9C Allotment Reductions

- From review of the M.G.L. c. 29, s. 9C cases and previous consultation with the AGO, there is a careful balance between:
 - the Executive’s discretion of where the 9C reductions will be made,
 - the implied covenant in all contracts of good faith and fair dealing, and
 - the necessity to fulfill the “underlying goals of the appropriation.”



PLEASE HAVE ALL STAFF REVIEW

- Fiscal Year Update – Comptroller Memo FY# 2014-__ at www.mass.gov/osc under “Guidance for Agencies” under “Fiscal Year Updates 2015”.
- Contract Policies:
 - Amendments, Suspensions and Terminations Policy (includes 9C guidance)
 - State Finance Law and General Requirements
 - Bill Payment Policy



CFO and Agency Counsel Should be involved with:

- Review of Contract reduction plan and justification that Plan supports:
 - Good faith business needs (the implied covenant in all contracts of good faith and fair dealing) and
 - Fulfillment of the “underlying goals of the appropriation.”
- Review of notice letters to ensure language is complete and accurate
- Support to verify actual receipt of notice and follow-up support if necessary



CFO and Agency Counsel Should be involved with:

- ❑ Support to ensure Internal Controls and contract policies are adhered to
- ❑ Support if litigation is threatened, problems arise or if performance must be negotiated
- ❑ Support to ensure 9C changes are adequately documented for records management, audit and litigation purposes
- ❑ Ensure electronic records are referenced and accessible for retention period



Department and Secretariat Wide Communication

- Biggest problems and most costly mistakes are made by
 - failure to communicate with line staff or
 - Failure to involve staff in the process
- Management needs to treat the current budget environment as an emergency situation and implement the same strategy and controls that would be implemented in an emergency
- Management decisions related to contracting can not be made in a vacuum without discussion with operational or program staff



Department and Secretariat Wide Communication

- ❑ Cuts proposed may have unintended consequences or create more costly issues because management does not know details or implementation issues (the devil is in the details)
- ❑ Line staff may have alternatives or suggestions that make reductions more efficient or less painful
- ❑ Departments need to discuss worst case scenarios with staff to identify potential pitfalls or impacts.



Department and Secretariat Wide Communication

- ❑ Failure to communicate may put line staff in the position of dealing with situations for which they are caught off guard or are not equipped to handle (press inquiries, irate or desperate contractors, program or service delivery failures, customer panic or complaints)
- ❑ Departments facing staff cuts are experiencing various degrees of uncertainty, panic and anger among staff, which is potentially disruptive and destructive if not managed carefully.



IDENTIFY DEPARTMENT PRIORITIES BASED UPON *INTERNAL CONTROL PLAN* AND *DEPARTMENT RISK ASSESSMENTS*

- Based upon the Departments *Internal Control Plan* and documented *risk assessments*, create a department plan of priorities and goals that will be applied to determine whether a contract will be reduced or eliminated (this plan will be critical in the event of litigation)
- Apply the plan consistently with the Department's Internal Control Plan and document decisions (also critical to demonstrate good faith and fair dealing)



IDENTIFY DEPARTMENT PRIORITIES AND GOALS AND ACTION PLAN

- Create action plan for how staff will implement priorities and goals so staff know focus of Department and their job focus
- Confirm key contacts or a centralized process for press releases, contractor or customer complaints or panicked inquiries, and public information request (which increase during 9C cuts)
- Confirm Authorized Signatories (as recorded in MMARS) who can approve obligations and payments.



Department and Secretariat Wide Communication

- ❑ Prepare “scripts” with key information that staff can use to explain the situation with “accurate facts”.
- ❑ Direct staff to document question or complaint and confer with key contacts internally first before providing information. Then update oral or written scripts.
- ❑ Failure to communicate with staff increases the state of panic, rumors and misinformation that are already spreading with contractors and customers/clients.



Department and Secretariat Wide Communication

- ❑ Manage the panic, both internally with staff and with contractors by working closely with staff, providing accurate information and demonstrating sensitivity and leadership.
- ❑ Prepare receptionists and Help Desks for upset contractors and where to send inquiries
- ❑ Ensure that staff are responsive and don't "ignore" calls or emails because they don't know how to respond or don't want to respond (bearer of bad news). Provide staff to support these inquiries.



Department and Secretariat Wide Communication

- If staff reductions will occur, determine how this will impact the effective management of contracts, programs and payments. Have a transition or back up person assigned for each contract PRIOR to the staff changes.
- Make sure re-assignment of duties complies with collective bargaining agreement to avoid unnecessary grievances
- Staff need special handling, sensitivity and empathy during difficult transitions to support employee productivity and successful department goals. (Department is only as strong as its weakest link. Don't forget to care for all the links during the commotion of making 9C decisions. A little TLC and motivational support goes a long way.)



