

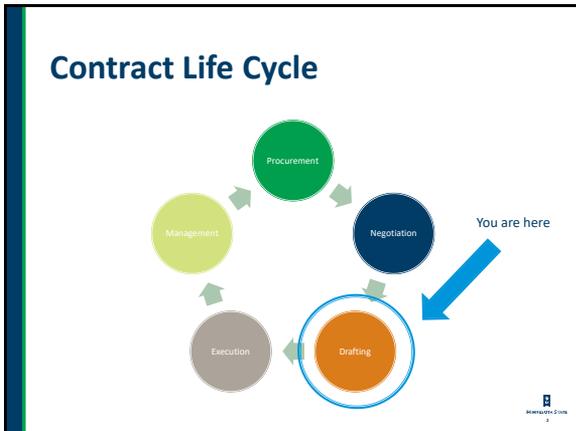


November 18, 2020
Office of General Counsel

Contract Drafting

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MINNESOTA STATE

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Drafting



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Contract Terminology

- Contract / Agreement / Master Agreement / MOU
- Exhibits
- Attachments
- Schedules
- Addendum
- Amendments
- Statement of Work (SOW)
- Service Level Agreement (SLA)
- Order Form / Work Order
- Quote
- License/Terms of Use/Terms of Service



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Contract Terminology: “Contract”

- In this series of trainings, we use “contract” to mean any agreement or other negotiable document covering a relationship and/or the mutual exchange of promises between Minnesota State (or a campus or department) and a vendor.
- The actual contract may be called something other than “contract” – it may be called an agreement, master agreement, memorandum of understanding, grant agreement, letter agreement, license, lease, etc.
- Intra-agency agreements are not contracts.



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Contract Terminology: “Attachments”

- May be called Attachments, Exhibits, Appendices, Annexes or Schedules
- Information that could have been included in the body of the contract but was instead moved elsewhere for convenience or clarity
- Frequently used to describe details of responsibilities or other matters too lengthy or complex for the contract
 - Sometimes done with EULAs/TOS if using our template
 - Can be a URL (a website containing terms)
- Must be referred to in the main contract so that the attachment is made a part of the whole, e.g.: “Exhibit A, attached herein, and is incorporated by reference in its entirety as part of this Agreement” or “in the form of Exhibit A”.
- AVOID attaching Vendor’s proposal or contract and incorporating it by reference without consulting legal counsel.
 - Language may conflict
 - It may not reflect what we negotiated
 - May include terms that Minnesota State is prohibited by law from agreeing to



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Contract Terminology: “Addendum”

- When parties want to add or modify terms before entering into a contract
 - A superseding Addendum is drafted
 - “the parties agree that if any of the following terms and conditions are in conflict with the terms and conditions of the Agreement the following terms and conditions will prevail”
 - Will reference the proposed contract and state how it is changed
 - May delete, modify, add, or supplement a proposed contract
- Most often used when signing a vendor’s contract form (e.g., software contract addendum)
- Needs to be signed and dated by representatives of both parties needed for validity at the same time the contract is signed
- Part of the original contract from the start
- Needs to be an attachment



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How to “Attach” Things to Your Contract

- Label the attachment and be consistent in your labels (Exhibit, Schedule, etc.)
- Actually reference the attachment in the contract
- “Exhibit A, is attached hereto, and is incorporated by reference in its entirety as part of this Agreement” or “Order Form in the form of Exhibit A” (Sarah: add addendum example)
- Attach only necessary documents (don’t attach correspondence, proposal responses, or other documents that aren’t part of the contract)



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Order of Preference

- When multiple documents make up a contract, they may contain conflicting provisions. It is important to include language to guide which provision controls.
- This language is **not** standard in our PT contract template and must be added if you are attaching any vendors’ terms. Contact legal counsel.
- Example:

The following Exhibits are attached and incorporated herein:

 - Exhibit A – Sample Work Order Contract
 - Exhibit B – Liability and Indemnification Options

The full and final agreement of the parties is comprised of this Contract and the Exhibits set forth herein. In the event of a conflict, the terms and conditions of the Contract prevail, followed by the exhibits in the order listed above. Any terms and conditions set forth in a subsequent Work Order shall apply solely to the services performed subject thereto. The terms of any Work Order may not modify, diminish, or otherwise derogate the terms and conditions set forth in this Contract.



