

INDEPENDENT CONTRACTS GUIDELINES

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SAN MATEO COUNTY
COMMUNITY
COLLEGE DISTRICT

BEFORE WE HIT THE ROAD....

-  We wanted to you to know that we are recording the training series and we have created a **Purchasing Road Show Training Tool Box** that can be found on the Purchasing Department's Downloads Page:
<https://downloads.smccd.edu/browse/purchgs>
-  If you have any questions during the presentation, please use the Q&A feature to submit your question. We will address your questions at the end of our presentation.
-  If we are talking too fast, please send us a quick note using the Zoom Chat Feature and we will take our foot off the throttle.
-  At the end of the training, please take a moment to fill out a very short survey.

DISCLAIMER

The discussion and materials provided in this presentation are for educational purposes only. Participants are advised to consult with your College and District Business Offices for guidance on any specific contractual or insurance related inquiries, as the final outcome is based on the facts and circumstances of each particular transaction. Certain matters may require the District to consult with legal counsel.

TODAY'S ROAD MAP

- Background on AB 5
- What's New; AB 2257
- Potential Misclassification Issues
- Independent Contractor Agreement Instructions
- Independent Contractor Agreement Routing and Approval Process
- Contract Tips

AB 5

- Codified the “ABC Test” for employee status adopted by the California Supreme Court in *Dynamex*
- Expanded the reach of the ABC Test
- Applied to work performed on or after January 1, 2020
- Exempted numerous occupations from the ABC Test, making *Borello* the governing standard for employee status



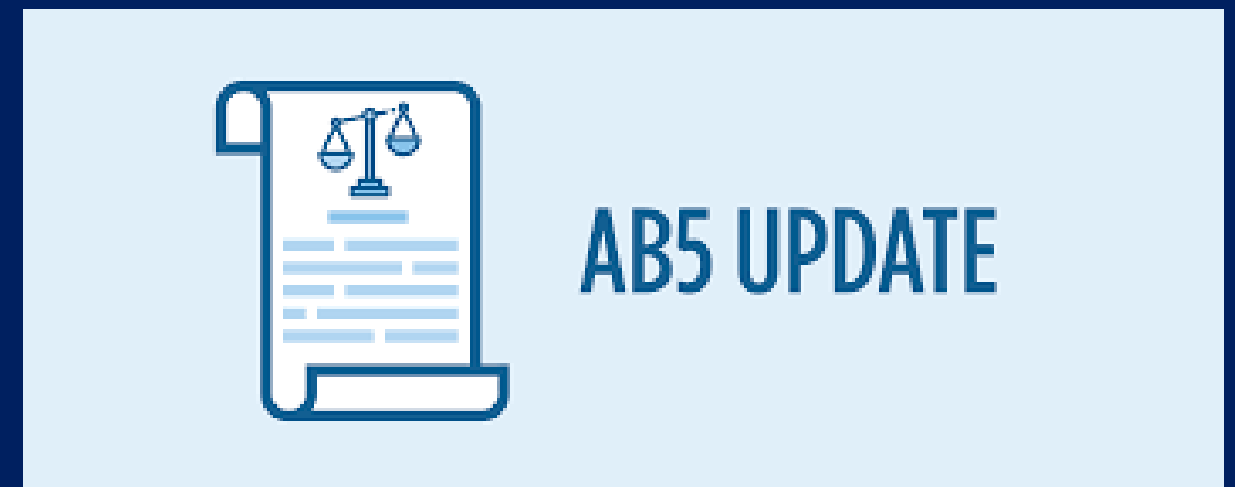
IMPLEMENTATION AND THE EFFECTS ON DISTRICT/COLLEGE OPERATIONS

- Human Resources/Purchasing/Risk Management Coordination
- Analyzed all IC contractual relationships
- Evaluated and addressed any potential misclassifications
- Future Contracts Review



WHAT'S NEW: AB 2257

- Became effective September 4, 2020 and replaces AB 5
- Maintains ABC Test and all of AB 5's exemptions
- Still applies to work performed on or after January 1, 2020
- Adds additional exemptions
- All exemptions apply retroactively
- Enhances enforcement powers



THE “ABC” TEST

- **(A)** The worker is **free from the control and direction** of the hiring entity in connection with the performance of the work, **both under the contract** for the performance of the work **and in fact**;
- **(B)** The worker **performs work that is outside** the usual course of the hiring entity’s business; and
- **(C)** The worker is **customarily engaged in an independently established** trade, occupation, or business of the same nature as that involved in the work performed.