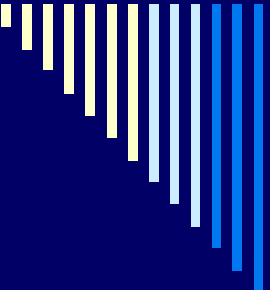
M.G.L. c. 29, s. 9C Contract Reduction Recommendations

- Contracts include service contracts, grants, subsidies, Interdepartmental Service Agreements and Interdepartmental Chargebacks.
- All contract reduction actions must be made in accordance with the terms of the Contract and the Office of the Comptroller [Contract Policies](#) and [Security Policies](#), including but not limited to:
 - Amendments, Suspensions or Terminations and
 - State Finance Law and General Requirements
 - Department Head Signature Authorization



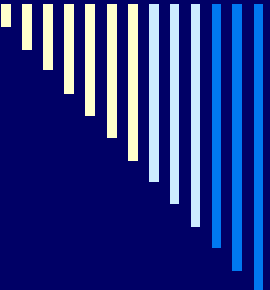
PRIOR REVIEW OF ANY 9C PLAN BY CFO AND LEGAL COUNSEL

- No actions should be taken by fiscal staff (including verbal communications with contractors) to change performance under any contract until the Chief Fiscal Officer (CFO) and the Department's legal counsel have reviewed and approved a plan for making the required reductions in consultation with the ANF budget analyst and any other ANF spending plan guidance.



IDENTIFY ALL CURRENT AND OUTSTANDING OBLIGATIONS

- It is critical that CFOs communicate with ALL staff to identify ALL current, outstanding and potential obligations in the current and future fiscal years
- Departments must identify all costs and **POTENTIAL** expenditures that might be triggered during the contract period at a later date, or if there is a contract change.



IDENTIFY ALL CURRENT AND OUTSTANDING OBLIGATIONS

- ❑ Failure to communicate with staff results in management or line staff incurring obligations or “discovering” obligations requiring payment that exceed spending limits
- ❑ If Department expenditures exceed spending limits, Department will be required to make additional cuts in operational costs, contracts or personnel to accommodate the spending limits.



What do I do for Contracts where an obligation has been incurred?

- Pursuant to [M.G.L. c. 7A, s 3](#), in order for the Comptroller to allow a payment the Department must provide a certification that:
 - *“articles have been furnished, services rendered and obligations incurred ...by the person authorized to incur such obligation.”*
- You must determine whether a legal obligation has been incurred. See [Bill Payment Policy](#) for additional guidance.
- If there is a legal obligation to make payment, then these payments must be made under the Contract and 9C reductions can be made only for the remainder of Contract (if any) or other Contracts.



When is an obligation incurred?

- *Goods – when an order is placed, payment obligation is triggered when goods are delivered and accepted*
- *Services –*
 - *When services are authorized to begin, OR*
 - *For performance-based obligations, when the milestone triggering a payment obligation is delivered (when a contractor not paid for any performance until milestone achieved); OR*
 - *When the contractor has provided possession or committed (reserved) access to goods or services on behalf of the department for a period of time, such as rentals, leases, TELPs, on-call service or maintenance, subscriptions and hotel reservations*



When is an obligation incurred?

- *Grants – financial assistance is not a fee-for-service for the Department*
 - *When grantee incurs costs intended to be paid under the grant, OR*
 - *The date a grant payment is due if grant is not performance based,*
 - *Date milestone fulfilled for performance based grants (no payment obligation if milestone not met)*



Verbal Communications must be documented

- Staff should be instructed *not* to have verbal conversations with contractors regarding contract termination, suspension or amendments without someone else also witnessing the call and notes of the conversation documented to ensure that contractors do not detrimentally rely on verbal communications which may lead to potential litigation.
- All discussions must be formally documented with response back to contractor (BE CAREFUL OF WHAT IS PUT IN EMAILS)



BE CAREFUL TO FOLLOW E-DISCOVERY and PUBLIC RECORD REQUIREMENTS

- All emails, communications and policy documents or decisions (paper or electronic) related to 9C activity are public records. (See SEC website on [Public Records](#).)
- Therefore, staff should be reminded that email is not an informal communication tool and that they need to be careful about what is communicated through email.



