



November 18, 2020  
Office of General Counsel

## Contract Negotiation

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MINNESOTA STATE

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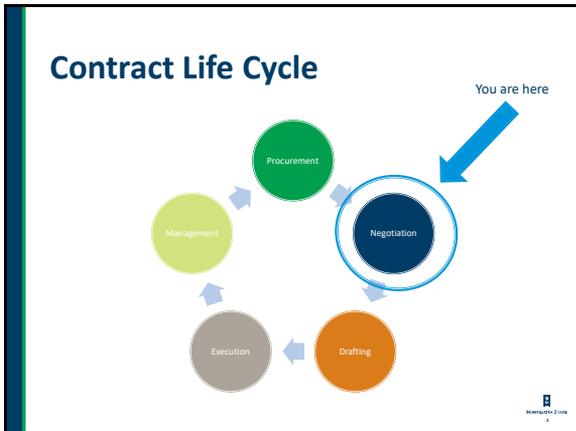
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## Contract Negotiation

Give a thumbs down if you feel uncomfortable negotiating?



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## What is Negotiation?

- Contract negotiation is more than merely haggling over price.
- It's a series of exchanges in order to obtain more favorable terms in your contract.
  - You give me that, I'll give you this
  - Just giving away things is conceding, not negotiating
- "In business as in life, you don't get what you deserve, you get what you negotiate." Chester Karrass
- What you negotiate is memorialized in the final, signed contract.



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## Barriers to Negotiation

- Which parts of a contract are up for negotiation?
- We don't want to lose the deal
- We want to be "nice"
  - The Vendor is our friend
  - The Vendor is a long-term Vendor
  - We don't want to offend
- We don't have experience in formal negotiation



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## Reasons to Negotiate

- Don't assume the terms of a vendor's contract are fair, even if it is a reputable company
- Don't assume that the first offer made by a vendor is their best offer
- Minnesota State employees are guardians of taxpayer and student dollars
  - It is our responsibility to make sure that money is wisely spent
  - What could your department do with the savings?
  - What could you do with more deliverables for the same amount of money?
- One of the best ways to avoid a contract dispute is to have a well-negotiated, clearly-written contract



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## Negotiation Skills

- Communication
- Listening
- Planning
- Persuasion
- Creativity and Flexibility
- Emotional Understanding



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## We Negotiate Daily

- Deciding where to go for dinner
- Making vacation plans
- Trying to get kids to cooperate
- At a flea market
- Buying a house or a car
- In team meetings
- Even with yourself



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## Do Your Prep Work

- Set Targets
  - Maximum Position (best)
  - Your goal (satisfied)
  - Bottom line (worst outcome you will accept under pressure)
- Make Lists
  - Concessions you will make
    - Rank them
    - Decide what you must get in return
  - Concessions you will not make
- Identify your BATNA – and theirs
  - Best Alternative to a Negotiated Agreement
  - i.e., what happens if you can't reach a deal?
    - Find another company
    - Changing specifications
    - Not going ahead
    - Doing it internally



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## How To Negotiate Well

### Know what you need/want

- Budget, features, deadlines, who is the decisionmaker, etc.

### Psych yourself up

- Acknowledge most of us feel uncomfortable
- Reflect on past successful negotiations
- Negotiation is more about preparation and practice than any special talent

### Know your worth

- We are the largest system of higher ed in Minnesota and the fourth largest in the United States. You are negotiating for more than your department. We are a big deal for many vendors.

### Research the vendor and their offerings and/or needs

- Knowledge is power

### Figure out what their interests are

- Deadlines, sales quotas, entry into higher education market

### Plan

- In person? Telephone? By email?
- Consider the order of items to negotiate




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## How To Negotiate Well (2)

### Establish a relationship

- Build trust and it may help you get insight into their goals
- Don't bluff - if you don't know the answer to a legal or business question, take a break and find out
- Collaboration without emotion likely to give the best results

### Ask a lot of questions

- Vendors are more open to sharing before negotiations begin

### Be creative and open to non-traditional solutions

- Especially ideas that don't cost you anything

### Listen more than you talk

- Embrace the awkward silence

### Don't take anything personally

### Emphasize points of agreement

- Places where you can say "You're right" or "I agree".