PROFESSIONAL SERVICES EXEMPTIONS FROM THE "ABC" TEST

- Lawyer
- Architect/Engineer
- Private investigator
- Fine Artist (*performing artist*/musician*/vocalist* and single event performers**)
- Certain licensed health care professionals
- Marketing (original and creative content)
- Travel agent services
- Graphic design
- Still photographer/photojournalist
- Freelance writer
- Grant Writer
- Editor
- *Tutoring**
- *Event vendor**
- *Interpreting services**
- Workers providing licensed barber, Esthetician or cosmetology services
- Others performing work under a contract for professional services with another business entity or pursuant to a subcontract with the construction industry
- *Sports official** (includes umpire, referee, judge, scorekeeper, timekeeper, or other person who is a neutral participant in a sports event)*

*New exemptions *under AB2257 | ** Under Labor Code 3352(a)*

POTENTIAL MISCLASSIFICATION: EMPLOYEE OR INDEPENDENT CONTRACTOR?

- Does the District exercise the same type and degree of control over the worker as its employee?
- Does the worker perform work outside the District's usual course of business?
 - Performing same work as employees
 - Performing work/services that hiring entity employees used to perform
 - Performing work/services that can be performed by employees of hiring entity
- Does the worker have their own "legitimate" business?
- Is individual providing services using District equipment/facilities?



POTENTIAL MISCLASSIFICATION: WHAT ARE THE RISKS?

For Independent Contractors:

- No withholding required (1099-MISC is issued)
- IC responsible for quarterly federal income tax payments and self-employment tax

For Employer (District):

- Paid sick leave benefits
- CalPERS Implications
- Potential Audit Findings
- IRS Penalties (Underpayment, nonpayment)
- Department of Labor Employer Penalties (Unintentional vs Intentional Misclassifications)

For Employees:

- CalPERS Implications
- Employers must withhold their share of:
 - Social Security
 - Federal Payroll Taxes
 - State Employment Taxes
 - Workers Comp Premiums
 - Other "Fair Labor" laws



INDEPENDENT CONTRACTOR AGREEMENT INSTRUCTIONS

BEFORE THE PROJECT BEGINS

- A. Contract Originator verifies if an Independent Contractor Agreement can be completed by completing the IC Checklist
- B. Contract originator completes an IC Agreement
- C. Contract originator obtains the required documentation from contractor
- D. Contract originator collects signatures/approvals and compiles documentation
- E. College Business Office reviews the contract documents for completeness and submits to the District's Purchasing Department for final approval/processing

IC AGREEMENT PAYMENT:

- A. Contract originator prepares payment authorization
- B. Accounts payable issues check.

CONTRACT DOLLAR THRESHOLDS: Board approval is required for IC agreements greater than the current legal bid limit of \$96,700

INDEPENDENT CONTRACTOR CHECKLIST – NEW!