BE CAREFUL TO FOLLOW E-DISCOVERY and PUBLIC RECORD REQUIREMENTS

- Since emails are discoverable in the event of litigation or an audit EMAILS RELATED TO 9C ACTIONS SHOULD NOT BE DELETED FOR ANY REASON.
- In addition, under recent E-Discovery rules, in the event Emails are deleted (even unintentionally) the Department may be considered to have acted in bad faith or willfully hiding emails and will be charged with paying for a forensic records management expert to attempt to retrieve the deleted emails, or may be subject to penalties.



BE CAREFUL TO FOLLOW E-DISCOVERY and PUBLIC RECORD REQUIREMENTS

- ❑ The content a public record will determine retention and most contract records must be retained for 6 years following the last payment on any contract. DO NOT DESTROY 9C related documents.
- ❑ Personally Identifiable Information (PII) and confidential information must also be carefully protected ([M.G.L. c. 93H](#) and [Executive Order 504](#))



SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED

- Special attention must be made to identify contracts that have *long term obligations* that cannot be terminated unless the DEPARTMENT AND ALL APPROPRIATIONS AND LEGALLY AVAILABLE FUNDS ARE TERMINATED
 - TELPS (tax exempt lease purchase)
 - Certain leases
 - Projects in progress where a substantial investment has been made by Commonwealth or contractor and termination or reduction would result in severe penalties for early termination or the payments to cover current performance would equal or exceed current fiscal year obligations.



SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED

- Please note that the goal of 9C reductions is to realize cost savings, not to increase costs, liabilities or damages.
- For certain contracts, like TELPS, Departments would be required to layoff staff and terminate other contracts before terminating a TELP, **EVEN IF THE EQUIPMENT THAT HAS BEEN TELP_{ed} IS NOT LONGER IN USE.**
 - TELP payments are loan payments that are repaying the Contractor (financer) for paying for the equipment in full at the time the TELP was done.



SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED

- ❑ It may not be enough that a line-item or an earmark is reduced if the type of contract or terms trigger severe penalties for reduction, suspension or termination.
- ❑ Normally the Commonwealth can terminate for “lack of funding” only if the Department is abolished or all funding is terminated.
- ❑ Even if a space under lease has been vacated or equipment is no longer in use, the leases can not be unilaterally terminated with payments stopped. Some leases have penalties for early termination, even if space is vacated or equipment is returned to the vendor.
- ❑ Lease clauses with “failure of appropriation” means all funds. If you have a choice to cut a lease or another expenditure, it would not be considered a failure of appropriation.



SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED

- ❑ Attempts should be made to re-deploy space or transfer a lease of equipment to another Department that may have funding, prior to terminating.
- ❑ Leases are priced with interest to cover the vendor's anticipated profit based upon full payments for the duration of the lease. Terminating a lease results in loss of use of the space and equipment if returned to the vendor, and any loss in income for the duration of re-letting space or re-deploying equipment (some of which can not be re-deployed).



SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED

- Certain projects already in process, such as large IT implementations, or construction contracts in progress, should not be reduced or terminated without consulting with ANF and ITD or DCP/DCAM to ensure that the Commonwealth won't be subject to liability, penalties or damages if the project is delayed or stopped.
- In some cases delay and penalty costs could exceed the value of the project, defeating the goal of the 9C reductions.



SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED

- ❑ Interdepartmental Service Agreements (ISAs) and Interdepartmental Chargebacks must be evaluated along with all other contracts and may not automatically be reduced or terminated because the agreement is with another state department.
- ❑ Statewide Chargebacks for central services, charges or services already incurred or obligated must be paid just like any other contract charge already incurred



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SOME CONTRACTS SHOULD NOT BE REDUCED OR TERMINATED

- ❑ Interdepartmental Service Agreements (ISAs) supporting programs and services must be carefully evaluated for reductions or terminations and coordinated and mutually agreed by both departments.\
- ❑ A Seller Department may not unilaterally cut or terminate an ISA unless both departments determine that the reduction can be supported. All outstanding obligations that have been incurred by the Child Department must be paid under the ISA, just like any other contract payment.



M.G.L. c. 29, s. 9C Contract Reduction Recommendations

- Departments must consider the costs of reducing or terminating contracts (such as delay penalties) to ensure that these associated costs will be sufficiently funded.
- IT IS CRITICAL TO CAREFULLY REVIEW CONTRACT TERMS
- Contractors always have the ability to terminate the contract for cause, so departments should also be prepared for this occurrence.
- *What is the back up plan for all current contracts?*



M.G.L. c. 29, s. 9C Contract Reduction Recommendations

- Departments are obligated to demonstrate **good faith and fair dealing** in all contract actions, therefore, justifications for business decisions related to 9C contract reductions should be documented to support rationale for decision.
- Courts usually give deference to department decisions that are made in good faith and with good business justification and that are properly documented.
- Failure to document decisions will work against a Department in a challenge, audit or litigation.



