

Implementing Contracts with Land Occupiers

Updated July 1, 2016

This document provides the requirements for implementing contracts, commonly called cost share or conservation practice contracts, with land occupiers. All BWSR grant recipient expenditure of funds providing financial assistance to landowners requires a contract with the landowner or land occupier. For contract implementation requirements specific to a particular grant or funding source, refer to the State grant rules, policies, agreements, and work plans for that funding source. Additionally, the information presented here assumes a specific parcel or location for a potential project has already been identified through planning or resource assessment.

Note: For the purposes of this document, *land occupier* means a person, corporation, or legal entity that holds title to or is in possession of land as an owner, lessee, tenant, or otherwise.

Project Technical Assessment

Once an issue or location for a potential conservation project is identified, a technical representative with appropriate expertise will gather information necessary to provide an initial recommendation on the practice(s) needed to address the issue. Some of the information may be gathered from resources within the office, other information will require visiting the site and communications with the land occupier. The following information is needed to complete this technical assessment:

- The nature of the problem and the overall resource management needs of the area where the problem is occurring.
- The possible conservation or management practice(s) needed to effectively treat the problem as well as preliminary cost estimate(s) for designing and installing the practice(s), or flat-rate payment amount if applicable.
- Whether the identified solution(s) would have adverse impacts on other resources, cultural resources, threatened and endangered species, wetlands, or flood plains of the area.
- If solving the problem is consistent with the intent of the State funds available as well as the organization's plans and priorities.
- The land occupier's objectives and abilities to implement and maintain the identified conservation practice(s). The land occupier should be provided with established rates for in-kind services and materials at this time.
- Whether the contributing watershed is a sediment source that will prevent normal operation and maintenance and reduce a proposed practice's effective life.
- Whether or not the problem is related to non-compliance with existing regulations, such as a soil loss ordinance, buffer requirement, or zoning restriction.
- Estimated benefit(s) for the practice(s) proposed, such as tons/acre.

Project Application and Contracts

The Conservation Practice Assistance Contract, signed by the land occupier, is the land occupier's application for assistance. This application may be required prior to completing all or a portion of the technical assessment to provide documentation of permission for the technical representative to access the parcel. After the technical assessment is completed, the application must be signed by the land occupier if further assistance with the conservation practice(s) identified is desired. If the land occupier does not hold title to the land, i.e. the land occupier is a lessee or tenant, the

Effective July 1, 2016

landowner(s) must also sign the application. The signed application must reference the conservation practice(s) recommended by the technical representative and include a cost estimate for installation, or when applicable a flat-rate payment total.

The organization board or council will then review the completed application and technical assessment information to determine whether or not to fund the proposed conservation practice(s). The primary purpose of the conservation practice(s) must meet the intent of the State grant program and any grant program-specific policies, including approved work plans, if applicable.

Considerations for Evaluating Applications

- Grant agreement has been executed.
- Proposed conservation practice(s) meet intent of funding source.
- Technical assessment was completed by a technical representative with appropriate qualifications.
- Work on the practice(s) has not started.
- Completion dates are reasonable.
- Additional considerations may include Bid Law, Prevailing Wage, Freedom of Information Act, Open Meeting Law, and requirements from the State Historical Preservation Office.

The organization board or council must take action to approve or deny the application. If approved, the application must be signed by the organization and land occupier notified. If denied, the organization should notify the land occupier in writing of the reason for denial. Either action must be documented in the organization meeting minutes as the legal record of the board or council's action and intent. Complete minutes will document the applicant's name, the contract number, the amount(s) and source(s) of funds being applied to the project, the type of project or practice(s) being installed, and any other information necessary to fully indicate the action and intent.

A completed application is a contract that provides the legal standing to insure practices are installed and maintained according to approved standards and specifications. The organization should include with the notice of approval to the land occupier a copy of the signed and dated contract and an outline of the next steps. Next steps may include, but are not limited to, timeline for finalization of plans and specifications, permits required to be obtained by the land occupier, and information about project assurances such as recording practices.

