



November 10, 2022

Office of General Counsel

Filling Your Contracts Toolbox (Don't Forget the Nuts and Bolts)

Mary Al Balber
Assistant General Counsel

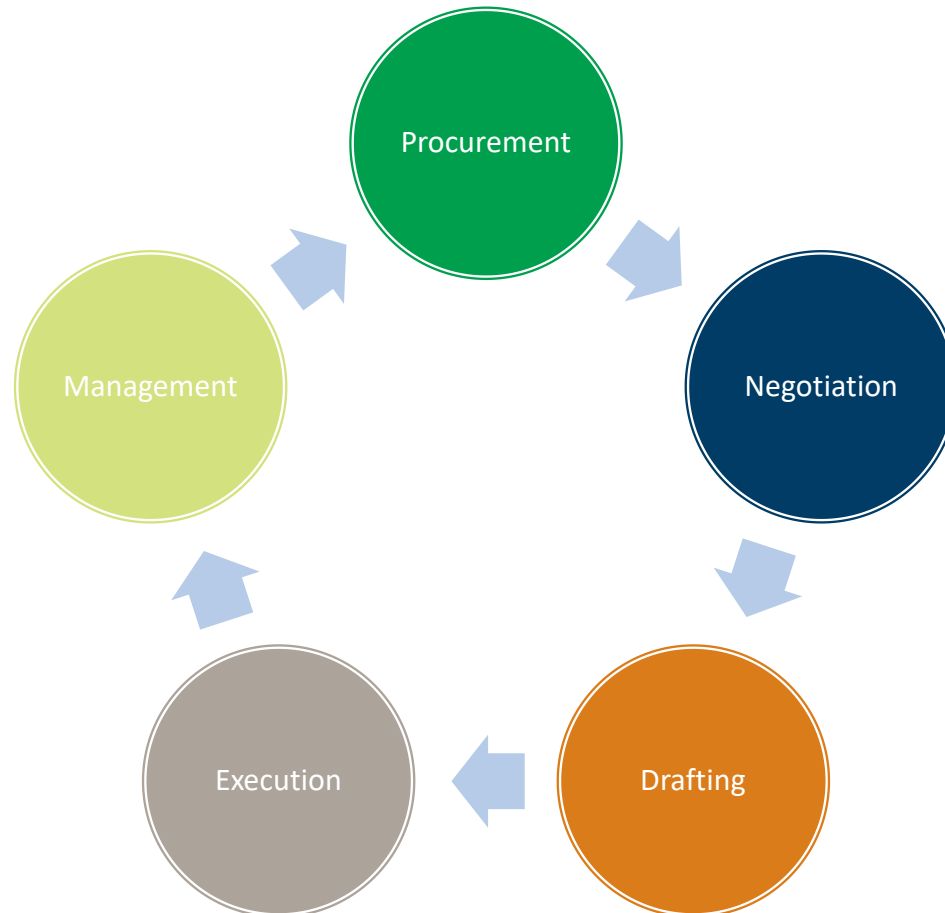
Gary Pihlstrom
Assistant Attorney General

MINNESOTA STATE

Session Overview

- Why Good Contracts Are Necessary
- Compliance
 - Board Policies and System Procedures
- Using system template agreements
 - Where to find them
 - Which template to use
 - What to do if not an approved template
- Critical contract terms: parties to contract, term and termination, payment/consideration, liability, data privacy, governing law and venue, insurance and more!
- Pay attention to insurance changes, liability, decision making and accountability.

Contract Life Cycle-In a Perfect World (Be Prepared for Detours)



Lead Time (Louder for the ones in back)

- Plan accordingly—expect the best and plan for the worst.
- Have signed contracts in place in plenty of time to be able to successfully perform the work.
- Use System templates and forms.
 - Resist changing footer.
- Allow time for negotiation.
- Allow time for other reviews/questions/decisions.
- Read Agreement.
- Not every contract can be an emergency.

What is a Contract?

A contract is: a legally binding document between two or more parties that defines the rights and obligations of the parties and sets “ground rules”

- **Offer** – a promise to do or not do something (“I’ll wash your car for \$10”)
- **Acceptance** – promise or performance (“I agree to pay \$10”)
- **Consideration** – the value or inducement to perform (the value received and given-the money and the washing of the car)
- Agreed to by someone with authority
- **Intra-agency** (i.e. two colleges) is not a contract

Why Do I Need A Written Contract?