M.G.L. c. 29, s. 9C Contract Reduction Recommendations

- Departments have three approaches to handle contract reductions:
 - Suspension (temporary halt of performance)
 - Amendment (formal change in performance)
 - Termination (full or partial formal cancellation of performance)



M.G.L. c. 29, s. 9C Contract Reduction Recommendations

- SUSPENSION - Provides Notice to contractor that all or part of contract performance will be suspended (put on hold) for the current fiscal year, which allows for the necessary encumbrance reductions but keeps the Contract intact in case additional funding is authorized during the fiscal year. (NO CONTRACT AMENDMENT REQUIRED)



Contract Suspension

- A contract suspension is appropriate for single or multi-fiscal year contracts requiring a temporary halt to performance (for a period of days, weeks, months, on a certain date or upon completion of a specific amount of performance) with anticipated continued performance at a future date.
- Appropriate when Department would continue performance or contract with Contractor if funding levels are restored



Benefits of Suspension vs. Amendment or Termination:

- ❑ More palatable for Contractors, since gives perception that suspension is temporary
- ❑ Less likely to prompt litigation or challenge
- ❑ Formal Amendment not required - only Letter of Notice with terms for suspension
- ❑ Letter of Notice of Suspension much easier for staff to implement than trying to obtain an Amendment
- ❑ Easier to reactivate Contract if allotment restrictions are lifted with Letter of Notice of Contract reactivation.
- ❑ Acts as termination (with no further paperwork) in the event allotment limits are not lifted.



Suspension Documentation

- Letter of Notice of Contract Performance Suspensions should identify:
 - the effective date of Suspension
 - instructions or restrictions concerning:
 - allowable activities (performance)
 - costs or allowable expenditures that can be made during the period of the suspension.
 - (See attached Notice of Contract Suspension letter.)



Suspension Documentation

- The Department can also send an *amended scope of performance and budget* that identifies how the reductions will impact the budget and performance.
- A budget with just a lump sum reduction in the maximum obligation will not be helpful to the Contractor and will leave full discretion to the Contractor.
- Therefore, performance expectations should be as detailed as possible.
- These documents become the attachments to the Standard Contract Form and MMARS transactions to support the reductions (without having to do a formal amendment) and will expedite the processing time for encumbrance reductions.



Suspension Documentation Maximum Obligation Contracts

- The Notice of Suspension should identify:
 - The specific amount of the reduction for each contract, and
 - The new total Maximum Obligation for the total duration of the contract, and
 - Whether the reduction applies solely to the current fiscal year or future fiscal years (multi-year contracts).
- These numbers are necessary to support the encumbrance reductions for the contract without having to execute a formal amendment.



Do Rate Contracts Need to be Suspended?

- Although most Rate Contracts depend upon the Department “requesting” performance before an obligation is incurred, a Notice of Contract Suspension is recommended for Rate Contracts (since these contracts do not have a Maximum Obligation)
 - since the Notice can provide advance notice that the Department intends to decrease or halt performance and puts the Contractor on notice of the maximum allowable expenditures than can be requested and paid for under the Contract for the period of the suspension or that the Contract will not be used “until further notice” from an Authorized Signatory



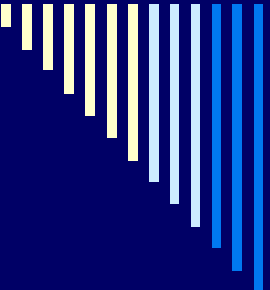
Do Rate Contracts Need to be Suspended?

- Some Rate Contracts have underlying purchase orders or Statement of Works (SOWs) that identify an underlying engagement.
- In this case the PO or SOW would have to be suspended, amended or terminated rather than the Rate Contract.



Contract Suspensions

- If additional revenues are received within the current fiscal year, and allotment and spending controls are lifted, the Department can revive a contract by providing a Notice to the Contractor lifting the suspension and allowing the resumption of performance, under the terms of performance and budget identified in the notice.



What happens to suspension of current year performance if spending limits are not lifted?

- ❑ If additional revenues do not support lifting of spending limits, the Contract will terminate for this fiscal year automatically with no further action by the Department.
- ❑ For multi-year Contracts, the Contract will be automatically reactivated in the subsequent fiscal year subject to appropriation with no action by the Department, unless the suspension was made for the full period of the contract, or the original notice suspended the contract “until further notice”. The suspension can be lifted through a Notice.
- ❑ No Contract Amendment is necessary unless subsequent fiscal year performance is changed.