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## How To Negotiate Well (3)

### Make a reasonable first offer

### Don't bid against yourself

- Give them time to respond

### Negotiate all items at once

- Avoid doing business terms first and then getting legal review

### Allow time for the negotiation process

- Don't give up quickly
- The "quick" deal may cause more pain in the future

### Be willing to walk away

- The "win" might be in no deal at all




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## How To Negotiate Well (4)

### Allow time for the negotiation process

- Don't give up quickly
- The "quick" deal may cause more pain in the future

### When you compromise, clearly identify that you have done so

- Labeling a concession invites reciprocity

### Make concessions in installments

- \$10,000 followed by \$5,000, rather than one \$15,000 concession

### Get legal approval before reaching a tentative agreement

- Avoid doing business terms first and then getting legal review



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## Keep Track

It's important to keep track of all the items you have negotiated – in a spreadsheet, word document, or series of emails:

- Price
- Scope of Work
- Warranties
- Length of agreement
- Services or Products to be provided
- Other terms and conditions
- RFP Response

And check that list against what is in the draft contract

- Contract may have new provisions you never discussed
- Price or quantity or length terms may not match your "handshake" agreement



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## Negotiation Phrases

If You Need to Buy Yourself Time ...

- That's a good question, let me think about that
- Let's set that aside for now and come back to it later
- That's more than what I was expecting, let me think about it
- We'll have to discuss this internally
- I'd like to consult with my superiors before making a decision

If You Are Looking for a Better Price ...

- How far are you willing to compromise on this price?
- Can you do any better? Is that your final offer?
- How about 20% off?
- I'm afraid we can only go as high as \_\_\_\_\_
- For us, an acceptable price would be \_\_\_\_\_

If you need to hold firm ...

- I think that's a fair offer



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## Negotiation Phrases (2)

### If You Need to Say No ...

- I'm afraid we can't agree to \_\_\_\_\_
- We understand your position, however we would prefer \_\_\_\_\_
- That's a deal breaker for us
- State law prohibits us from \_\_\_\_\_
- As an alternative, we propose \_\_\_\_\_
- We appreciate the effort you've made to \_\_\_\_\_, but unfortunately we are going to go in a different direction
- Well that's a good starting point, but \_\_\_\_\_
- No, that's not an option

### If You Need to Ask for More Value ...

- We propose that \_\_\_\_\_
- Would your team consider \_\_\_\_\_?
- How flexible are you on \_\_\_\_\_? Is there any wiggle room on \_\_\_\_\_?
- Is \_\_\_\_\_ a deal-breaker?
- If \_\_\_\_\_ is resolved, are you happy with everything else?
- \_\_\_\_\_ is in line with industry standards. I'm only asking for what's fair.




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## Negotiation Phrases (3)

### If You Are Looking to Compromise ...

- What I might be willing to consider is \_\_\_\_\_?
- We feel there has to be a trade off here. If we \_\_\_\_\_, can you \_\_\_\_\_?
- We'd be prepared to \_\_\_\_\_
- In exchange for \_\_\_\_\_ would you agree on \_\_\_\_\_?
- We are ready to accept your offer, however there would be one condition \_\_\_\_\_
- It is going to be a struggle to balance our budget with this price, but we can make some adjustments. We expect that you are now in a better position to offer \_\_\_\_\_.
- A fair solution might be \_\_\_\_\_.




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## Negotiation Phrases (4)

### If You Need More Information ...

- Could you clarify one point for me?
- Are you saying \_\_\_\_\_?
- If I understand you correctly, \_\_\_\_\_

### When You Are Ready to Say Yes ...

- I'm comfortable with that
- That's acceptable to us
- I think we have a deal
- Let me go over what we talked about
- Here's what I think we've agreed to: \_\_\_\_\_
- I think that's a fair offer
- Sounds like we have a deal, I need to run it past counsel before I can give the official okay.