- Services, unlike goods, are not governed by Uniform Commercial Code (UCC)
- Clarity, completeness, and common understanding are essential
- Supersedes previous oral discussions or “how we’ve always done it”
- After a contract is signed, if parties wish to change it, conversations or e-mails to change the contract are not sufficient. Changes to contracts (amendments) must be in writing and signed by the parties.

Why Do I Need A Written Contract?

- Contract must be signed **before** the parties begin performing duties under the contract.
 - Good practice & required by law
- Well-written contracts are preventative care
 - Easier to work out issues before signing contract than to leave things unaddressed or “silent” and risk breaching the contract or litigation later.
 - Identify and minimize risk before something happens
 - AVOID relying upon “informal” documents and “how we’ve always done it” behavior/relationship

Politics and Government

Report: Records show DHS violated state contract law

MPR News Staff November 6, 2019 7:34 a.m.



Documents show Minnesota state agency broke law on contracts, committing millions of dollars without approval

The Department of Human Services had more than 200 violations of state contract law within the past year, according to records.

By Glenn Howatt and Chris Serres Star Tribune staff writers |

NOVEMBER 6, 2019 — 11:20AM



Minnesota lawmakers blast agency heads for sloppy contracting

Special hearing follows disclosure of contract violations at Department of Human Services.

By Glenn Howatt and Chris Serres Star Tribune staff writers |

NOVEMBER 14, 2019 — 5:08AM

GALLERY  GRID

< 1/7 >



A Document by Any Other Name is Still a Contract

- Grant
- Nondisclosure Agreement
- Memorandum of Understanding (MOU)
- Terms of Service
- End User License Agreement (EULA)
- License
- Terms and Conditions
- Memorandum of Agreement(MOA)
- Affiliation Agreement
- Joint Powers Agreement
- Real Estate-Lease, License, Purchase Agreement
- Clinical Agreement
- “Click” Agreements
- Statement of Work
- Terms of Use
- Inter-Agency Agreement
- Letter of Engagement

Minnesota State Board Policies and Procedures

Nuts and Bolts:

- Policy 5.14 Contracts and Procurement
- Procedure 5.14.2 Consultant, Professional or Technical Services
- Procedure 5.14.5 Purchasing
- Board Policy 7.7 Gifts and Grants Acceptance



Minnesota State Board Policies and Procedures (2)

IMPORTANT: Board Policy 5.14, Subd. 3:

- Subpart C. Board approval required for:
Any procurement, lease agreement, or professional/technical/consulting service contract with a value in excess of \$1,000,000 or contract amendment that would increase the total value of a contract to more than \$1,000,000 must be approved in advance by the Board. (Nuts and Bolts: Plan Accordingly)

IMPORTANT: Equity in Purchasing and Procurement

- Board Policy 5.14, part 8



Minnesota State Standard Contract Approved Forms (Templates)

Required unless other form is approved by Attorney General's Office (AGO) or Office of General Counsel (OGC)

- Required by System Procedure 5.14.2 Consultant, Professional or Technical Services Part 3, Contract Preparation:
 - Contracts must be prepared on forms approved by the system office to assure that they include all state required contract language. Any modification of forms approved by the system office or the use of a non-system office form requires the review by the system legal counsel and approval of the vice chancellor-chief financial officer. System legal counsel includes either the Minnesota State Colleges and Universities General Counsel or the Minnesota Attorney General's Office.



Minnesota State Standard Contract Templates



Minnesota State Forms and Contract Templates

Minnesota State is a public entity and enters into a high volume of [contracts](#) each year. Many of these contracts can be accommodated on the approved Minnesota State standard contract forms.

This page contains most of the standard templates which relate to contract matters. These forms have been approved by the Office of General Counsel and comply with Minnesota State policies and procedures. Any contract that is not on a Minnesota State standard contract form must be reviewed and approved by system legal counsel.

If you are looking for a document that is not listed, you may want to look at the [forms](#) library or you may contact us at: Sourcing@MinnState.edu.

Thank you for visiting!

> Clinical Agreement

> Design & Construction

> Goods & Services

> Facilities & Lease Agreements

> Sourcing / Soliciting Proposals

> Other



Minnesota State Standard Contract Templates (2)

What standard contract template should I use?