AMENDMENTS

- Provide Notice to contractor that full or partial performance changes will be effective as of a certain date or upon a specified level of expenditures. (maximum obligation contracts).
- (CONTRACT AMENDMENT REQUIRED)
- Appropriate when reduction or change is considered permanent for fiscal year or term of contract and may not be reinstated if funding levels are restored.
- However, Amendments are paper-intensive and Departments should consider a temporary suspension instead, which achieves the same end with less paperwork and time for staff.



Amendment Documentation

- Departments and Contractors must:
 - sign a Commonwealth of Massachusetts **Standard Contract Form** for the identified changes and
 - attach any instructions or restrictions concerning allowable activities (performance), costs or allowable expenditures (amended budget and scope of performance).
- A budget with just a lump sum reduction in the maximum obligation will not be helpful to the Contractor and will leave full discretion with the Contractor.
- Therefore, performance expectations should be as detailed as possible.
- These documents become the attachments to any MMARS transactions and will expedite the processing time for encumbrance reductions.



Amendment Documentation

- If the Contractor fails to sign and return by the specified date, the Department may treat the changes as effective on the date specified in the notice of amendment to the Contractor if Notice of Suspension is included in the Notice of Amendment. (See attached draft Notice of Contract Amendment letter.)



Amendment Reduction Sample Letter language

- *“Please be advised that failure to execute and return the attached Amendment Form shall not operate to delay the Amendment changes and the effective date of these changes will be the date the Amendment is executed by the parties or [enter date amendment terms will be effective], whichever is later.”*



Do Rate Contracts Need to be Amended?

- Although most Rate Contracts depend upon the Department “requesting” performance before an obligation is incurred, a Notice of Contract Suspension is recommended for Rate Contracts (since these contracts do not have a Maximum Obligation)
 - since the Notice can provide advance notice that the Department intends to decrease or halt performance and puts the Contractor on notice of the maximum allowable expenditures than can be requested and paid for under the Contract for the period of the suspension.



Do Rate Contracts Need to be Amended?

- ❑ Some Rate Contracts have underlying Purchase Orders or Statement of Works (SOWs) that identify an underlying engagement.
- ❑ In this case the Purchase Order or Statement of Work (SOW) would have to be suspended, amended or terminated rather than the Rate Contract.



Reverse Amendment

- If additional funds become available in the current fiscal year, the Department would have to execute another **Standard Contract Amendment** to increase authorized performance, budget and the Maximum Obligation prior to amended performance beginning.
- Amendments are paper and time consuming, therefore, suspensions should be considered first if reductions might be reversed if funding levels restored



CONTRACT TERMINATION

- Provides Notice to contractor that full or partial performance termination will be effective as of a certain date or upon or upon a specified level of expenditures.
- A contract termination is a *permanent* cancellation of the contract and should be used only in situations when the Department does not foresee continuing business with a Contractor.



CONTRACT TERMINATION

- Terminations are a *last resort* and should not be made if there is time remaining on the procurement and the Department could use the Contractor during this period if spending limits are increased and additional funds are available.
- Suspensions put the contract in a holding pattern in the event additional funding becomes available during the period of procurement.



CONTRACT TERMINATION

- If additional revenues support the lifting of spending limits during the fiscal year the Department would have to execute either a **new Standard Contract Form** (with all required attachments).



PROVIDE PRIOR WRITTEN NOTICE

□ PRIOR WRITTEN NOTICE.

- Contractors must receive as much prior written notice as possible when contracts will be reduced, amended or terminated.
- For Contracts using the *Commonwealth of Massachusetts Standard Contract Form* and Instructions, the “**Contract Manager**” is the person to receive notices unless otherwise specified in the Contract.



BE CAREFUL TO FOLLOW PRIOR NOTICE PROVISIONS

- Contracts must be reviewed to ensure that **notice requirements are known**, what performance has been completed to date, outstanding payments that must be made and whether contracts have performance requirements that are capable of being reduced in whole or in part or renegotiated.
- Some contracts can be re-negotiated to cut costs or modify performance and get a better deal (subject to state finance law).



CONTRACT TERMINATION

- *“Unless otherwise specified in the Contract, legal notice sent or received by the Contractor’s Contract Manager (with confirmation of actual receipt) through the listed fax number(s) or electronic mail address will meet any requirements for written notice under the Contract”.*
- For other types of Contracts (construction, leases, etc.) Departments should carefully review the language for the person and form of receipt of notice that is required.