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## Negotiation Phrases To Avoid

Don't undercut yourself. Don't say:

- "If that's ok with you?"
- "What are your thoughts on that?"
- Don't ask questions of the vendor where "no" seems an acceptable answer
- Let silence hang

Use firm numbers and quantities (and not your top dollar)

- You wouldn't go to a car dealer and say my budget is \$30,000
- Don't say to a vendor, "We're looking to spend between \$10,000-\$15,000 on this project" – you've automatically conceded \$5,000

Limit the realm of acceptable responses

- In many ways, like dealing with a toddler:
  - Don't Ask: "Do you want to wear your red shirt today?"
  - Ask: "Do you want to wear your red shirt or your blue shirt today?"
- "If you've got a solution that addresses our need for a lower price while still maintaining quality, I'd be happy to discuss it."



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## What is Negotiable?



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## Everything is Negotiable

- Most legal terms (except where not allowed by law)
- All business terms (except what you've deemed a deal-breaker)



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## Terms to Negotiate in All Contracts



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## Terms That Should Be Negotiated

### All Business Terms

- Anything in the "Duties" Section of a P/T Contract
- Total Price or Rate
- Other Payment Terms
- Quantities
  - Price Breaks at Certain Quantities
- Timing of Completion
- Length of Contract
- Quality of Product
- Check-in/Check-out Times
- Service Level Agreements ("uptime")



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## Terms That May Be Negotiated

### Some Legal Terms

- Cancellation or termination processes
  - Terminate for convenience?
  - Terminate for breach?
  - Terminate for lack of appropriation
- Insurance limits (contact risk management)
- Warranties
- Limitations of Liability
- Breach of Contract Terms
  - What must happen before you can terminate?



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# Terms to Negotiate in Vendor Contracts



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## Terms that Must Be Negotiated

All of the Business Terms (listed above) and Some Legal Terms:

- Indemnification (prohibited)
- Choice of Law (MN or silent)
- Venue (MN or silent)
- Auto-Renewal (prohibited)
- Non-Disclosure / Confidentiality Clauses (subject to MGDPA)
- Non-Solicitation Clauses (prohibited)
- Arbitration or alternate dispute resolution (disfavored)
- Data Security clauses (if applicable)
- PCI-DSS clauses (if applicable)
- MGDPA clause (added)
- Audit clause (added)



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## Terms that Must Be Negotiated

Some Legal Terms

- Liquidated Damages (prohibited)
- Acceleration Clauses (prohibited)
- Prepayment (prohibited)
- Requesting the College/University sign a BAA under HIPAA (contact OGC)
- Endorsement clauses
- IP assignments

This **NOT** a complete list (& why we recommend using system templates)



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## Sample Clauses for Negotiation



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### Sample Clauses for Negotiation: Warranties

- Contract Language: The Software is provided to you "AS IS" and "AS AVAILABLE" and with all faults and defects without warranty of any kind.
- This means that if the Software malfunctions, the vendor is not responsible.
- Assess the risk of damage caused by a software malfunction, and the likelihood of a malfunction.
- Also assess the risk of disruption to your business if you cannot use the software, and the likelihood that could happen.
- Talk to legal counsel if you need a warranty added. Important for mission-critical software & activities with a risk of physical injury to others.



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### Sample Clauses for Negotiation: Limitation of Liability

- Contract Language: "Under no circumstances will the Company be liable for any direct, indirect, incidental, special, exemplary, or consequential damages, personal injury/wrongful death, lost or anticipated profits, lost data, or business interruption, the use or misuse of The Content in any way whatsoever arising out of the use of, or inability to use, The Service, whether or not the Company parties are advised of the possibility of such damages."
- This means if the Company breaches the contract, it would not pay for damages resulting from that breach.
- Contract Language: "The Company's maximum liability to Customer for any action arising under this Agreement, regardless of the form of action and whether in tort or contract, shall be limited to the amount of fees paid or payable by Customer from which the claim arose during the six (6) months preceding the claim."
- This means if the damage happens in month one of a 5 year multi-million dollar contract, the maximum you could get is one month's worth of fees. Companies will often agree to a higher figure.
- Read the liability language, assess the potential cost to the campus that could result from something gone wrong, and the likelihood of such events.
- Talk to legal counsel if there are risks of IP infringement, bodily injury, a data breach to carve out exceptions to limitations of liability.