Step	Description	Yes	No	Action
1.	Is the Contractor a current employee of the District?	<input type="checkbox"/>	<input type="checkbox"/>	If YES : Contact HR to process as employee If NO : Go to Step 2
2.	Is the Independent Contractor a government agency, an agency registered as an LLC, LLP or Corporation (C-Corp, S-Corp)?	<input type="checkbox"/>	<input type="checkbox"/>	If YES : Use the Standard Services Agreement (SSA) If NO : Go to Step 3
3.	<p>Is the Independent Contractor engaged in an exempt occupation including, among others:</p> <ul style="list-style-type: none"> ▪ Lawyer ▪ Architect/Engineer ▪ Private investigator, ▪ Fine Artist (performing artist/musician/vocalist and single event performers), ▪ Certain licensed health care professionals ▪ Marketing (original and creative content) ▪ Travel agent services ▪ Graphic design ▪ Still photographer/photojournalist ▪ Freelance writer ▪ Grant Writer ▪ Editor ▪ Tutoring ▪ Event vendor ▪ Interpreting services ▪ Workers providing licensed barber, Esthetician or cosmetology services, ▪ Others performing work under a contract for professional services with another business entity or pursuant to a subcontract with the construction industry ▪ Sports official (includes umpire, referee, judge, scorekeeper, timekeeper, or other person who is a neutral participant in a sports event) 	<input type="checkbox"/>	<input type="checkbox"/>	If YES : Use the Independent Contractor Agreement (ICA) If NO : Go to step 3
4.	<p>ABC test in which <u>a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless ALL of the following conditions are satisfied:</u></p> <p>A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.</p> <p>B. The person performs work that is outside the usual course of the hiring entity's business.</p> <p>C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.</p>	<input type="checkbox"/>	<input type="checkbox"/>	If YES : Use the Independent Contractor Agreement (ICA) If NO : Do Not Hire the individual as an Independent Contractor, Consult with HR

REVIEW OF INDEPENDENT CONTRACTOR AGREEMENT

Independent Contractor Agreement – Fillable PDF Form - Page 1

District E#: _____

Agreement No. _____



3401 CSM Drive, San Mateo, California 94402

Independent Contractor Agreement

District Office
 Cañada College
 College of San Mateo
 Skyline College
 If ASB Check:
 If ASB check:
 If ASB check:

Division: _____

This Independent Contractor Agreement ("Agreement") between San Mateo County Community College District, a public educational agency ("District") and _____ ("Independent Contractor" or "IC") is effective upon the execution date of this Agreement by both Independent Contractor and District, whichever shall later occur. District and Independent Contractor are referred to in this Agreement individually as "Party" and collectively as "Parties."

Independent Contractor's Legal Name (as it appears in SSN Card): **[This field will autofill from Step #3]** _____

G#: _____ Address: _____
 City: _____ State: _____ Zip: _____ Phone: _____
 Email: _____ Check if out-of-state. (Refer to section 11 for tax information)

Is IC a Retired Annuitant or Former District Employee? (Refer to section 24) No Yes

If YES Check ONE: PERS STRS (District Verification Completed: _____)
(Initials/Date)

WHEREAS, District may contract with independent contractors for the furnishing of services to or for District or any of its Colleges or Departments; and

WHEREAS, it is necessary and desirable that Contractor be engaged by District for the purpose of performing services hereinafter described; and

Step 1) Select Location, and check off if ASB funded

Step 2) Identify Division

Step 3) Enter Legal Name of IC

Step 4) Enter G#, Address, Email and Check box if out-of-state

Step 5) Check applicable box if IC is a retiree or former District employee

Step 6) If yes, check box for applicable system

Independent Contractor Agreement – Fillable PDF Form - Page 3

17. Ownership of Intellectual Property. The Services hereunder are work made for hire and District shall exclusively own, in perpetuity and worldwide, all rights to and flowing from the work, including any work product, performed under this Agreement. IC assigns to District any and all rights IC could have, may have, or does have, in the work and/or the work product performed under this Agreement, and District shall have all right, title, and interest in said matters, including the right to secure and maintain the copyright, trademark, and/or patent of said matters in the name of the District. IC consents to the use of IC's name in conjunction with the sale, use, performance, and distribution of said matters, for any purpose and in any medium. All copies of such Information in written, graphic or other tangible form shall be returned to the District upon termination of the Agreement. Information shall be kept confidential by Contractor, shall be used only in performing hereunder, and may be used for other purposes only upon prior written approval of District Executive Vice Chancellor or Designee.

