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Office of General Counsel


Procurement

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Session Overview


- Purchasing Options
- Purchasing Requirements
- Request for Proposal (RFP)
- Delegation of Authority
- Contract Supervisor
- Test your Knowledge (It's fun!)



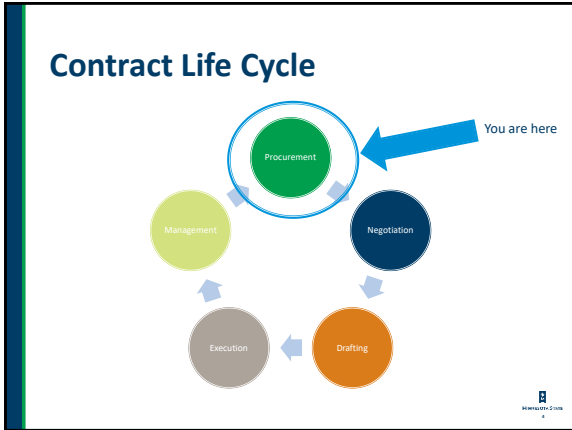
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Procurement

General compliance, not Marketplace system process



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Lead Time

- Plan accordingly
- Hope for the best, plan for the worst
- Not every contract can be an emergency

Management Solutions

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Purchasing Options

Management Solutions

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Contract vs Purchase Order

Contract

- Services
- Intellectual Property
- Real Estate
- Data

Purchase Order (PO)

- For off the shelf items or widgets that don't involve services
 - Question to ask: can this item be returned and resold? If yes, use a Purchase Order.



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Master Contracts

State of MN/Department of Administration Contracts

- Purchasing off state contracts makes the procurement piece compliant with state law and board policy without the need for an RFP. Purchasing off a state contract does not mean that the legal terms are in Minnesota State's best interest or abide by other regulations that we are subject to. If the purchase is for software legal review is required.

Cooperative/Joint Purchasing Programs

- Still require legal review as terms may need to be modified
- Is this the best way to procure this?
- Are there collateral issues/risks or related contracts?
- Widgets/returnable items vs materials needing installation or related services?



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Equity Select

- On the horizon/in development and likely a pilot program launch
- Will allow Minnesota State to forego competitive solicitation and award or purchase directly from TGB
 - MMB process to allow on opportunities up to \$25,000
- Represents a business process culture change requiring intentionality, time and commitment
- Stay tuned!



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Purchasing Requirements



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Authority

Pursuant to Minn. Stat. §136F.581, the board has authority for contracts and purchases consistent with Minn. Stat. §471.345, the Uniform Municipal Contracting Law, and other pertinent statutes, as well as the authority to utilize any contracting options available to the commissioner of administration under Minn. Stat. Chapters 16A, 16B and 16C.

- Board Policy 5.14.5 Part 1.

Minnesota State Colleges and Universities is required to follow the purchasing requirements as defined in Minn. Stat. § 471.345 Uniform Municipal Contracting Law or other authority granted in Minn. Stat. § 16A, 16B, and 16C

- System Procedure 5.14.5 Part 4




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Purchasing Requirements for \$0-\$25,000

System Procedure 5.14.5 Part 4. Subpart A

- If the amount of the purchase is estimated to be \$25,000 or less, the purchase may be made either upon quotation or in the open market, at the discretion of the system office, college, or university. If the purchase is made upon quotation, it shall be based, so far as practicable, on at least two (2) quotations. Quotations may be obtained by telephone or in written form via facsimile (FAX), delivery service, or Internet. Quotations must have a specified date and time for submission. Each institution shall determine a level at which written quotes will be required. All quotations obtained must be kept on file until audited, but not less than one year. The record to be retained must include the names of vendors providing quotes, amounts of quotations, and each successful quote signed and dated.



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Purchasing Requirements for \$25,000.01-\$50,000

System Procedure 5.14.5 Part 4. Subpart B

- The purchase may be made either upon sealed bids or by direct negotiation by obtaining two (2) or more quotations for the purchase or sale when possible, and without advertising for bids or otherwise complying with the requirements of competitive bidding. Quotations may be obtained by telephone or in written form via facsimile (FAX), delivery service, U.S. mail or Internet. Quotations must have a specified date and time for submission. If quotations are obtained by telephone, they must be followed up with a signed quote. All quotations obtained must be kept on file until audited, but not less than one year. The record to be retained must include the names of vendors providing quotes, amounts of quotations, and each successful quote signed and dated.