- [Minnesota State Standard Contract Templates- FAQ](#)
 - This document was created by the Office of General Counsel to assist you in determining what template to use

There is a checklist!

- [Checklist for Contract Creation](#)
 - This checklist was created by the Office of General Counsel to help you in creating your contracts. Note: every contract is different and this checklist might not address every situation.
 - **Nuts and Bolts**: include in your toolbox good judgment, common sense, knowledge of your contract drafting and approval process

Not A Minnesota State Form Or Template?

Nuts and Bolts:

- College/university must review for essential elements, prohibited provisions, practicality and business decisions.
- Don't assume that a provision suggested by a party can't be changed or modified.
- If other party wants to use its contract form, consult with Office of General Counsel or Attorney General's Office for legal review and possible negotiation and recommended changes, or drafting addendum or amendment.
- Avoid "We'll sign yours, if you'll sign ours."

A Brief Digression – Independent Contractor vs Employee

- IRS concern
- Questions in Marketplace
- Contract with corporation
- Contract with existing or past employee
- **Nuts and Bolts**
 - Plan Accordingly
 - May need to do due diligence about the work and your expectations of individual
 - Work with HR
 - Stock your toolbox with this knowledge

Contract Management

- Delegated to campuses with system office assistance
- Finance and Office of General Counsel review for statutory/policy/procedure and best practices
- Rely on campus leadership and managers to bid, negotiate, and execute high value engagements
- Rely on campus/system office decision-makers to make the decisions
- **Nuts and Bolts**
 - Gather information, evaluate risks, understand and read the contract

Decision Making and Accountability

- Who has the big picture view of all contracting actions?
- Who is the campus contract supervisor responsible for timely addressing problems, unsatisfactory work, possible breach or termination?
- Who evaluates vendor performance and takes action?
- Who else needs to be in the loop with this decision?

Risk



Areas of Risk When Developing a Contract

Nuts and Bolts

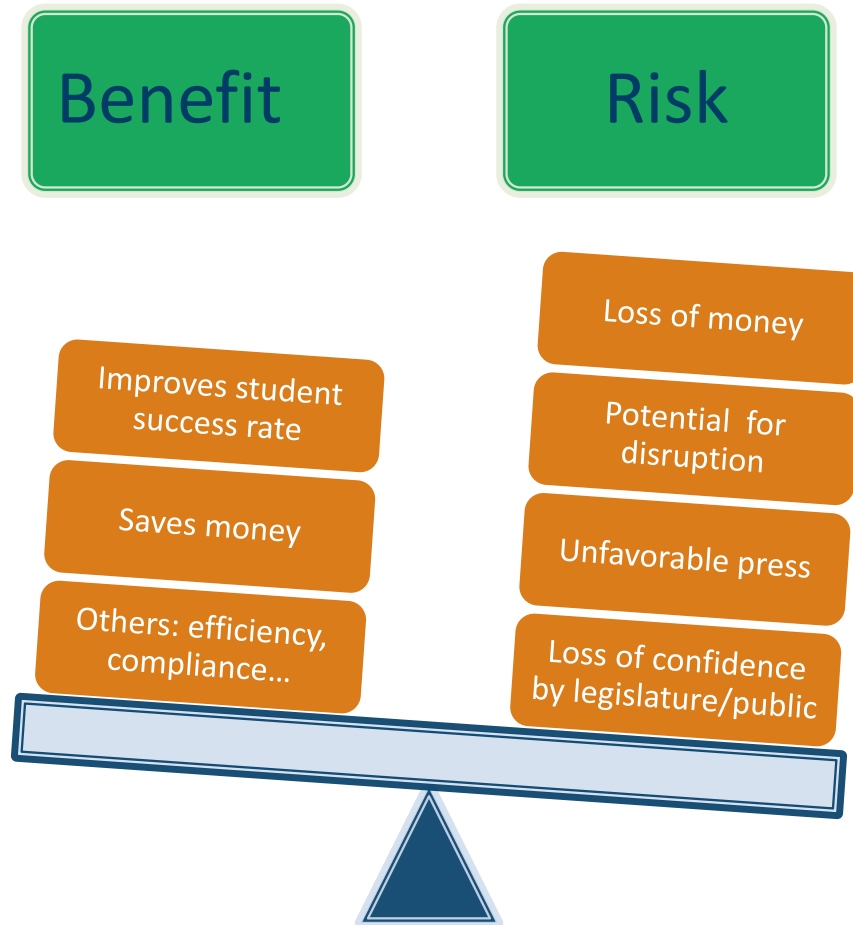
- Strategic risks
- Operational risks
- Reputational risks
- Compliance risks
- Questions about risks

Who Accepts Risk?

