

Contract Training Schedule

November 16, 2020- Contract Law and Practice Overview

- Presented by General Counsel Gary Cunningham

November 17, 2020- Procurement

- Presented by Assistant General Counsel Mary Al Balber

November 18, 2020- Negotiation

- Presented by Assistant General Counsel Sarah McGee

November 18, 2020- Drafting

- Presented by Assistant General Counsel Sarah McGee

November 19, 2020- Contract Management

- Presented by Assistant General Counsel Daniel McCabe

November 19, 2020- Marketplace

- Presented by Chief Procurement Officer Michael Noble-Olson

November 20, 2020 - Form & Execution, Software Contract and Working with the OGC

- Presented by Paralegals Heidi Slegers and Amanda Bohnhoff

November 20, 2020- Risk Management

- Presented by Director of Risk Management Keswic Joiner





November 16, 2020

Office of General Counsel

Contract Law and Practice Overview

Gary Cunningham
General Counsel

MINNESOTA STATE

Training Overview

- Preliminaries & Fundamentals
- Risk and Role of Attorneys
- Procurement
- Negotiation & Drafting
- Performance
- Marketplace
- Form and Execution

- Risk Management
- Resources and Contacts

Gary Cunningham

Mary Al Balber

Sarah McGee

Dan McCabe

Michael Noble-Olson

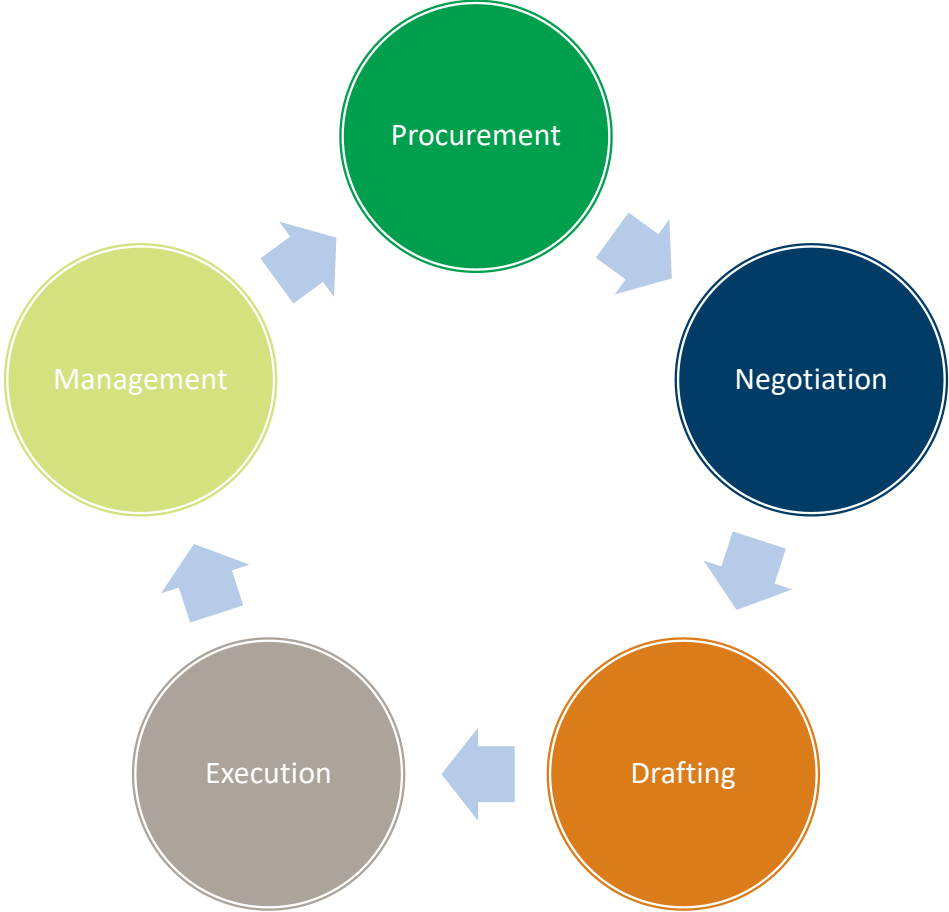
Heidi Slegers

Amanda Bohnhoff

Keswic Joiner



Contract Life Cycle



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 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.