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Purchasing Requirements for \$50,000.01 and Up

System Procedure 5.14.5 Part 4 Subpart C

If the amount of the purchase is estimated to exceed \$50,000, sealed bids must be solicited by public notice through publishing a minimum two (2) week notice on a State of Minnesota website or in one or more official newspaper.

Bids and documents pertaining to the award of the purchase shall be retained and made a part of the permanent file. The record to be retained must include the names of vendors providing bids, amounts of bids, and each successful bid signed and dated.

Bid solicitation is not required for purchases from Minnesota Department of Administration master contracts, MN.IT Services master contracts, Minnesota State Colleges and Universities master contracts, or through cooperative purchasing agreements listed on the system's official web site and authorized for use by the colleges and universities.

For proposed single-source purchases of goods and services over \$50,000, the request form for single-source exception must be completed.



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Purchasing Requirements for \$50,000.01 and Up (2)

Purchases over \$50,000 must be done by public solicitation

- Request for Proposal (RFP)
- Request for Bid (RFB)

Note: Some campuses may have made a business decision to seek RFP/RFB at an amount less than \$50,000



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Purchasing Requirements for Over \$100,000

In addition to doing a sealed bid or proposal (RFB/RFP)

- System Procedure 5.14.5 Part 4 Subpart. D.
 - Require written approval from the vice chancellor-chief financial officer. Colleges and universities shall submit a memorandum explaining the need for the purchase, and the purchase amount, shall verify that funds are available for paying for the purchase, and shall describe what process will be used in making the award.
 - **Limited exceptions to vice chancellor approval:** Written approval not required for the following types of purchases where the value of the purchase is less than or equal to \$500,000.
 1. Utility services provided annually where no competition exists or where rates are fixed by law or ordinance.
 2. Merchandise purchased for resale. Vice chancellor-chief financial officer approval is not required for blanket encumbrances established for purchasing card programs; however, individual purchases made using purchasing cards are subject to the purchasing requirements within part 4 of the system procedure.



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Purchasing Requirements for Over \$100,000 (2)

Businesses with more than 40 employees within Minnesota

- Vendors who intend to bid on any purchases or contracts exceeding \$100,000 and who have had on any single working day in the previous twelve (12) months more than forty (40) full-time employees within Minnesota shall apply for a Workforce Certificate of Compliance from the Minnesota Department of Human Rights. Bids or proposals on purchases or contracts exceeding \$100,000 from vendors who have not applied for this certificate must not be accepted. An award exceeding \$100,000 must not be made to vendors who have not obtained this certificate.
 - Required by Minn. Stat. 363A.36



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Purchasing Requirements for Over \$100,000 (3)

Businesses with more than 40 employees outside Minnesota

- Vendors who do not have more than forty (40) full-time employees in Minnesota, but who have had on any single working day in the previous twelve (12) months more than forty (40) full-time employees in the state in which their principal place of business is located, shall have a Minnesota Workforce Certificate of Compliance or shall certify that the business is in compliance with federal affirmative action requirements in order to receive a contract award exceeding \$100,000.
 - Required by Minn. Stat. 363A.36



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Purchasing Requirements for Over \$100,000 - Summary

For purchases over \$100,000 you must:

1. Do an RFP/RFB
 2. Get written approval from the vice chancellor-chief financial officer by submitting a memorandum explaining the need for the purchase, the purchase amount, verifying that funds are available for paying for the purchase, and describe what process will be used in making the award.
 3. Get appropriate certificate from vendor
 - Workforce Certificate of Compliance from the Minnesota Department of Human Rights (more than 40 employees within Minnesota)
 - Minnesota Workforce Certificate of Compliance or shall certify that the business is in compliance with federal affirmative action requirements (more than 40 employees outside Minnesota)
- Note:** There are exceptions. See System Procedure 5.14.5



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Purchases Over \$500,000

For purchases over \$500,000 (or that have the potential to exceed \$500,000) you must:

1. Do an RFP/RFB
2. Get appropriate Workforce Certificate from vendor
3. Get Equal Pay Certificate from vendor

Obtaining the appropriate certificates is done as part of the RFP or RFB. The vendor should provide them as part of their RFP or RFB response. Vendors should contact Minnesota Department of Human Rights if they have questions.