Entering into a contract entails accepting risk.

- Always keep this in mind.
- Determine who has the authority to agree to take on any risk(s).
- It is often the role of the Contract Supervisor to analyze the business risk of a contract and make a determination whether to proceed. Others may need to be consulted or informed before making a determination.

Example Risk Analysis



Business Risk Questions

- Could this cause reputational harm?
- Are the terms of the contract in the best interest of Minnesota State?
- What is the potential harm if something goes wrong?
- How will we address harm to minimize future risk?
- How much risk will Minnesota State carry versus risk the vendor will carry?
- Is there a potential for physical harm to individuals involved?
- Could we lose money? How much?

Strategic Risk Questions

- Does the contract contribute to our goals of student success, equity and inclusion, and financial sustainability?
 - Figuring out if it does or does not and how it may be impacted may help to assess risk
- Does this contract make sense from a substantive point of view?
- Does the contract represent the best use of resources?
 - This may also include evaluating if the price/compensation also is best use too

Operational Risk Questions

- Are the deliverables and other significant performance indicators (i.e., time of performance, product standard) specifically defined so that we could establish breach of contract if we are dissatisfied?
- Has the contract supervisor (and others) performed a “what can go wrong?” analysis?
 - Avoid post-contract “what were they thinking?!”
- Does the contract unreasonably shift risk or liability to the school?
- Can an existing contract at another campus be leveraged rather than a new contract executed?
- Do the terms proposed match the RFP?

Reputational Risk Questions

- Does the contract have the potential for unanticipated and unintended consequences?
- Does the contract give another party access to or control over our social media sites?
- Are we creating an appearance of endorsing a questionable vendor?

Compliance Risk Questions

- Does the contract involve student or employee personally identifiable data?
- Does the contract have intellectual property aspects?
- Does the contract require pre-payment?

Risk Mitigation

How can you mitigate the potential business risks?

- Insurance
- Contract language and provisions - clearly written
- Contract supervisor oversight during contract term
- Timely communication and documentation when problems arise
- Do not enter into the contract



Caution

In general, watch out for contract provisions that require the college or university to adopt policies of the other party or take on new responsibilities unless authorized by the Office of General Counsel (OGC) or Attorney General's Office (AGO).



MORE NUTS AND BOLTS



Identify the Vendor

Get the proper vendor name, entity type, and status from the [Minnesota Secretary of State's Office](#).



Identify the Vendor(2)

- Is it a Minnesota entity or a foreign entity?
- Is it active and good standing in Minnesota?
- If not active and good standing, why not?



Identify the Vendor (3)

- Is it properly entered into the SWIFT system?
- Be careful of entities with similar names that might be in the system
- Confirm you have the correct full address, not a P.O. Box, for vendor

CONTRACT TERMS

- Are the business terms easily understandable to someone with a high school education?
 - If not, they should be redrafted

Contract Terms (2)

I call and ask before redrafting an ambiguous contract: “Tell me in plain English what you are trying to accomplish with this contract?”



Contract Terms (3)

- Strive to use plain language
- Eliminate possible areas of ambiguity
- Are there things that should be included in a services contract to make it crystal clear what the party's expectations are?

Contract Terms (4)

- What is and is not included in the price to be paid?
- Are there warranties? If so, what are they?
- When is delivery of the service expected and what happens if not delivered on time?
- When will payment be made? Usually within 30 days AFTER acceptance of services but often maybe at the date of the provision of the service, after delivery
- Pre-payment is not allowed by law except in very limited circumstances

Term Of Agreement

- Have a fixed time period with beginning (effective) and end (termination) dates
 - Include specific dates and time period for each day of use. If time period not necessary, do not include.
- No longer than five years per Minnesota State Board policy
- Avoid automatic renewal provisions- be clear in drafting

Termination/ Cancellation

- Templates have different notice time periods to cancel (10, 30 day and more)
 - Read, know and understand before signing
 - Adjust notice time period if needed
- Preferred
 - Provide written notice of termination to authorized representative of other party
- Negotiate over how much notice must be given
 - What works for you?
 - Don't assume if providing notice on executed contract
 - Read your contract carefully and comply with what was agreed upon