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Contract Terminology: “Order Form” or “Work Order”

- Often used when a contract allows but does not require the purchase of a good or service. The Work Order is the order for services placed against an existing contract (often on an intermittent basis).
- May be encountered when buying off a cooperative contract
- Also frequently seen with software vendors who use a stock contract with all clients, but quantities, term and pricing will be specific to your institution on the Order Form
- You must treat ordering documents as a separate contract.
- Unless an order form is identical in terminology to an exhibit to an approved contract, it must be reviewed by system legal counsel in order to remove and include certain provisions in accordance with Minnesota law, and Federal law, and system policies.



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A Cautionary Tale About Order Forms

- Minnesota State entered into a system-wide master software contract in 2016 with favorable provisions to us, from which campuses could place an order.
- A sample order form was negotiated at the time of the master contract, but it was not incorporated into the master by reference.
- In 2019, the vendor sent campuses order forms for renewal that said:
 - “The Order Form is governed by the [Vendor’s] Solutions Agreement and applicable terms and conditions in the Online Terms and Conditions Center and by signing this form you agree to these terms.”
- Some campuses sent their Order Form to OGC for editing and some did not. The above language was replaced with:
 - “The Order Form is governed by [Vendor’s] Solutions Agreement as revised and signed by the parties on June 13, 2016 and attached hereto.”
- Now in 2020, are some campuses bound by different terms?
- You must ensure you are using an approved Order Form!



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Contract Terminology: “Statement of Work (SOW)”

- Document(s) that are attached to the final contract that list the specifics of the work, deliverables, locations, timelines, pricing, acceptance criteria and other requirements of a contractor in performing specific work. A very detailed “duties” section.
- In most cases, a statement of work is accompanied by a separate (master) agreement or other governing document that contains the legal terms as well as other business terms that will govern the transaction
 - E.g., a campus contract for a software license may have an SOW for the professional services piece of implementation and training.
- SOWs can also be used in place of an order form or work order when placing an order against an existing contract.
 - E.g., the system office has a master contract for a wide variety of forensic services – a campus may use an SOW to engage a vendor for a specific project
- Should be reviewed by legal counsel and incorporated by reference into the contract
- Like the contract, it should be understandable to someone not involved in the project



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Contract Terminology: "Amendment"

- Common for parties to want to make changes to an existing contract
 - Fix errors
 - Address new circumstances
 - Change the deal terms (price or length)
- Must be done before the agreement expires (or else you need to do a new agreement)
- Might also be called an "Extension" or "Modification" agreement
- Use Amendment Template but contact OGC if you have questions



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Contract Terminology: "Redlines"

- Using the track changes feature of Word to show what is proposed to be added/deleted from a contract.
 - To see track changes in Word: Review > Track Changes > All Markup
- All changes should be accepted before a contract is signed.
 - To accept changes in Word: Review > Accept > Accept All Change and Stop Tracking
- You are responsible for comparing the version uploaded for signature in Marketplace against what legal counsel has approved to ensure no hidden changes were made by the vendor.



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Drafting



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A Well-Drafted Contract

Tells the **who, what, when, where, how and why.**

- Why are the parties entering into the contract?
- Who is party to the contract?
- What is being delivered?
- When will the deliverables be provided?
- Where are the deliverables to be provided?
- How will the deliverables be provided?
- How much?
 - Flat fee?
 - Hourly Rate?

Should be understandable by a person with no background – be specific!



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Example 1



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How Could This Be Improved?