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Million Dollar Contracts

Board Policy 5.14 Part 3 Subpart D

- 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.
- The following contracts and agreements must be approved in advance by the Board if the total value of the initial contract/agreement and/or subsequent amendments exceeds \$3,000,000:
 - Inter-agency agreements;
 - Joint powers agreements;
 - System master contracts if the total purchases made for goods or services under the master contract are expected to exceed \$3,000,000; individual purchase orders made under a system master contract approved by the Board are not subject to separate Board approval;
 - Grant agreements other than federal grants or grants from Minnesota state agencies.

Note: Policy provides for limited exemptions to the approval process under Subpart C.



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Contract Trigger Amounts

Contract over \$500,000

Contract over \$100,000

Contract over \$50,000

- *Request for Proposal (RFP)
- *RFP
- *Workforce Certificate of Compliance
- *RFP
- *Workforce Certificate of Compliance
- *Equal Pay Certificates

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Contracts Exceeding 5 Years

Contracts, including real property leases, shall not exceed five years, including renewals, unless a longer period is otherwise provided for by law, or approved by the board for contracts subject to approval under Subpart C, or by the chancellor or the chancellor's designee.

- Board Policy 5.14 Part 3 Subpart D
- Procedure 5.14.2 Consultant, Professional or Technical Services, and Income Contracts
 - Subpart A. Contracts shall generally not exceed five years. Contracts must show any renewal information including the amount previously paid. Any contract or amendments to original contracts that a campus or the system office proposes to continue beyond five years shall be reviewed and approved by the vice chancellor-chief financial officer.

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System Guideline 5.14.2.1 Guest Lecturer or Presenter

Guest Speaker Template

- For transactions below \$3,000 in compensation, including travel reimbursement, and when intellectual property or other risk is considered low.
- **Note:** Under the authority in System Procedure 5.14.2 Consultant, Professional or Technical Services, campuses may develop procedures for guest lecturer agreements via a purchase order after ensuring adequate risk mitigation.

Professional Technical (P/T) Template

- All guest lecturer or presenter transactions involving more than \$3,000 in compensation, including travel reimbursement, and/or
- if intellectual property or other risk is considered elevated.

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Avoid the Contract “Creep”

What is it?

- Contract “creep” is when your contract goes over dollar amounts and/or exceeds 5 years which triggers additional requirements.
 - RFP/RFP, Board Approval, Equal Pay, Affirmative Action, VC Approval

How Does it Happen?

- Amendments
 - Adding funds via an amendment increases the total value of the contract.
- Contracts for the same service year after year.
 - Should I be doing an RFP?
- Renewals
 - Renewals add time to the contract. If the renewal(s) push the contract over 5 years additional approval will be needed.

How to Prevent it?

- During procurement ask yourself: Is there a potential for this contract to go over \$50,000, \$100,000 or \$500,000?
 - If the potential is there, plan for it
 - Plan for the worst and hope for the best



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Contract Creep Example



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Request for Proposal (RFP)



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RFP - Request for Proposal

RFP- What is it?

- A public document that identifies the needs of Minnesota State and provides instructions to vendors on how to respond.

RFP- Why do it?

- Because it is required by law and policy for purchases over \$50,000.

RFP- Purpose and Benefit

- Helps to ensure transparency in government purchasing.
- Helps to ensure Minnesota State procures the most competitively priced goods and services.



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RFP - Request for Proposal (2)

Get the right people involved including, but not limited to:

- Subject Matter Experts (ASA, Marketing, etc.)
- Technical Writers
- Contracting/Procurement
- System Legal Counsel (AGO or OGC)
- Finance
- Stakeholders
- IT Security



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RFP - Drafting

Why take the time to write a good RFP?

- Helps clarify what Minnesota State requires and needs.
- Responders can more accurately price their proposals and submit higher quality responses.
- Helps Minnesota State appropriately evaluate and score responses.
- Minimize the need for addenda and amendments later on.
- Allows for performance assessments.
- Reduces complaints and contract disputes.
- Makes contract negotiations and drafting easier and quicker.