FEE: Consideration And Payment

- Include rate of use (daily or total, etc.), how much for the services listed in the duties or consideration and terms of payment
 - Follow any campus policies for fees as applicable
 - Be consistent in rates/fees to avoid criticism or favoritism
 - One dollar is nominal fee (consideration)
- Include in your agreement any clear budget breakdown for use of property or equipment if applicable
 - Technology costs, catering costs, etc. if billing costs separately

What To Pay Particular Attention To

Nuts and Bolts

- Space to be used, (equipment, catering, etc...);
- Liability;
- Government Data Practices Act;
- Insurance;
- Jurisdiction and Venue; and
- Entire Agreement or “other provisions”
 - Include any exhibits such as insurance, completed space/map, etc

LIABILITY- Review Your Contract

- Liability provisions in the contract templates vary, and may depend upon what the nature of the activities are, where, for how long
 - Contact OGC or AG office if there are proposed changes
- Contract template language may require the other party (not Minn. State) to indemnify and hold harmless
- If asked, the STATE cannot indemnify other parties under Article XI, section 1 of the Minnesota Constitution and Minn. Stat. § § 16A.138 and 16A.15, subd. 3
- Never agree to indemnify anyone for anything



Liability- Review Your Contract (2)

- Some templates may include liability “compromise” language.
 - “MINNESOTA STATE and TENANT agree that each party will be responsible for its own acts and the results thereof to the extent authorized by law and shall not be responsible for the acts of any others and the results thereof. MINNESOTA STATE'S liability shall be governed by the provisions of the Minnesota Tort Claims Act, Minnesota Statutes, Section 3.736, and other applicable law.”
 - “Each party agrees that it will be responsible for its own acts and the results thereof to the extent authorized by law and shall not be responsible for the acts of the other party and the results thereof. The STATE’s liability shall be governed by the provisions of the Minnesota Tort Claims Act, Minnesota Statutes sections 3.732 and 3.736, et seq., and other applicable law.”

Government Data Practices Act

- Minnesota Government Data Practices Act (MGDPA) applies and is not dependent on who is the vendor, or owns the facility or providing the service or property being used by the other
 - Good news: Each template has specific language included to comply with the law (Already in your toolbox)
- Confidentiality Clauses Proposed By Other Party
 - May be overbroad:
 - Can't agree to keep everything confidential
 - Alternative language is available if needed
 - **Must be reviewed and approved by Office of General Counsel or Attorney General's Office**

Governing Law And Venue

- Minnesota State contracts provide that Minnesota law governs the contract and interpretation
- If other party is outside Minnesota or is another state, tribal or federal entity and wants its law to apply, OGC and AGO can assist in negotiating or providing additional contract language
 - “Notwithstanding the foregoing, this agreement shall not be construed to deprive the State of Minnesota of its sovereign immunity, or of any legal requirements, prohibitions, protections, exclusions or limitations applying to the agreement as afforded by the State of Minnesota law.”
- Venue for litigation of a contract (preferred)
 - “Venue for all legal proceedings arising out of this contract, or breach thereof, shall be in the state or federal court with competent jurisdiction in Ramsey, County, Minnesota.”

Got Or Need Insurance?

- Appropriate insurance provisions are included in Minnesota State standard contract templates
 - However, if activity or risk is unusual, may require additional insurance requirements
 - Assess the risks discussed earlier
- External Contracts should have any insurance provisions reviewed by Minnesota State Risk Management
 - Contact: Keswic Joiner, Minnesota State Director of Risk Management (651-201-1778) or the Department of Administration's Risk Management Office (651-201-2591)

Software Contracts

There is no Minnesota State standard contract template for software contract

- Software contracts will always be vendor paper
 - Therefore, all software contracts will require legal review pursuant to Board Policy 5.14

All software contracts go through two reviews (in this order):

1. System Office IT Security Review
 - [Software contract review questionnaire](#)
 - risk-assessment@minnstate.edu
2. Legal Review
 - Office of General Counsel; or
 - Attorney General's Office

Software Contracts (2)

- Additional contract terms may be needed when data is involved
- Know what data may be part of your contract, where the data will be stored and who will have access to it
 - Know what you expect the vendor to do with the data after contract terminates
- Consult IT security in plenty of time to help evaluate risks and consult with OGC or AGO to provide appropriate contract terms to protect private data and secure data