2. **CONTRACTOR'S DUTIES. The CONTRACTOR will:**

Speaker for OGC Web Training 11/18/2020

3. **CONSIDERATION AND TERMS OF PAYMENT**

- a. Consideration for all services performed and goods or materials supplied by the CONTRACTOR pursuant to this contract shall be paid by Minnesota State as follows:



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A Better Duties Section

- 1
2. **CONTRACTOR'S DUTIES. The CONTRACTOR will:**
 Deliver a web-based presentation on drafting contracts via Zoom on November 18, 2020 from 10-11am to an internal Minnesota State audience. The presentation will address:
 Basic concepts and rules for drafting
 Types of contracts
 Drafting best practices
 Hands-on exercises to practice drafting skills
 Contractor will be available for up to an hour after the scheduled presentation to answer follow-up questions from the audience.
3. **CONSIDERATION AND TERMS OF PAYMENT**
 - a. **Consideration** for all services performed and goods or materials supplied by the CONTRACTOR pursuant to this contract shall be paid by Minnesota State as follows:



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Examples Compared

- Missing a verb
- Where and what time?
- What's the topic?
- Uses complete sentences
- Provides all relevant details

- | | |
|--|---|
| <ol style="list-style-type: none"> 2. CONTRACTOR'S DUTIES. The CONTRACTOR will:
 Update the OGC Web Training 11/18/2020 3. CONSIDERATION AND TERMS OF PAYMENT <ol style="list-style-type: none"> a. Consideration for all services performed and goods or materials supplied by the CONTRACTOR pursuant to this contract shall be paid by Minnesota State as follows: | <ol style="list-style-type: none"> 2. CONTRACTOR'S DUTIES. The CONTRACTOR will:
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|--|---|



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Common Reasons for Poor Drafting

- We are in a hurry
- We have always done it that way
- I inherited this
- It's never been a problem
- Drafter lacks necessary details



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Why Improve Things?

- It saves time in the long run to write a good contract.
- Most useful when things go wrong – you only have the contract to rely on.
 - Contracts with ambiguous, unclear, or missing language are not helpful and can be harmful
 - Assuming “We all know what that means” will not help in court.
- Contracts serve as a reminder of what both parties agreed to do and when.
- Did we mean the same thing? If the contract is clearly written, everyone is (probably) on the same page.



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Tips For Drafting



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General Instructions

- Use Minnesota State Templates
 - Start fresh – do NOT write over old contracts
 - Don't use a template from elsewhere on the internet
 - Be careful copying & pasting
- Write Well
 - Use plain but formal English
 - Be detailed and specific
 - Proofread



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General Instructions (2)

- Avoid
 - Ambiguity
 - Imprecise phrases and words
 - Aspirational language (should)
 - Redundancy
 - Creativity for creativity's sake
 - Laziness



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Avoid Ambiguity

The same words could mean different things

- Contractor must provide a report bi-weekly
 - Contractor must provide a report twice each month.
- Contractor must be located in the State of Minnesota.
 - Contractor must be headquartered in the State of Minnesota.

Contextual Ambiguity

- Missing exhibits and attachments
- Mislabeled exhibits and attachments
 - Exhibit A vs Attachment A
- Unfamiliar references
- Undefined words (e.g., "Dollar")

All contracts should be understandable to someone without knowledge of the details



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Avoid Imprecision

- Responses to the RFP may be submitted until July 1.
 - Are responses on July 1 timely?
- Contractor shall hire Andrea and Bob or Christine
 - Contractor shall hire (Andrea and Bob) or Christine
 - Contractor shall hire Andrea and (Bob or Christine)
- Avoid vague phrases
 - Reasonable efforts
 - Promptly
 - Immediately
 - Substantially
 - Good Faith



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Avoid Using And/Or

- It is tempting to use And/Or
- Here is why you should avoid it:
 - "Contractor must get approval for all change orders from a licensed engineer, a licensed architect **and/or** the project manger."
 - ...a licensed engineer, a licensed architect and the project manager.
 - ...a licensed engineer, a licensed architect or the project manager.
- Use "X or Y or both" or re-write.



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Avoid Virgules (Slashes)

- Generally to be avoided in formal writing
- Can mean "and/or" or "and" or "per" or another type of distinction
- More ambiguous than even "and/or"
- Example:
 - Contractor will review/advise/train Minnesota State on software workflow options
 - Is this review, advise and train?
 - Or is reviewing alone sufficient?