Group Projects

Where the cooperation of several land occupiers is required, a group project addendum may be used in addition to the contract. The group spokesperson identified on the addendum signs the contract on behalf of the group and negotiates all project details with the organization. Payment for the organization's share of the practice is issued to the group spokesperson. The group spokesperson is responsible for executing the division of payment according to the plan prepared by the group and should inform all of the members of the operation and maintenance requirements. If requested, the organization may issue separate payments to each group member according to the division of payments schedule attached to the group project addendum.

Design and Implementation

Once the contract has been approved and executed, the technical representative proceeds with design and implementation activities. These activities generally include the following:

- Final design of the conservation practice(s); including preparation of construction or management plans, specifications, and bid documents as appropriate.

- Development of the operation and maintenance plan for the practice(s), including coordination with the land occupier.
- Monitor installation and certify completion according to the plans and specifications, including as-built documents.
- Review and certify any proposed changes or amendments to the practice(s).

Note that the technical representative may vary depending on the phase of implementation.

Amendments to Conservation Practice Contracts

Changes to an executed contract are considered an amendment to the contract and subject to review and approval by the organization. Amendments are limited to extensions of starting or completion dates, increases or decreases to estimated project cost, changes to practice type(s), or to identify a different land occupier. Amendments should be considered only when circumstances such as weather, unforeseen cost or soil conditions, or other uncontrollable events occur and should be approved with discretion. The procedure to amend a contract is as follows:

1. The land occupier provides information justifying the need for an amendment and completes the amendment form. The form may be completed in consultation with the technical representative.
2. The technical representative reviews the proposed amendment and certifies on the form that the change is necessary.
3. The organization reviews the amendment request and either approves or denies the request.
 - a. If approved, the date of approval is recorded at the top of the original contract and the amendment form is signed and dated by the board or council chair or delegated authority. A copy of the approved amendment is sent to the land occupier.
 - b. If denied, the land occupier should be notified in writing of the reason for denial of the application.
4. Amendments must be filed in advance of and approved prior to final payment request.
5. If an amendment request is received that involves dates outside the executed State grant agreement date, outside the contract practice install date, or grant program policies BWSR staff must be consulted and a grant agreement amendment may be required.

Payment Procedures

Payments to land occupiers are made only after all practices are installed and certified complete by the technical representative. Partial payment may be considered for projects that are phased or in cases where weather or unanticipated circumstances force postponement of completing the project. Payments must be made to the party that the contract is with. If so desired, and if recommended by the LGU attorney, a joint payment may be made to the land occupier and contractor.

Percent of Installation Cost Payments

The procedures for issuing payment for a percent of the total cost based on receipts or invoices are as follows:

1. The land occupier incurs all expenses for project implementation and submits receipts or invoices to the organization. The land occupier certifies, by signing the Voucher Form, that the submitted materials are accurate and a true summation of actual costs of practice construction. Receipts or invoices must include the following information:
 - a. the name of the vendor;
 - b. the materials, labor, or equipment used to establish the practice;

- c. the component unit costs (e.g., hours, feet, cubic yards, etc.); and
- d. date the work was performed.

In-kind services and materials provided by the land occupier such as, but not limited to, earthwork, seedbed preparation, seeding, and permanent fencing materials may be credited toward the land occupier's share of total eligible cost of the practice. Organization rates for in-kind services should be established through local policy and provided to the land occupier prior to project initiation.

2. The technical representative certifies the practice was installed according to standards and specifications and the receipts or invoices submitted reflect the actual cost of the practice by signing the voucher. Certification may also be accomplished through detailed written communication from the technical representative.
3. The completed voucher can be processed as any other bill or invoice the organization receives, according to the organization's policies and procedures. In cases where the actual cost of the practice exceeds the estimated cost on the contract, the organization may provide reimbursement for the difference only if an amendment to the contract was previously approved.
4. A letter or notice of payment approval, a copy of the voucher or communication from the technical representative, and a copy of the final as-built documents should be sent to the land occupier along with the payment.
5. Requests for partial payment should be considered and approved for payment only when the practice(s) will still be completed within the terms of the contract and according to the specifications and standards as planned. All expenses incurred to correct damage caused by the land occupier's failure to expeditiously complete the practice must be borne by the land occupier, and the land occupier is required to repay a partial payment if the practices is not satisfactorily installed.