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

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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

Lead Time

- Plan accordingly
- Not every contract can be an emergency



Minnesota State Board Policies and Procedures

Applicable Minnesota State Board System Procedures:

- 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

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.

IMPORTANT: Equity in Purchasing and Procurement

- Board Policy 5.14, part 8



Approved Forms (Templates)

Required unless other form is approved by AGO or 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.

A Brief Digression – Independent Contractor vs Employee

- IRS concern
- Questions in Marketplace
- Contract with corporation
- Contract with existing or past employee

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

Risk



Areas of Risk When Developing a Contract

- Strategic risks
- Operational risks
- Reputational risks
- Compliance risks

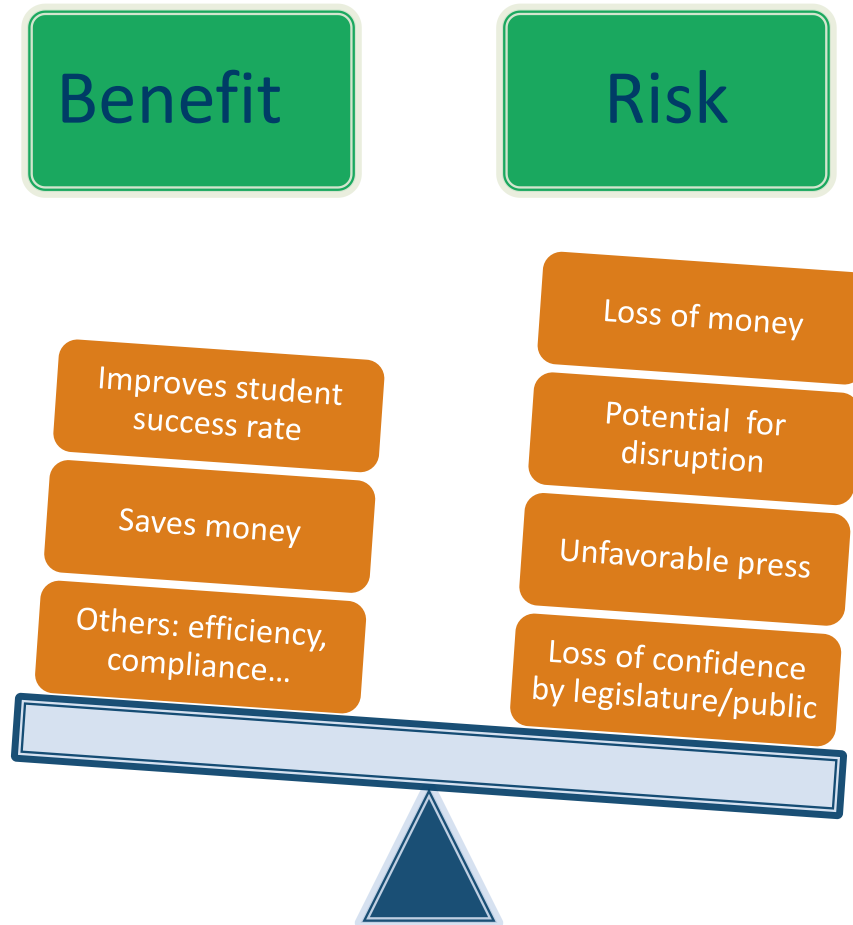


Who Accepts Risk?

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?
- Does this contract make sense from a substantive point of view?
- Does the contract represent the best use of resources?

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 if we are dissatisfied?
- Has the contract supervisor performed a “what can go wrong?” analysis?
- 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

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 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, IT security.

Attorney Client Privilege and Communication

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.
 - 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, you are not charged for our advice.



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](#)



Non-Legal Resources

Data security –

Craig.Munson@Minnstate.edu

State property use –

Paul.Harrington@Minnstate.edu

Tax liability –

Steven.Gednalske@minnstate.edu

Insurance/Risk Management –

Keswic.Joiner@Minnstate.edu





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