(check here if applicable) _____ Notwithstanding the provisions of section 17 it is understood that IC is not producing works for hire as described in section 17. Therefore, section 17 does not apply to IC's copyrighted works, intellectual property or products provided by and used by IC in the course of providing the Services.

17.a Photography, Videography. (check here if applicable) _____ If products and services to be performed under this Agreement include photography and/or videography, Appendix 1, Additional Terms and Conditions, shall apply in place of Section 17.

17.b Use of Unmanned Aerial Systems. (check here if applicable) _____ If Contractor and its subcontractors will use Unmanned Aerial Systems (Drones) in the performance of this Agreement, Contractor and its subcontractors shall be subject to Appendix 2, Insurance Requirements for use of Unmanned Aerial Systems (Drones).

18. Non-Discrimination/Compliance with District Rules. IC agrees that he/she will comply with all applicable Federal and California state anti-discrimination laws and regulations and agree not to unlawfully discriminate against any person, on the basis of race, color, age, ancestry, national origin, sex, religious creed, marital status, or physical or mental disability, or sexual orientation or any other category protected by law, including but not limited to, the California Fair Employment and Housing Act, beginning with Government Code Section 12940. IC also agrees to comply with the District's Board Policies and Administrative Procedures.

19. Governing Law. This Agreement shall be governed and interpreted in accordance with the laws of the State of California in accordance with its fair meaning and not strictly for or against the District or IC. Any legal proceedings brought to interpret or enforce the terms of this Agreement, shall be brought in San Mateo County, California.

20. Disputes. Except in the event of the District's failure to make earned and undisputed payments to IC, if the District and IC have a dispute, each will continue to perform its respective obligations, including IC's duty to provide and perform the Services, during all attempts to resolve the dispute.

Step 7) Check box only if the IC will not be producing any "works for hire"

Step 9) Check box only if the IC will be using a drone(s) to perform the services

If checked, Appendix 2 should be attached and initialed by IC where appropriate

Step 8) Check box only if the IC will be performing services that include photography and/or videography

If checked, Appendix 1 should be attached

Independent Contractor Agreement – Fillable PDF Form - Page 4

Step 10) This field will autofill when IC's legal name is entered on page 1

all prior agreements or negotiations, whether written or verbal. It may not be modified except in a writing signed by both Parties.

IC Legal Name: [This field will autofill from Step #3]

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT

~~AGREEMENT OF INDEPENDENT CONTRACTOR:~~ By signing below, I agree to perform the services described in this Agreement for the payment indicated. I understand that while performing Agreement services I am not an employee of the San Mateo County Community College District because:

1. I follow an independent trade or profession,
2. I will not be subject to control and direction as to the details and means for accomplishing the anticipated result of my service, and
3. I customarily perform work that is outside the usual course of the DISTRICT'S business, and operate my business offering the same type of services to other clients as being offered to the District.

Signature

(Print) Name

Date

District Authorized Signature

Yanely Pulido, Director of General Services

Date

DEPARTMENT USE ONLY					
ORIGINATOR: _____		Date: _____		Extension: _____	
FOAP: <u>F</u> <u>O</u> <u>A</u> <u>P</u>				Amount: _____	
FOAP: <u>F</u> <u>O</u> <u>A</u> <u>P</u>				Amount: _____	
FOAP: <u>F</u> <u>O</u> <u>A</u> <u>P</u>				Amount: _____	
FOAP: <u>F</u> <u>O</u> <u>A</u> <u>P</u>				Amount: _____	
<u>OTHER APPROVALS:</u>					
_____ Department Administrator Signature		_____ Date		_____ VP, Admin Services Signature	
_____ Print Name:				_____ Print Name:	
_____ Exec. Director/Bus. Officer Signature		_____ Date			
_____ Print Name:					

Step 11) Enter name of Originator, Date, Extension and applicable FOAPs and respective amounts