Minnesota State Software Contract Addendum

- The software contract addendum can be used in place of legal review only after system IT security review and all the below criteria are met
- All three criteria must be met to use the software contract addendum without legal review:
 1. System IT Security and the person with delegation of authority have determined there is low risk regarding private data; and
 2. The software is “off the shelf,” and does not require customization or integration with ISRS; and
 3. The contract value is less than \$10,000.
- If any of the above three criteria are not met the contract needs to be sent to system legal counsel for legal review

Minnesota State Software Contract Addendum (2)

- Not for contracts that include professional services, customized software, or implementation
- If the vendor wants to red-line the addendum, OGC must review those changes
- Like all addenda, it is to be signed at the same time as the contract and kept with the contract

Authorized Signatures

- Must have delegated authority to sign contracts to legally bind college/university
- [System Procedure 1A.2.2](#)
- All required signatures from both parties for contract to be effective
 - College/university is last to sign
 - Not a law or requirement but a BEST practice
 - Review contract again before signing to ensure no changes have been made

Drug And Alcohol Testing Requests/STOP and Call For Help

- Campus doesn't have authority to require this
- Sometimes requested in clinical agreements and other agreements like student teaching
- Contact OGC or AGO to change wording if proposed- may to require facility to arrange directly with student and arrange who will pay costs
 - Minnesota State generally does not keep test results (student data)
- In general Minnesota State does not require of employees
- Contact OGC or AGO if proposed by other party
 - May require labor division and HR input

Who Can Call for Legal Services?

- President determines internal process, who on campus is authorized to seek legal advice
 - Legal counsel may need to contact others on campus for information, etc.
- Generally, advice is given only to administrators in order to protect attorney/client privilege
- Callers are directed to other appropriate resources as needed—e.g., labor relations, Facilities, Academic and Student Affairs, Risk Management, IT security

Attorney Client Privilege and Communication

Nuts and Bolts

- Legal advice provided by AGO and OGC is generally protected by attorney/client privilege, work product
- Privilege belongs to Board of Trustees, Chancellor as governing authorities of system
 - Staff do not have authority on their own to share privileged information, communication with others
 - Consult with legal counsel before forwarding emails, documents to others
 - Avoid including staff and non-administrators on emails to OGC or AGO unless asked.
 - If you are contacted by an outside attorney or agency, DO NOT communicate with them – forward it to the OGC

Don't hesitate to call the OGC or AGO, you are not charged for our advice.



What Remains Important Before You Finalize And Sign!

- Description of facility/goods/services to be provided by college/university
 - Clear and understandable description of the subject of the contract
 - Limit use of highly technical terms and jargon when possible
- Other Party's legal name, full address (not a PO Box), phone, email, fax
 - Verify current information
 - Check Minnesota Secretary of State Office for accuracy
- Contact person(2) for other party, name, title, address, phone, fax, email
 - Verify current information, especially if anything differs from the second item above
- Date contract is to begin
 - This may or may not be the date the contract is signed, however standard Minnesota State contracts state "whichever occurs later." Do not allow access, work to begin, use of space, or sending students elsewhere until the contract is "effective".

What Remains Important

- Date contract ends- Dead contracts hard to resuscitate!
 - This refers to the date the contract would normally end unless terminated earlier for any reason.
 - READ your contract for termination date and triggers (“or until all obligations have been satisfactorily fulfilled, whichever occurs first”)
 - Avoid having contract language with multiple ways to terminate the contract.
- Other important dates
- Dates should be clearly identified. Use full dates (ex. “June 3, 2020”) whenever possible. Add time/hours of use if applicable and necessary to the contract.
- Has the work, or action started prior to execution of contract?
 - If the work or obligation has already started prior to the execution of the contract, complete the Minn. Stat. 16.A form found on the contract website.
 - By law, contracts must be in place prior to Minnesota State taking on an obligation. This includes zero dollar contracts where students/faculty may be going on-site elsewhere.

What Remains Important (2)

- Procedure for renewal clearly identified and understood?
 - Avoid “automatic renewals” or trigger periods to terminate or extend. Minnesota State contracts cannot extend beyond 5 years without additional authorizations. Agreeing to “auto renew” may require additional contract management/monitoring. Best practice is to have a definite terminate date.
- Clear description of amounts of money or other consideration for contract
 - Partial payment should be stated with due dates; tied to other amounts (e.g. Access, catering, equipment) should be stated in clear terms.
- Rights, obligations, duties of every party clearly listed
 - Each party’s responsibilities identified in understandable wording. Who, what, when, where, how...