Reimbursement amounts for materials, labor, and equipment may be adjusted if the amounts are not believed to be an accurate representation of average or appropriate costs or if more than the minimum amounts of necessary components (e.g., extra fence) to establish the practice were purchased. If adjustments are made or the organization determines that certain claims are not justified, the reasons for the adjustments should be documented in writing and an explanation provided.

Submitting false bills is considered fraudulent. The potential for this to occur can be avoided by officially adopting a policy to only accept paid receipts for reimbursement.

Flat-Rate Payments

Before entering into contracts with land occupiers for flat-rate payments, it is important to check the specific requirements for the particular grant or funding source to ensure that flat-rate payments are allowed. The procedures for issuing flat-rate payments are as follows:

1. The land occupier certifies, by signing the Voucher Form, that the practice was completed according to plans and specifications.
2. The technical representative certifies the practice was installed according to standards and specifications by signing the voucher. Certification may also be accomplished through detailed written communication from the technical representative.

3. The completed voucher can be processed as any other bill or invoice the organization receives, according to the organization's policies and procedures.
4. A letter or notice of payment approval and a copy of the voucher and practice certification form or communication from the technical representative should be sent to the land occupier along with the payment.
5. Requests for partial payment should be considered and approved for payment only when the practice(s) will still be completed within the terms of the contract and according to the specifications and standards as planned. All expenses incurred to correct damage caused by the land occupier's failure to expeditiously complete the practice must be borne by the land occupier, and the land occupier is required to repay a partial payment if the practices is not satisfactorily installed.

For flat-rate payments related to non-structural land management practices, such as but not limited to cover crops, residue management, or nutrient management, practices are considered complete after the practice has been installed and certified by the technical representative in its initial year. All remaining years in the practice duration must be incorporated into the operation and maintenance plan and inspected annually or as identified in specific program policies. Payments may be made in full after installation of the initial year or annually after inspection by the technical representative. Payments must be made within the terms of the grant agreement.

Conservation Practice Contract Noncompliance

Failure to complete, maintain, or repair a conservation practice or unauthorized alteration is considered non-compliance with an executed conservation practice contract. These situations may be identified through complaints, site investigations, or other means and typically can be resolved quickly and informally. Should the land occupier fail to maintain the practice during its effective life, the land occupier is liable to the State of Minnesota, through a local government unit grantee, for the amount up to 150% of the amount of financial assistance received to install and establish the practice unless the failure was caused by reasons beyond the land occupier's control, or if conservation practices are applied at the land occupier's expense that provide equivalent protection of the soil and water resources. The following procedure provides a framework to follow if non-compliance issues cannot be informally resolved.

1. After learning of potential non-compliance issue, begin with review of the contract language, project file contents, and operation and maintenance plan and discuss the non-compliance with the land occupier where appropriate.
2. Complete an on-site investigation, take photographs, and complete a practice site inspection form.
3. Keep a log of dates, times, communications, and facts surrounding the investigation. Keep this log in the project file as documentation of the facts.
4. If the initial investigation identifies an obvious non-compliance situation and the land occupier agrees to take immediate corrective action, document this decision and follow-up in a reasonable amount of time to see that corrective actions were taken.
5. If the land occupier is not cooperative, will not allow access, or corrective actions are not implemented in a reasonable timeframe, a formal Corrective Action Plan may need to be considered. A Corrective Action Plan should:
 - a. solicit land occupier input to determine if the land occupier has knowledge of conditions or suggestions of actions that are somewhat different from what the technical representative has identified but may achieve the same desired end result;

- b. reference the items in the cost share contract or operation and maintenance plan that are not in compliance;
- c. specify what the land occupier must do to correct the situation;
- d. give reasonable deadlines for performance; and
- e. request a response from the land occupier within a reasonable time.

Occasionally, an organization's best efforts to resolve non-compliance issues may not be successful. If the land occupier fails to respond, refuses to sign and/or does not implement the Corrective Action Plan, the organization may want to request the assistance of the organization's attorney.

Summary of changes for FY2017:

- EDITED language specifying that these are requirements.
- ADDED content to reflect new flat-rate policy and differentiate between flat-rate versus percent of installation cost-based payments
- ADDED language under Group Contract section permitting separate payments to each group member
- ADDED language under Design and Implementation to include management as well as construction