Independent Contractor Agreement – Fillable PDF Form - Page 5

EXHIBIT A SCOPE OF SERVICES

1. **Project Description:**

2. **Scope of Work/Description of Services Provided:**

3. **Contract Term:** Start Date: _____ End Date: _____

4. **District Point of Contact:**
 Name: _____
 Phone: _____ Email: _____

5. **Rate of Payment:**
 Hourly rate (if applicable): \$ _____ per hour
 Estimated hours required for completion: x _____ hours = \$ _____
OR
 Lump sum upon completion of all Services: \$ _____
 Other cost factors:
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____
Total Cost of Services Not to Exceed: \$ _____

6. **Method of Payment:** IC requests for payment to be sent:
 Single payment, upon successful completion of project and District's receipt of deliverables.
 Multiple payments. Payments will be made as follows:

Step 12) Describe the intent/purpose of the Project.

Step 14) Enter the Start Date and End Date for the entire term of the Contract

Step 16) Identify Payment Terms; Is it on a Time & Material Basis with hourly rates and estimated # of to complete the project?
 -OR-
 Lump Sum/Fixed Fee?

Step 16) Cont'd
 What other cost factors are required? Any reimbursable expenses?
 Enter Total Cost of Services NTE amount

Step 13)
 Describe/identify the SOW, what services are being provided

Step 15) Add POC's information for the individual responsible to manage this contract

Step 17) Select the method of payment.
 If multiple payments, describe how payments will be made.
 Monthly? At specific milestones? End of project?
 X% upon execution of agreement, remaining x% upon completion of services?

Independent Contractor Agreement – Fillable PDF Form - Appendix 1 Page 1

Photographer's directors, officers, employees, subcontractors or agents (if any) of this provision.

5. Use of Unmanned Aerial Systems (Drones)

5.1. Acceptance of Drone Use Policy

Photographer understands that use of Drones for work performed for the District is subject to the District's Policy 8.49. Use of drones in violation of this policy will constitute a breach of this agreement.

5.2. Liability and Insurance Requirements for Drone Use

Photographer understands that use of Drones for work performed for the District requires that Photographer provide proof of insurance coverages and will name the District as additional insured as more completely set forth in Appendix 2 Insurance Requirements for Drone Use.

6. Certification of Drone Use (either 6.1 or 6.2 must be initialed/dated)

6.1. Contractor certifies that Drones WILL NOT be used in the performance of the Agreement, whether by Contractor or any Subcontractor, and that any unauthorized use shall be considered a material breach of the Agreement.

Contractor Initial: _____ Date _____

OR

6.2. Contractor certifies that Drones WILL be used in the performance of the Agreement within the parameters described and/or identified in Exhibit A to the Agreement.

Contractor Initial: _____ Date _____

7. In the case of any conflict between the terms of this Appendix and the terms of the Agreement, the terms of this Appendix shall govern and control such conflict with regard to photography and/or videography services.