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Avoid Legalese

- Legal jargon doesn't make a contract official, write so everyone can understand
 - Avoid: Attachment A is attached and incorporated herein
 - Use: Attachment A is attached and incorporated into this contract.
- Avoid provisos (e.g., "Provided however" or "notwithstanding the foregoing")
 - It can mean either a condition, a duty, a limitation, an exception or an additional requirement.
 - Use "If", "Except" or "Also"
- Avoid Herein/Therein
 - Not clear whether it means "in this sentence", "in this paragraph" or "in this contract."



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Other Drafting Tips

- Address everything once
 - One spot
 - Only once
 - Not more frequently than one time.
- Keep it simple – always choose plain language
 - Use technical language only when really needed
 - Needs to be understandable to someone outside the system
- Use words consistently
 - Vendor vs. Responder vs. Seller
 - Exhibit 1 vs. Attachment 1
 - Pick one and stick with it
 - Once a word order is chosen, stick with it
- Shall means “has a duty to”



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Other Drafting Tips

- Use active voice
 - Avoid: The material will be delivered by September 30, 2021.
 - Use: The contractor will deliver the material by September 30, 2021.
- Use strong verbs
 - Avoid: “A list of subcontractors must be maintained and kept updated by the program manager. Notice shall be given if there are any subcontractor changes.”
 - Use: “Contractor will maintain a list of subcontractors and keep it updated with any changes. Contractor will notify Minnesota State if there are any subcontractor changes.”



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Sentence Structure

- Keep the subject, verb and object close together (SVO)
 - Avoid: The contractor shall, if approvals are obtained from the College, revise the final plans for the design.
 - Use: Once approvals are obtained from the College, the contractor shall revise the final plans for the design.
- Use short clear sentences
 - Eliminate unnecessary words
 - Every word should serve a purpose
- Use Parallel Construction
 - Avoid: “If the College rejects the deliverables, the College has the following options (1) Grant the Contractor 20 days to cure (2) the right to liquidated damages or (3) termination of the contract.”
 - Use: “If the College rejects the deliverables, the College has the following options: (1) grant the Contractor 20 days to cure (2) require the contractor to pay liquidated damages or (3) terminate the contract.”



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Formatting Tips

- Use page numbers, numbering, and headings
 - Be consistent
 - Don't have a 1 without a 2
- Break things down into subsections that are grammatically independent, but related
 - The Contractor's progress report must contain the following:
 - A list of items completed;
 - The hours spent on each item;
 - Total cost for the completed items; and
 - An update on the status of uncompleted items
- Don't be afraid to use lists or tables



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Formatting Tips (2)

- If deleting a section – either renumber or state “intentionally omitted.”
- Remove all redlines and instructions
- Proofread!
 - Are numbers in order?
 - Are internal cross-references still valid?



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Tips for Drafting – Duties

- Start with a list
 - What is essential to the project?
 - Include the who, what, where, when and why
 - Everything the parties negotiated
 - Leave nothing to “understanding”
- If not enough space, you can write the duties as an attachment



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Tips for Drafting – When You Have an RFP

- Don't copy a Contractor's proposal (RFP response) for a duties section of the contract
 - Proposals are written in language of aspiration
 - You must re-write the proposal using the language of obligation (e.g., Contractor must ____; Contractor will ____)
 - Don't attach the RFP response as it may conflict with other terms
- Do make sure all of their promises in the proposal end up in the contract.



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Tips for Drafting – Payment Terms (How Much)

- Determine the best payment method
 - Fee-based (\$20 to shovel the driveway)
 - Time and Materials (\$10 per hour to shovel)
 - Time and Materials, not to exceed (\$10 per hour for shoveling, but the whole driveway must be cleared for no more than \$20).
- Break it down! Think about what happens if you cancel
- Tie all payments to performance measures and deliverables
 - Lump sum payments are not appropriate for anything that occurs over more than one day.
 - Do not pay for the passage of time
 - Pay for completion of project segments
 - Use this method regardless of fixed price or time and materials approach



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Tips for Drafting – Payment and Invoicing (When)

- Set up intervals that make sense
 - Based on performance (\$500 every time they snow plow the campus parking lots), submit invoice upon completion of each plowing event.
 - Based on a calendar if performance is regular (\$3,000/month to plow all campus parking lots every time it snows more than an inch), submit invoice monthly.