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RFP - Drafting (2)

Understand and address actively:

- Liability
- Insurance
- Intellectual Property
- Data Practices Issues (Chapter 13); FERPA
- Accessibility
- Affirmative Action/Equal Pay (\$100K and \$500K)
- IT Security/Data Protection
- Deliverables and costs/values



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RFP - Do

- Use the RFP template - most current version
- Get the right people involved
- Use due diligence - know what you want a vendor to deliver, how it may be accomplished, and what the market costs may be
- Plan ahead and take your time drafting the RFP
- Plan for internal subject matter and other reviews
- Use complete and clear sentences



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RFP - Don't

- Write over an old RFP
- Cut and paste hastily
- Attach old RFP or documents to new RFP
- Use vague, unclear, or ambiguous language
- Skip the RFP because you didn't plan ahead and/or don't have time
- Attach RFP to resulting contract
- Attach proposal to the resulting contract



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RFP - Evaluation

This is arguably the most difficult and most challenging aspect of the RFP procurement process.

- The first critical step to help ensure a successful evaluation is the creation of a well-thought-out and well-written RFP.
- Why/What can go wrong?
 - Vendor Dispute/Challenge
 - Unfavorable Press or unfavorable public scrutiny
 - Loss of Money
 - Organizational conflicts of interest



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RFP - Evaluation Form

- Be very thoughtful when creating the evaluation form.
- You may want to create this at the same time the RFP is being drafted or you may want to draft it in collaboration with the evaluation team.
- At the very minimum, make sure the form is consistent with the criteria and weight as stated in the RFP.
- Remember, this is public data.



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Data Privacy in Procurement

You have Government Data

- Documents created during procurement are government data, e.g., evaluation forms
 - Maintain "official records" in accordance with approved retention schedule
- Privacy laws apply
 - E.g., Minnesota Government Data Practices Act (MGDPA) Minn. Stat. Chapter 13
- You have responsibilities
 - Appropriate protection, release, referral
- Not everything is confidential
 - Even if a vendor labels their documents "confidential" they may not be under MGDPA



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What is Public? When?

Minn. Stat. § 13.591, Subd. 3 (b)

RFP Submissions - all responses become property of Minnesota State

- Prior to due date specified in solicitation
 - All submissions are private or nonpublic
- At due date specified in solicitation
 - the names of the responders becomes public
- After completed evaluation process (contract signed) - pursuant to statute, completion of evaluation process occurs when government entity has completed negotiation with selected vendor
 - all remaining public data submitted by all responders is public



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Trade Secret Data

Trade Secret Data is nonpublic BUT:

- Must meet each element of Minn. Stat. § 13.37 Subd. 1(b)
 1. Supplied by the affected individual or organization;
 2. Is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy; and
 3. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- Cost, proposals, pricing, schedules are generally not trade secret.
- If challenged, a judge makes determination on what is trade secret under the law, not Minnesota State.



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Avoid MGDPA Problems

The RFP should include explanation of MGDPA application to submissions

- This language is already included in the RFP template

Know who to contact for help or questions

- Data Practices Compliance Official at your college/university/system office

Know what data you have and if it's public or nonpublic

- Use appropriate security measures for nonpublic data



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Single Source- Definition

“Single source” means an acquisition where, after a search, only one supplier is determined to be reasonably available for the required product, service, or construction item.

Laws, Policies & Procedures:

- [Minn. Stat. § 16C.02, Subd. 18](#)
- [The State Single Source Policy](#)
- [Minnesota State Board Procedure 5.14.5](#)



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Single Source: The Exception Not The Rule

Single source requests are scrutinized because it is a practice contrary to the fundamental principles of an open and competitive process.

- The burden of proof is on Minnesota State to justify single source procurements
- Documentation on the basis for single source determination shall be retained in the contract file
- The documentation is public information
- Minnesota State may be required to justify its single source procurement in cases of audits, vendor protests, media or legislative or public inquiries and litigation



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Single Source

The following are unlikely to be sufficient single source justifications:

- Personal or Minnesota State preference for a contractor
- Minnesota State perception that the vendor is the best qualified (this should be determined through a competitive process)
- Lack of Minnesota State planning resulting in limited time to conduct a competitive procurement process
- Past or existing relationship with the vendor
- Special incentive or deal offered (can be assessed in open and competitive solicitation)
- Minnesota State convenience

A true Single Source is usually a good or service that is of a propriety nature, it is owned by the vendor, has use limitations or installation requirements.



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Delegation of Authority




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Delegation of Authority – What is it?

“The formal conveyance from one person to another of the authority to bind Minnesota State Colleges and Universities, the system office or a college or university to a legally enforceable obligation. Any such transfers of powers and duties of the Board and the chancellor are therefore significant actions requiring great care and scrutiny.”