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## Sample Clauses for Negotiation: Intellectual Property Rights

- Marketplace provides 4 choices for intellectual property (“IP”) language, so you’ll need to think about what you want and negotiate this with the vendor before setting up the contract.
  - Minnesota State owns all IP (Standard)
  - Contractor owns all IP but grants a license to Minnesota State
  - Contractor owns all IP
  - No IP / each party owns its own
- To change the IP language, you need to go back and change your answer to this question




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## Sample Clauses for Negotiation: IP Rights

- Standard Contract Language: “Minnesota State shall own all rights, title and interest in all of the materials conceived or created by the CONTRACTOR, or its employees or subcontractors, either individually or jointly with others and which arise out of the performance of this contract, created and paid for under this contract, including any inventions, reports, studies, designs, drawings, specifications, notes, documents, software and documentation, computer based training modules, electronically, magnetically or digitally recorded material, and other work in whatever form (hereinafter MATERIALS).”
- If you choose this, it will not trigger legal review. We will own whatever the Contractor creates during the contract.
- If we expect we will be building on work the Contractor did before the contract started, we may carve out “pre-existing IP” and be clear they get to keep that. Contact legal counsel.




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## Sample Clauses for Negotiation: IP Rights

- Alternate Contract Language: “CONTRACTOR shall own all rights, title and interest in the materials conceived or created by the CONTRACTOR, or its employees or subcontractors, either individually or jointly with others and which arise out of the performance of this contract, created and paid for under this contract, including any inventions, reports, studies, designs, drawings, specifications, notes, documents, software and documentation, computer based training modules, electronically, magnetically or digitally recorded material, and other work in whatever form (hereinafter MATERIALS).”
- This means that the Contractor owns whatever they create and we won’t have a right to use it in the future. This will trigger legal review, because generally we shouldn’t pay for things that we will not own.
- We do allow this when it is a canned presentation not created especially for Minnesota State.




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## Sample Clauses for Negotiation: IP Rights

- Alternate Contract Language: "CONTRACTOR shall own all rights, title and interest in the materials conceived or created by the CONTRACTOR, or its employees or subcontractors, either individually or jointly with others and which arise out of the performance of this contract, created and paid for under this contract, including any inventions, reports, studies, designs, drawings, specifications, notes, documents, software and documentation, computer based training modules, electronically, magnetically or digitally recorded material, and other work in whatever form (hereinafter MATERIALS). **The CONTRACTOR hereby grants MINNESOTA STATE a non-exclusive, perpetual, irrevocable, worldwide, fully paid, royalty-free license to reproduce, modify, distribute, publicly display, and use the MATERIALS for internal non-profit educational purposes consistent with this agreement.**"
- This means that the Contractor owns whatever they create, but we can keep a copy and use it for very limited purposes.
- If the Contractor will not assign us the IP (the standard option) and we want broad use, contact legal counsel to change the license language above.



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## Sample Clauses for Negotiation: IP Rights

- Alternate Contract Language: "Contractor and Minnesota State will continue to own all copyrights, patents, trademarks, service marks, trade secrets, and other proprietary rights that such party owned immediately prior to this Agreement. No intellectual property is intended to be created or transferred in connection with this Agreement, and all rights with respect to any intellectual property developed or conceived by a party will remain solely owned by the party that developed or conceived such intellectual property."
- Each party keeps what they develop. Could lead to some confusion if the agreement actually creates something significant.



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## Sample Clauses for Negotiation: IP Rights

- In some contracts, Minnesota State is the vendor providing service to another entity (another state agency, the City of Minneapolis, etc.)
- In those contracts, and certain other vendor contracts, our partner may want Minnesota State to assign our intellectual property to them.
- Always consult legal counsel when asked to do so. We can only assign IP that we own, and we often do not own the IP of faculty or students.



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## IP Language Pop Quiz

1. You are commissioning someone to compose a song for your graduation ceremony. Which IP clause do you select?
2. A nationally recognized speaker is coming to give a talk at your faculty in-service day. Which IP clause is appropriate?
3. You are hiring a company to do 3D photography of your campus for a web-based tour. Which IP clause is appropriate?
4. A zero-depth snow plow contract. Do you need an IP clause?