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Example 2



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Tips for Drafting – Payment Terms and Invoicing (Example)

- Piano Tuning Contract
 - *“Provide piano tuning for all pianos owned by the music department between August 2019 and May 2020.”*
 - *Compensation of Fall semester 2019: up to Two Thousand 00/100 Dollars (\$2,000.00) and Spring semester 2020: up to Two Thousand 00/100 Dollars (\$2,000.00).*
- What issues do you see?



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Tips for Drafting – Payment Terms and Invoicing

- How will they know when to tune the pianos? Do we call them? Do they just show up on the first of every month?
- Are we still paying \$2,000 if our pianos don't need tuning?
- How can this be improved?



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Tips for Drafting – Deleting Marketplace Clauses

- Certain clauses only apply above various dollar thresholds. Know the dollar value of your contract (including renewals).
- Marketplace will include all clauses by default, regardless of the dollar value of your contract.
- If your contract is under \$100,000 delete both the Affirmative Action and the Equal Pay Certification clauses.
- If your contract is under \$500,000 delete the Equal Pay Certification clause.
- Carefully check the paragraph numbering & formatting when you are finished.



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Tips for Drafting – Edits in the Final Contract

- Avoid scanning in handwritten edits for the final contract.
- Do not include redlines in Word/PDF as the final contract. Ensure all track changes have been accepted.
- Ask OGC if you have questions.



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Tips for Drafting – Signature Blocks

- Copy and Paste our signature blocks onto a vendor’s contract
- Make sure it has Form & Execution and Encumbrance as well as a signature



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Interactive Drafting Exercises



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Drafting Exercise Instructions

- Spot the issues
- Attempt to fix it
- Identify any concepts you learned today that apply to the problem
- Add details and information if necessary
- There's no perfect answer



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Drafting Exercise #1

College wants to pay for a local bus company to provide rides to students, faculty and staff.

CONTRACTOR'S DUTIES. The CONTRACTOR will:
transportation for all MINNESOTA STATE students, faculty and staff. A CONTRACTOR bus will stop at the campus in accordance with the publish bus schedule on the bus and city transit website <http://citybusschedule.org>



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Drafting Exercise #1

CONSIDERATION AND TERMS OF PAYMENT.

- Consideration for all services performed and goods or materials supplied by the CONTRACTOR pursuant to this contract shall be paid by MINNESOTA STATE as follows:
 - Compensation of Seventy-five cents (\$0.75) per MINNESOTA STATE rider.
 - The **total obligation** of MINNESOTA STATE for all compensation and reimbursement to the CONTRACTOR shall not exceed Seven Thousand Dollars and 00/100 cents (\$7,000).



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Drafting Exercise #1

CONSIDERATION AND TERMS OF PAYMENT.

Terms of Payment.

- Payment shall be made by MINNESOTA STATE promptly after the CONTRACTOR'S presentation of invoices for services performed and acceptance of such services by MINNESOTA STATE'S authorized representative. All services provided by the CONTRACTOR pursuant to this contract shall be performed to the satisfaction of MINNESOTA STATE, as determined at the sole discretion of its authorized representative, and in accordance with all applicable federal, state and local laws, ordinances, rules and regulations. The CONTRACTOR shall not receive payment for work found by MINNESOTA STATE to be unsatisfactory or performed in violation of any applicable federal, state or local law, ordinance, rule or regulation. Invoices shall be presented by CONTRACTOR according to the following schedule:
 - Invoices shall be emailed to MINNESOTA STATE at Jane.Doe@minnstate.edu or mailed to her attention at Jane Doe, 30 East 7th Street, Suite 350, St. Paul, MN 55101



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Drafting Exercise #1 - Issues



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Drafting Exercise #1 - Issues

- What is a “Minnesota State Rider”? How are they counted?
- What if the bus company changes schedules? Do we want to guarantee minimum hours?
- Basic grammar – missing a verb, publish vs. published
- Is it 75 cents per ride or per rider? How is it counted? What proof are students showing?
- When is the bus company sending invoices?