NOTICES SENT BY AUTHORIZED SIGNATORY AND DOCUMENT ACTUAL RECEIPT OF ALL NOTICES

- *Notices should be sent by Authorized Signatory* so there is no challenge later that sender had no authority to send notice.
- *For all notices, Department must document a Contractor's actual receipt of notice.*
 - If multiple contracts are involved, your staff may want to have a spreadsheet with all the contracts and the date and format of actual receipt.



RECORDS MANAGEMENT NOTICES

- All documentation related to a Notice of Suspension, Amendment or Termination must be retained in the contract file or other location referenced in the contract file in case a challenge to notice is raised at a later date.
- See [815 CMR 10.00](#) for Records Management requirements for contracts.



Notify Agency Counsel and AGO of any potential or threatened litigation or potentially contentious interactions

- Difficult potential or actual interactions with contractors should be coordinated with the Department's legal counsel who may be able to provide negotiation assistance and prevent escalating problems or potential litigation.
- Threats of litigation must be brought immediately to the attention of the Department's legal counsel, and from there immediately to the Office of the Attorney General (AGO).
- Don't just do a dump and run by just sending an email or fax. Personally contact each contractor to ensure they are clear on Notice. Customer Service is professional.



MMARS CHANGES

- *MMARS reductions may not be made until the Department has confirmed and documented actual receipt of the Notice of Suspension, Amendment or Termination.*
- MMARS considered the “official record” or “record copy” of fiscal activities and will supersede paper or other formats of the same information.
- Don’t forget to enter changes in MMARS so MMARS and paperwork matches.



Reminder -- MMARS MUST MATCH 9C Actions to Contract

- ❑ Encumbrance reductions must use the use the same MMARS Doc ID as the contract being amended to keep all documentation together.
- ❑ The same MMARS Doc ID must be retained from year to year for the life of the contract and must appear on the top of all contract documents for Records Management and Audit purposes.



Be Careful of “Creative” Accounting Traps

- ❑ Resist the temptation to move contract expenditures around to other line-items, trust accounts, federal or capital accounts.
- ❑ trust accounts, federal or capital accounts have specific restrictions and obligations, payments and transferred charges must meet these terms
- ❑ Creative accounting may violate state finance law if the charges are moved to accounts not authorized or not appropriate for those charges.
- ❑ Knowingly violating policies may subject user to [M.G.L. c. 29, s. 66](#) penalties



Be Careful of “Creative” Accounting Traps

- ❑ Bringing a transaction to “Final” in MMARS (encumbrance or payment) acts as the Department Head certification that transaction complies with state finance law and the funding source is appropriate.
- ❑ Once an expenditure is transferred, it can not be transferred back to an account once funding is available.
- ❑ Therefore, you may not “transfer” charges or payments made to other accounts unless the original charge was a mistake. See [EX policy](#).



Be Careful of “Creative” Accounting Traps

- ❑ Beware of the temptation to move personnel and contract employees to trust accounts or other non-operating accounts.
- ❑ Fringe and other mandated charges follow the employees and contract employees and may trigger higher costs.
- ❑ Some trusts and federal grants limit the level of administrative costs which might violate trust language.



Be Careful of “Creative” Accounting Traps

- If trust or retained revenue account has legislative language which authorizes the Comptroller to allow obligations to be incurred “*in anticipation of revenue*” Departments will have to certify that sufficient revenues will be collected to support the obligations to ensure that the Department does not have a deficiency if revenues fall short.



Be Careful of “Creative” Accounting Traps

- Beware of the temptation to:
 - pre-pay for contract performance now in anticipation of reductions (advance or pre-payments are prohibited absent specific exceptions) See [Bill Payment Policy](#).
 - Deferring payment until next fiscal year (*payments must be made for performance in this fiscal year with current fiscal year funds*).
 - Holding invoices until next fiscal year to trigger a Prior Year Deficiency
 - Re-negotiating TELPs or leases to reduce current payments by extending period of TELP or lease, or accepting a higher interest rate.
 - See [Contract and Payment Policies](#) for restrictions



PAYMENTS

- ❑ Ensure that [Bill Payment Policy](#) is followed for all invoices properly received for performance properly made and accepted.
- ❑ Departments can not “refuse” to accept performance if made as requested.
- ❑ Certain goods can be returned subject to return policies (not specialty items built to specs).
- ❑ Don’t hold invoices. Invoices must be rejected for inaccuracies or errors within 15 days and paid within period for Prompt Pay Discounts, or no later than 45 days (but in no event later than August 31st – accounts payable period – budgetary funds).