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## IP Language Pop Quiz: Answers

1. Ideally we'd own the IP (standard language) as we are commissioning them to create it. However, if the composer wants to be able to use the song elsewhere and record it for sale, we could accept a broad license. The license in Marketplace is likely too narrow because it says "for internal non-profit purposes." Contact legal counsel for assistance.
2. If it is not a training created for us, and we don't plan to record it, we can allow them to own it. This will trigger legal review.
3. Unlike the music contract, it's unlikely that the photographer would need/want to use this elsewhere, so the standard language where we own everything is best. Contact legal counsel if the vendor objects.
4. It is unlikely that there will be any IP generated from this contract, so you could select the "No IP" language in Marketplace. This will trigger legal review, so if the contractor does not object, our standard language may get you to signature faster.



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## Sample Clauses for Negotiation: Term and Termination

- Contract Language: "This contract is effective on January 1, 2020 ("Effective Date") and shall remain in effect until January 1, 2025 ("Termination Date"). This contract shall automatically renew unless Customer provides Company written notice of termination no more than ninety (90) days, but no fewer than thirty (30) days, before the Termination Date."
- Issue: this contract renews for beyond five years and has a restrictive "termination window."
- If possible, make sure vendors agree to our standard termination language. Make sure you have sound business reasons for making exceptions.



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# A Quick Word About 16A



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## What is 16A?

- 16A is a chapter of the Minnesota Statutes regulating all purchasing & contracting by State Agencies.
- 16B and 16C are also statutes on procurement & contracting but only apply to Minnesota State if we are specifically listed or opt in by policy.