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Drafting Exercise #2

College wants to outsource cleaning services.

CONTRACTOR’S DUTIES. The CONTRACTOR will:

Janitorial Services Inc., will provide a worker who will provide general cleaning services to College on the South campus. Services will include but are not limited to: pushing in chairs in the commons, spray and wipe off tables in the commons, clean carpeted areas throughout the campus as needed, clean windows and front of doors to all entrances, clean the top of garbage cans and water fountains, and perform other janitorial duties as requested.



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Drafting Exercise #2

CONSIDERATION AND TERMS OF PAYMENT.

a. Consideration for all services performed and goods or materials supplied by the CONTRACTOR pursuant to this contract shall be paid by MINNESOTA STATE as follows:

- i. Compensation of Compensation of \$9,910.00.
- ii. The total obligation of MINNESOTA STATE for all compensation and reimbursement to the CONTRACTOR shall not exceed Total obligation of \$9,910.00.



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Drafting Exercise #2

Terms of Payment.

i. Payment shall be made by MINNESOTA STATE promptly after the CONTRACTOR'S presentation of invoices for services performed and acceptance of such services by MINNESOTA STATE'S authorized representative. All services provided by the CONTRACTOR pursuant to this contract shall be performed to the satisfaction of MINNESOTA STATE, as determined at the sole discretion of its authorized representative, and in accordance with all applicable federal, state and local laws, ordinances, rules and regulations. The CONTRACTOR shall not receive payment for work found by MINNESOTA STATE to be unsatisfactory or performed in violation of any applicable federal, state or local law, ordinance, rule or regulation. Invoices shall be presented by CONTRACTOR according to the following schedule:

1. An invoice shall be emailed to Dave.Daniels@minnstate.edu or mailed to his attention at 30 E. 7th Street Suite 350, St. Paul, MN 55101



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Drafting Exercise #2 - Issues



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Drafting Exercise #2 - Issues

- Is this a flat fee or an hourly rate contract?
- How many hours a week of janitorial services is the college entitled to? Which hours of the day? How will they access the building?
- Who can direct the worker to do additional tasks?
- When will the College be billed?
- General grammar (two provides)
- "Provide a worker" – will it be the same worker every time? What about absences?



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Drafting Exercise #3

CONTRACTOR'S DUTIES. The CONTRACTOR will: WordPress updates, project management and up to Twelve (12) hours of support per quarter year.

CONSIDERATION AND TERMS OF PAYMENT.

a. Consideration for all services performed and goods or materials supplied by the CONTRACTOR pursuant to this contract shall be paid by MINNESOTA STATE as follows:

- i. Compensation of Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) per quarter year.
- ii. The total obligation of MINNESOTA STATE for all compensation and reimbursement to the CONTRACTOR shall not exceed Ten Thousand and 00/100 Dollars (\$10,000.00).



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Drafting Exercise #3 - Issues



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Drafting Exercise #3 - Issues

- What are the duties? Project management of what?
- Duties section lacking any verbs at all.
- Payment for the passage of time – paid every quarter with no milestones.



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Drafting Exercise #4

CONTRACTOR'S DUTIES. The CONTRACTOR will: help set up RFY conference, manage all AV needs, signage, and organization. Contractor will coach interns, emcee participant readings and other events, troubleshoot, and help to debrief the staff and process surveys at the end of the conference. The schedule is attached for these events.



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Drafting Exercise #4 - Issues



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Drafting Exercise #4 - Issues

- Schedule is not a labeled exhibit
- Schedule does not obligate contractor to appear at any particular time. Where and when does the contractor have to be there? If a multi-day conference, how many hours are expected each day?
- What does the acronym refer to?
- How can duties be clearer?



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