PAYMENT TRANSACTION OVERRIDES

- ❑ Certain payments will reject due to spending controls and other edits in MMARS that are designed to prevent overspending
- ❑ Properly authorized payments within approved ANF spending limits can be overridden to process
- ❑ An Authorized Signatory of the Department should send email to with transaction type, transaction # Doc ID, the reason for the override and certification that the payment is within approved ANF spending limits to the CTR Contracts Bureau



FOLLOW INTERNAL CONTROLS

- ❑ All the normal rules apply, even in a 9C situation.
- ❑ Biggest and costliest mistakes occur when Departments take short cuts and fail to follow their own Internal Control Plans.
- ❑ Budget reductions are key time when Internal Controls protect Department and prevent future audit findings.
- ❑ Coordinate 9C Action Plan with Internal Control Plan.
- ❑ Departments should review risks identified in Internal Control Plan to ensure these risks continue to be mitigated and addressed even with budget shortfalls
- ❑ Departments may want to develop Internal Control Plan chapter which incorporates action plan for implementation of 9C reductions.



FOLLOW INTERNAL CONTROLS

- Primary risk is failing to document 9C decisions and ensuring that supporting documentation is located or referenced in each contract file.
- A centralized 9C file is sufficient PROVIDED each contract file references the centralized file for 9C documentation. (notice on file cabinet not enough)



FOLLOW INTERNAL CONTROLS

- Careful documentation and cross referencing (especially the location of electronic files and emails) is critical for audit, litigation and E-Discovery purposes
- Ensure that 9C plan and internal controls are Communicated to ALL staff, including regional offices.



Public Information and Privacy Concerns.

- Since certain MMARS fields are a matter of public record MMARS doc IDs (encumbrances, payments, etc.), vendor invoice numbers, contract numbers, check descriptions, and any comment fields *MUST NOT contain personal information (such as individual's names, SSN numbers, bank account numbers, date of birth, addresses etc.) or other information that could jeopardize privacy or facilitate identity theft.*
- MMARS doc IDs and key comment fields may be printed on checks, sent electronically as part of remittance advice, and will appear on VendorWeb (and may be viewed related to public records requests), therefore care must be taken that individual personal information is not used.



9C Impact on Procurements in Process

- For procurements governed by 801 CMR 21.00, please contact OSD for specific guidance. If RFRs are posted on COMMBUYS contact OSD for guidance.



9C Impact on Procurements in Process - OPTIONS

1. Cancel the procurement. Post a notice canceling the procurement and repost when funding is available (essentially starting over). This option makes sense only if the procurement was recently posted and the project is a single year or short term project and funding availability is unlikely in the current fiscal year.



9C Impact on Procurements in Process - OPTIONS

2. Postpone date of Response Submission. Post an RFR Amendment to postpone the date of submission of Responses (extend the date out) so that the procurement/application process is extended. This may have to be done periodically if funding delays extend well into 2015.



9C Impact on Procurements in Process - OPTIONS

3. Complete Procurement/Contracts, but Delay Start of Performance. Post an RFR Amendment that the Department intends to complete the procurement/grant application process and execute Contracts, however that the Contracts will contain language that performance may not begin until funding is available and the Department provides a notice to proceed with performance, and that no performance made prior to this notice will be compensable. This option would allow the department to have all the paperwork completed and contracts ready to go depending upon the length of delay of funding. The contracts might have to be amended if performance scope or budget need to be adjusted if funding becomes available.



9C Impact on Procurements in Process - OPTIONS

4. Complete Procurement/Delay Contract Execution. Post an RFR Amendment that the Department intends to complete the procurement/grant application process and select contractors, but that contract execution will be delayed until funding is available. Since Responses for 801 CMR 21.00 procurements are only valid for 90 days, if the delay in final contract execution will/might extend beyond 90 days from the date of submission of Responses, the Department should request that Bidders submit a letter extending the Responses for an additional 90 days (which may have to be done periodically if funding delays extend well into 2015 or 2016. Once funding is available, contracts can be executed and performance may begin.



9C Impact on Procurements in Process

- For options #2, #3 or #4, the Department will have to determine if the delay in funding will significantly change or impact the scope of the original procurement. In some cases, the delay will have no impact on the goods or services sought by the Department, but will just delay when the Department can obtain the goods or services.
- However, if the delay will impact the ability of a Contractor to meet the contract requirements (e.g., if the performance was required to be completed on a certain date which can no longer be accommodated with the delayed contract start), or the delay in contract execution or the start of performance would be unfair to Contractors the Department should consider whether the RFR should be amended so that Bidders/Grantees can submit Responses based upon the anticipated delay.