MINNESOTA STATUTES 2019

CHAPTER 16A  
DEPARTMENT OF MANAGEMENT AND BUDGET

16A.01	DEPARTMENT OF MANAGEMENT AND BUDGET	16A.01	DEPARTMENT OF MANAGEMENT AND BUDGET
16A.02	COMMISSIONER	16A.02	COMMISSIONER
16A.03	ADVISORY BOARD	16A.03	ADVISORY BOARD
16A.04	ADVISORY BOARD	16A.04	ADVISORY BOARD
16A.05	ADVISORY BOARD	16A.05	ADVISORY BOARD
16A.06	ADVISORY BOARD	16A.06	ADVISORY BOARD
16A.07	ADVISORY BOARD	16A.07	ADVISORY BOARD
16A.08	ADVISORY BOARD	16A.08	ADVISORY BOARD
16A.09	ADVISORY BOARD	16A.09	ADVISORY BOARD
16A.10	ADVISORY BOARD	16A.10	ADVISORY BOARD
16A.11	ADVISORY BOARD	16A.11	ADVISORY BOARD
16A.12	ADVISORY BOARD	16A.12	ADVISORY BOARD
16A.13	ADVISORY BOARD	16A.13	ADVISORY BOARD
16A.14	ADVISORY BOARD	16A.14	ADVISORY BOARD
16A.15	ADVISORY BOARD	16A.15	ADVISORY BOARD
16A.16	ADVISORY BOARD	16A.16	ADVISORY BOARD
16A.17	ADVISORY BOARD	16A.17	ADVISORY BOARD
16A.18	ADVISORY BOARD	16A.18	ADVISORY BOARD
16A.19	ADVISORY BOARD	16A.19	ADVISORY BOARD
16A.20	ADVISORY BOARD	16A.20	ADVISORY BOARD
16A.21	ADVISORY BOARD	16A.21	ADVISORY BOARD
16A.22	ADVISORY BOARD	16A.22	ADVISORY BOARD
16A.23	ADVISORY BOARD	16A.23	ADVISORY BOARD
16A.24	ADVISORY BOARD	16A.24	ADVISORY BOARD
16A.25	ADVISORY BOARD	16A.25	ADVISORY BOARD
16A.26	ADVISORY BOARD	16A.26	ADVISORY BOARD
16A.27	ADVISORY BOARD	16A.27	ADVISORY BOARD
16A.28	ADVISORY BOARD	16A.28	ADVISORY BOARD
16A.29	ADVISORY BOARD	16A.29	ADVISORY BOARD
16A.30	ADVISORY BOARD	16A.30	ADVISORY BOARD
16A.31	ADVISORY BOARD	16A.31	ADVISORY BOARD
16A.32	ADVISORY BOARD	16A.32	ADVISORY BOARD
16A.33	ADVISORY BOARD	16A.33	ADVISORY BOARD
16A.34	ADVISORY BOARD	16A.34	ADVISORY BOARD
16A.35	ADVISORY BOARD	16A.35	ADVISORY BOARD
16A.36	ADVISORY BOARD	16A.36	ADVISORY BOARD
16A.37	ADVISORY BOARD	16A.37	ADVISORY BOARD
16A.38	ADVISORY BOARD	16A.38	ADVISORY BOARD
16A.39	ADVISORY BOARD	16A.39	ADVISORY BOARD
16A.40	ADVISORY BOARD	16A.40	ADVISORY BOARD
16A.41	ADVISORY BOARD	16A.41	ADVISORY BOARD
16A.42	ADVISORY BOARD	16A.42	ADVISORY BOARD
16A.43	ADVISORY BOARD	16A.43	ADVISORY BOARD
16A.44	ADVISORY BOARD	16A.44	ADVISORY BOARD
16A.45	ADVISORY BOARD	16A.45	ADVISORY BOARD
16A.46	ADVISORY BOARD	16A.46	ADVISORY BOARD
16A.47	ADVISORY BOARD	16A.47	ADVISORY BOARD
16A.48	ADVISORY BOARD	16A.48	ADVISORY BOARD
16A.49	ADVISORY BOARD	16A.49	ADVISORY BOARD
16A.50	ADVISORY BOARD	16A.50	ADVISORY BOARD
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16A.63	ADVISORY BOARD	16A.63	ADVISORY BOARD
16A.64	ADVISORY BOARD	16A.64	ADVISORY BOARD
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16A.72	ADVISORY BOARD	16A.72	ADVISORY BOARD
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16A.74	ADVISORY BOARD	16A.74	ADVISORY BOARD
16A.75	ADVISORY BOARD	16A.75	ADVISORY BOARD
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16A.78	ADVISORY BOARD	16A.78	ADVISORY BOARD
16A.79	ADVISORY BOARD	16A.79	ADVISORY BOARD
16A.80	ADVISORY BOARD	16A.80	ADVISORY BOARD
16A.81	ADVISORY BOARD	16A.81	ADVISORY BOARD
16A.82	ADVISORY BOARD	16A.82	ADVISORY BOARD
16A.83	ADVISORY BOARD	16A.83	ADVISORY BOARD
16A.84	ADVISORY BOARD	16A.84	ADVISORY BOARD
16A.85	ADVISORY BOARD	16A.85	ADVISORY BOARD
16A.86	ADVISORY BOARD	16A.86	ADVISORY BOARD
16A.87	ADVISORY BOARD	16A.87	ADVISORY BOARD
16A.88	ADVISORY BOARD	16A.88	ADVISORY BOARD
16A.89	ADVISORY BOARD	16A.89	ADVISORY BOARD
16A.90	ADVISORY BOARD	16A.90	ADVISORY BOARD
16A.91	ADVISORY BOARD	16A.91	ADVISORY BOARD
16A.92	ADVISORY BOARD	16A.92	ADVISORY BOARD
16A.93	ADVISORY BOARD	16A.93	ADVISORY BOARD
16A.94	ADVISORY BOARD	16A.94	ADVISORY BOARD
16A.95	ADVISORY BOARD	16A.95	ADVISORY BOARD
16A.96	ADVISORY BOARD	16A.96	ADVISORY BOARD
16A.97	ADVISORY BOARD	16A.97	ADVISORY BOARD
16A.98	ADVISORY BOARD	16A.98	ADVISORY BOARD
16A.99	ADVISORY BOARD	16A.99	ADVISORY BOARD
16A.100	ADVISORY BOARD	16A.100	ADVISORY BOARD



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## 16A.15 Subd. 3(a)

### Allotment and Encumbrance

A payment may not be made without prior obligation. An obligation may not be incurred against any fund, allotment, or appropriation unless the commissioner has certified a sufficient unencumbered balance or the accounting system shows sufficient allotment or encumbrance balance in the fund, allotment, or appropriation to meet it. The commissioner shall determine when the accounting system may be used to incur obligations without the commissioner's certification of a sufficient unencumbered balance. An expenditure or obligation authorized or incurred in violation of this chapter is invalid and ineligible for payment until made valid. A payment made in violation of this chapter is illegal. An employee authorizing or making the payment, or taking part in it, and a person receiving any part of the payment, are jointly and severally liable to the state for the amount paid or received. If an employee knowingly incurs an obligation or authorizes or makes an expenditure in violation of this chapter or takes part in the violation, the violation is just cause for the employee's removal by the appointing authority or by the governor if an appointing authority other than the governor fails to do so...