What Remains Important (3)

- Time and place clear if applicable
 - If use of facility, locations or access extends over a period of time, or is intermittent, include dates as necessary.
- If insurance is required, types and levels of coverage listed
 - The Minnesota State Director of Risk Management and the State of Minnesota Risk Management office should be consulted if there are questions about the levels of coverage and/or carriers. Risk analysis – business, program, operational and reputational risks.
- Assignment by either party must be approved in advance in writing
 - Don't assume that assignment of an executed contract is acceptable. Due diligence often required to assess if appropriate and acceptable. Plan accordingly.

What Remains Important (4)

- Has the contract been modified or required clauses deleted without AGO or OGC review?
 - Use most current template directly from Finance website each time you draft to avoid use of outdated forms. Ensure no changes are made. If there are changes by the third party, contact system legal counsel.
- Avoid I'll sign yours if you sign ours!
- Spelling, formatting, grammar, punctuation, math, and general appearance of document are professional and accurate
 - Minnesota State is the third largest higher education systems in the U.S. Your work product should reflect the professionalism expected of a college or university and which you will provide to others.

What Remains Important (5)

- Indemnification, attorney's fees, waiver of liability, waiver of statutes of limitations, clauses.
 - These types of clauses are not allowable because of state constitutional restrictions. Notify other party that these must be deleted.
 - AFTER attempting to have these deleted, if the other party refuses to agree, contact the system legal counsel (OGC or AGO) for further assistance.
- Governed by laws of the State of Minnesota
 - Minnesota State colleges/universities/system office may not agree to be governed by the laws of another state. Contact OGC/AGO if other party wants different law to control.
- Venue for suits in court located in Ramsey County
 - Contact OGC or AGO if other party is requesting mediation and arbitration clauses
- Confidentiality provisions
 - Minnesota State cannot agree to keep information confidential if it is subject to public disclosure under the Minnesota Government Data Practices Act.

Employee Code of Conduct

Why is Employee Ethical Behavior Important?

- We are obligated to comply with the law
- Violations can result in:
 - Criminal penalties
 - Employment sanctions – including termination
- Minnesota State Employee Code of Conduct is a compilation of various existing statutes and policies that govern employee conduct.
 - Minnesota State System Procedure 1C.0.1 - Employee Code of Conduct
 - [Frequently Asked Questions about Minnesota State Employee Code of Conduct](#)



Employee Ethics

Three basic principles in the ethics code for state employees:

- State/system resources are not to be used for private purposes;
- Gifts/favors given for duties performed by employee generally are prohibited;
- Conflicts of interest must be avoided when acting on behalf of the state.

Minn. Stat. § 43A.38

Employee Self-Service Learning Management has training module for Minnesota State employees. Very helpful!



Nuts and Bolts: Contacts

Mary Al Balber

Assistant General Counsel

maryal.balber@minnstate.edu

651-201-1752

Paul Harrington

Real Estate Manager

paul.harrington@minnstate.edu

651-201-1539

Keswic Joiner

Director of Risk Management

Keswic.joiner@minnstate.edu

651-201-1778

Gary Pihlstrom

Assistant Attorney General

Gary.Pihlstrom@ag.state.mn.us

651-757-1314

Adam Sorenson

Assistant Attorney General

j.adam.sorenson@ag.state.mn.us

651-757-1202

Steve Gednalske

System Director-Tax and Financial Services

steven.gednalske@minnstate.edu

651-201-1675



Resources

System Office IT Security

- risk-assessment@minnstate.edu
- [Product/Service Security Risk Assessment Request](#) (aka Contract Review Questionnaire)

Office of General Counsel

- [Contract Resources](#)
- [Second Thursday Webinar Series](#)
- [Contacts for Contracts](#)
- [Attorney General Contact List and Campus Assignments](#)

Contract Templates

- [Minnesota State Approved Contract Templates](#)
- [Minnesota State Design and Construction](#)





MINNESOTA STATE

30 East 7th Street, Suite 350
St. Paul, MN 55101-7804

651-201-1800
888-667-2848

www.MinnState.edu

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