- Minnesota State Board Procedure 1A.2.2



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Delegation of Authority – Who has it?

Board of Trustees


- The Board of Trustees receives its authority from the State of Minnesota’s Constitution and Minnesota Statutes.
- The Board of Trustees gives the Chancellor his/her delegation

Chancellor

- The Chancellor receives delegation of authority from the Board of Trustees
- The Chancellor can give delegation of authority to others

Others

- Others can receive a delegation of authority from the Chancellor; e.g. Presidents
- Some of these “others” are allowed to delegate to “others”; e.g. Presidents delegating to CFO



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Delegation of Authority – Why Does it Matter?

Signing a contract without authority may:

- Render the entire contract void
- May subject the signer to liability
- May result in disciplinary actions, up to and including termination

Delegated Authority = Responsibility

- Delegated authority to sign contracts comes with responsibility. If you have delegated authority, you must not only **read the contracts** you sign, you must **understand the provisions** in the contract and, sometimes you must ask that provisions in a contract be added, deleted, or modified.

Check your delegation before you sign a contract – clicking “I accept” requires a delegation



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Contract Supervisor



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Contract Supervisor

Who is the Contract Supervisor?

- The individual who is responsible for the contracting process and the resulting contract.
 - This individual is empowered either through delegation or job position to make decisions on behalf of Minnesota State.
- The role of managing contracts is more inclusive than processing paperwork.
- Ensuring continuity in Contract Supervisor responsibilities and familiarity with the contract is important when there are employee changes, transitions, retirements... Plan accordingly.



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Contract Supervisor (2)

What is the Role of the Contract Supervisor?

- Takes **responsibility** and **ownership** of the:
 - Procurement process (determining if the transaction is subject to competitive bid process, or should be, and acting accordingly);
 - Contract documentation (initiating, during and conclusion)
 - Understandings, intentions and obligations each party is making to the other party;
 - Terms and conditions outlined in the contract, and/or the statement of work to be performed and the delivery schedule for that work, deciding if work is satisfactory, or unsatisfactory
 - Determining appropriate compensation/payments; and
 - Benefit to Minnesota State's stakeholders, including colleagues, leadership and any individuals Minnesota State serves.



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Contract Supervisor (3)

A good Contract Supervisor will stop and ask:

- Should we be doing this contract?
 - Is this a good use of tax payer money?
 - Is this related to our mission and to benefit Minnesota?
 - Is this truly necessary?
 - Is there an employee who should or could be doing this instead?
 - Could this cause unfavorable scrutiny or reputational harm?
 - Is a funding mechanism in place for need? (now and duration of service)?
 - Ask, WHY, are you doing this ("Want" v. "Need")



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Encumbrance

Funds must be encumbered prior to making an obligation

- Minn. Stat. Ch. 16A15, Subd. 3
- Minnesota State Procedure 5.14.2, Part 4

An employee authorizing or making the payment, or taking part in it, may be liable to the state for the amount paid

- A knowing violation of Minn. Stat. Ch. 16A.15, Subd. 3, is just cause for the employee's removal.



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Business Decisions

What are they?

- A business decision is a decision as to whether or not something is “good” business.
 - This includes academic, programmatic, accreditation, mission, financial and other risk considerations.
 - Not always a clear “yes” or “no” answer

Who is Responsible?

- It is the responsibility of the person with delegated authority to make business decisions (or may require seeking approval at various levels at college/university/system office). It is not the role of the Office of General Counsel to make business decisions. However, the Office of General Counsel can help you identify issues and potential risks.



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Example of a Business Decision

The vendor requires that if Minnesota State decides to cancel an event to be held at a specific venue, in advance of the event date, Minnesota State agrees to pay the vendor half of the rental amount as agreed upon.



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Legal Decisions

What are they?

- A determination as to whether or not something is legal.

Who is responsible?

- The Office of General Counsel and the Attorney General’s Office review contracts and provide legal guidance to ensure compliance with the law and Board Policy and Procedure.
- Note: Just because something is “legal” doesn’t mean it may be a good idea. See previous slides.



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Examples of a Legal Decision

The other party requests that the contract be subject to the laws of another state or country, and by signing the contract Minnesota State agrees to another state's law.

Any disputes will be decided by binding arbitration.



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