March 2021

Appendix 1 - Page 1 of 1

Step 18) IC must initial appropriate section to confirm that drones

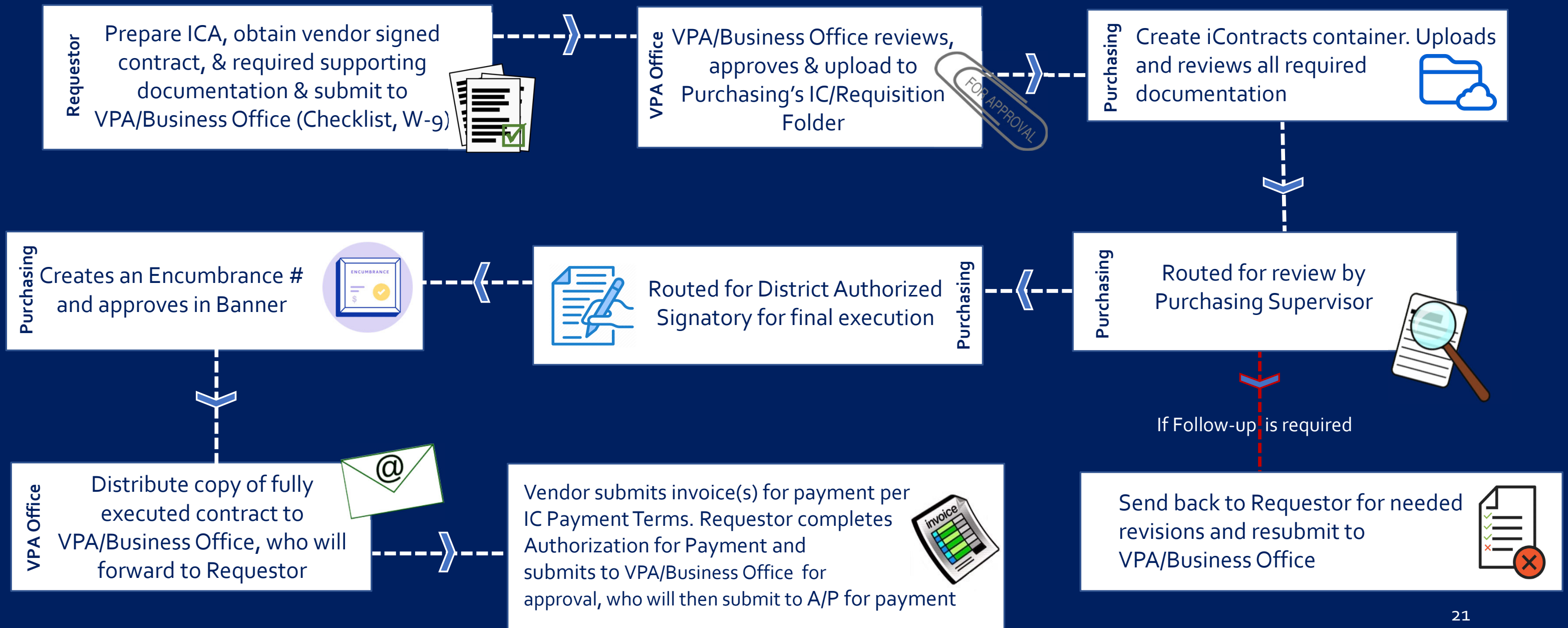
WILL NOT or WILL

be used to perform the services only IF Appendix 1 is attached

ADDENDUM TO ICA (AMENDMENT)

- A contract amendment, also known as contract addendums or change orders, is a mutually agreed change making modifications to, correcting, deleting from, or adding to an existing contract
- Any modifications to an existing contract are required to be in writing
- Use the District's Addendum to ICA template to amend your contract
- Of course, to have a valid amendment, you must first have a proper contract in place (contract cannot be expired)
- All proposed amendments must be approved by the District Business Office

INDEPENDENT CONTRACTOR AGREEMENT (ICA) ROUTING AND APPROVAL PROCESS



CONTRACT TIPS

- Obtain the latest contract template from the Purchasing Downloads Page
- **The originator of the contract should 'fill in the blanks' on the contract, not the vendor.**
- **Be clear, concise and descriptive** when completing Exhibit A – Scope of Services for full transparency and understanding between all parties and stakeholders.
- **Do not have a vendor start work until the contract is fully executed.** (Fully executed means that both the District and vendor has signed the agreement).
- **IMPORTANT!** Give yourself ample time to prepare a contract and collect the required documentation. Do not wait until the last minute! Sometimes there is a need for last minute agreements; however, these should be the **exception instead of the rule!**

EXCITING UPDATES COMING SOON!

District Contract Templates and Forms

- Contract for Guest Speakers (2 pgs) – ***New!***
- Contract Signature Request form – ***Revised!***
- Standard Services Agreement – ***Revised!***

Upcoming Trainings/Webinars

- Webinar: Advanced Contract and Insurance Guidelines – ***New! TBD***

QUESTIONS?

THANK YOU!

If you would like additional information on today's topic, please contact:

Yanely Pulido at pulidoy@smccd.edu, Roxanne Brewer at brewerr@smccd.edu, or

Debbie McCarthy at mccarthyd@smccd.edu