Drafting
Contract Life Cycle
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!
Example 1
How Could This Be Improved?

2. **CONTRACTOR’S DUTIES.** The CONTRACTOR will:
   
   Speaker for OGC Web Training 2/5/2020

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:
A Better Duties Section

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

   Deliver a web-based presentation on drafting contracts via Zoom on February 5, 2020 from 10 to 11 a.m. to an internal Minnesota State audience. The presentation will address:

   - Basic concepts and rules for drafting
   - Why careful drafting is often ignored
   - Other drafting best practices
   - Hands-on exercises to practice drafting skills

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:
Examples Compared

• Missing a verb.
• Where and what time?
• What’s the topic?

• Uses complete sentences.
• Provides all relevant details.

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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
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.
Tips For Drafting
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
General Instructions (2)

• Avoid
  ▪ Ambiguity
  ▪ Imprecise phrases and words
  ▪ Aspirational language (should)
  ▪ Redundancy
  ▪ Creativity for creativity’s sake
  ▪ Laziness
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
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
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 manager.”
    • ...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.
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?
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.”
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

• Use words consistently
  - Vendor vs. Responder vs. Seller
  - Pick one and stick with it
  - Once a word order is chosen, stick with it

• Shall means “has a duty to”
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.”
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.”
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
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?
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”

• Don’t use a Contractor’s proposal (RFP response) for a duties section of the contract
  ▪ Proposals are written in language of aspiration (state what must be done by one or more parties)
  ▪ Contracts must be written in language of obligation
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
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.
Example 2
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?
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?
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
Interactive Drafting Exercises
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
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
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).
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
Drafting Exercise #1 - Issues
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?
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.
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 $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.
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
Drafting Exercise #2 - Issues
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?
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).
Drafting Exercise #3 - Issues
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.
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.
Drafting Exercise #4 - Issues
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?