TYPES OF AVAILABLE CONTRACT ACTIONS DUE TO BUDGETARY REDUCTIONS (M.G.L. c. 29, s. 9C)[¶]

CONTRACT ACTION [Ⓞ]	RESULTS OF CONTRACT ACTION [Ⓞ]	REQUIRED DOCUMENTATION [Ⓞ]
TEMPORARY SUSPENSION[¶] (temporary suspension or delay of performance) [Ⓞ]	<ul style="list-style-type: none"> • → Provides Notice to contractor that full or partial performance suspension will be effective as of a certain date or upon a specified level of expenditures.[¶] • → Suspension keeps contract intact but temporarily halts or limits performance for the duration of suspension.[¶] • → Partial suspension may reduce allowable performance and allowable expenditures during period of suspension (scope of performance and budget reductions must be included with notice of suspension).[¶] • → Suspension can be made for current fiscal year only or indefinitely until notice of the lifting of the suspension. Projects in progress may be put on hold until funds are authorized for continuation.[¶] • → MMARS encumbrance adjustments must be made to reduce encumbrance for current fiscal year to match reduced performance and budget authorization in the suspension notice.[¶] • → Notice of Contract Suspensions are recommended for Rate Contracts to identify the maximum allowable performance or expenditures that will be funded to ensure that obligations are not incurred in excess of allowable funding.[Ⓞ] 	<ul style="list-style-type: none"> • → No formal contract amendment is necessary. The Notice of Suspension and scope of performance and budget reduction attachment(s) are sufficient to support MMARS encumbrance reductions.[¶] • → If additional funds are authorized, suspension may be lifted with written notice to Contractor and contract adjustments made at that time if needed.[¶] • → If suspension made solely for current fiscal year, contract will automatically be reactivated for FY'08 without action by department, subject to appropriation.[Ⓞ]
AMENDMENT[¶] (Temporary or partial Contract Reduction) [Ⓞ]	<ul style="list-style-type: none"> • → Provides Notice to contractor that full or partial performance changes will be effective as of a certain date or upon a specified level of expenditures.[¶] • → Amendments will formally reduce performance under a contract. Scope of performance and budget reductions must be included with notice of Amendment.[¶] • → For multi-year contracts, Amendments may be made solely for current fiscal year only.[¶] • → MMARS encumbrance adjustments are made to reduce encumbrance for current fiscal year to match reduced performance and budget authorization in the Amendment.[¶] • → If the Contractor fails to sign and return Amendment Form by the specified date, the Department may treat the changes as effective on the date specified in the Notice of Amendment to the Contractor (partial termination of this performance).[Ⓞ] 	<ul style="list-style-type: none"> • → Requires Standard Contract Form and attachment(s) with identified performance and budget reductions.[¶] • → Notice of amendment must identify the total Maximum performance and expenditures that will be allowable under the Contract.[¶] • → If additional funds are authorized, Department may negotiate a Standard Contract Amendment to increase performance and budget authorizations.[¶] • → If Amendment is made solely for current fiscal year, contract will automatically continue as outlined in the Contract for FY'15 without action by department, subject to appropriation.[Ⓞ]
TERMINATION[¶] (Permanent reduction or halt of performance) [Ⓞ]	<ul style="list-style-type: none"> • → Provides Notice to contractor that full or partial performance termination will be effective as of a certain date or upon a specified level of expenditures.[¶] • → Terminations are used primarily for single year Contracts or other Contracts when performance will be permanently reduced or halted, without a potential for resumption if additional funding is authorized.[¶] • → Partial termination may reduce allowable performance and allowable expenditures during period of notice of termination (scope of performance and budget reductions must be included with Notice of Termination).[¶] • → MMARS encumbrance adjustments must be made to reduce encumbrance for current fiscal year to match reduced performance and budget authorization in the Notice of Termination.[Ⓞ] 	<ul style="list-style-type: none"> • → No formal contract amendment is necessary. The Notice of Termination and scope of performance and budget reduction attachment(s) are sufficient to support MMARS encumbrance reductions.[¶] • → If additional funds are authorized, Department must execute a new Contract with all required attachments, provided the procurement is still active (if applicable).[¶]

[¶] Contracts include service contracts, grants, subsidies, Interdepartmental Service Agreements and Interdepartmental Chargebacks. All actions must be made in accordance with Office of the Comptroller [Contract Policies](#), including but not limited to: ["Amendments, Suspensions or Terminations"](#) and ["State Finance Law and General Requirements"](#).[¶]



Customer Service Comments and Questions

- We value your comments and feedback
- Please send comments about this guidance or questions to the Comptroller Helpdesk at:
comptroller.info@state.ma.us