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## 16A.138

### Officials Not To Exceed Appropriation

When there has been an appropriation for any purpose it shall be unlawful for any state board or official to incur indebtedness on behalf of the board, the official, or the state in excess of the appropriation made for such purpose. It is hereby made unlawful for any state board or official to incur any indebtedness in behalf of the board, the official, or the state of any nature until after an appropriation therefor has been made by the legislature. Any official violating these provisions shall be guilty of a misdemeanor and the governor is hereby authorized and empowered to remove any such official from office.



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## What does all that Legal Jargon Mean?

Funds must be encumbered prior to making an obligation



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## Four Ways 16A is Violated

- No Encumbrance
- No Fully Signed Contract
- Unauthorized Pre-Payment (limited exceptions in 16A.065)
- Agree to Pay Attorneys' Fees, Penalties, Liquidated Damages, and Indemnification
  - All of these are promises to pay an unknown amount of money at an undetermined time in the future without an encumbrance to cover it.



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## Limited Exceptions for Prepayment

The State pays in arrears. Minn. Stat. § 16A.065 lists a number of exceptions:

- Software & software maintenance services
- IT hosting services
- Sole-source maintenance agreements not cost-effective to pay in arrears
- Boat slip rental & exhibit booth rental when required to guarantee availability
- Registration fees where advance payment is required or a discount is provided
- Newspaper, magazine & other subscription fees
- Costs where advance payment discount is provided or are customarily paid for in advance (e.g., hotels)
  - NOTE: THIS IS NOT A BROAD EXCEPTION



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## Opinion of the Attorney General's Office (AGO) Regarding Indemnification

Minn. Const. Art. XI §1 states that no money may be paid out of the treasury except pursuant to an appropriation.

Minn. Stat. § 16A.15, subd. 3 prohibits any incurrence of an obligation without an encumbrance against an appropriation.

Minn. Stat. § 16A.138 states that it is unlawful to incur any indebtedness of any nature on behalf of the state until an appropriation for it has been made by the legislature. An undertaking to indemnify a third party is by its nature not known and this is not an obligation to which a state agency can agree.



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## Opinion of the AGO Regarding Indemnification (2)

An indemnity is a promise of an indeterminate amount of money for an indeterminate reason at an undetermined time in the future.

As such, there is no appropriation or encumbrance available for such a contingency and not available for other purposes.

In addition, the State has not waived its tort immunity for damages exceeding the limits found in Minn. Stat. § 3.736, so it cannot promise to indemnify for costs and damages that exceed those statutory limits.



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## Risk of Violating 16A

### Personal

- 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.
- An official incurring indebtedness beyond an agency's appropriation shall be guilty of a misdemeanor.

### Minnesota State

- Reputational Risk
- Compliance Risk



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1 SECTIONS | P | StarTribune

### 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 Torres Star Tribune staff writers

NOVEMBER 8, 2019 — 12:20 AM



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1 SECTIONS | P | StarTribune

### 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 Torres Star Tribune staff writers

NOVEMBER 14, 2019 — 6:06 AM



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### Work started prior to an executed contract being in place?

What should I do?



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### Work started prior to an executed contract being in place?

What should I do?

- Provide written notice to Contractor to stop work until there is a valid contract specific to such services for the specific time frame.
- Find out all the details
  - Make a list of what services were provided, the dates for each of those services and the break-down of the dollar amounts of what is owed (the exact dates, and the exact dollar amounts).
- Contact OGC with the exact details to draft an amendment
- Complete 16A form



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### Work is continuing after the contract expired

What should I do?



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### Work is continuing after the contract expired

#### What should I do?

- Provide written notice to Contractor to stop work until there is a valid contract specific to such services for the specific time frame.
- Find out all the details
  - Make a list of what services were provided, the dates for each of those services and the break-down of the dollar amounts of what is owed (the exact dates, and the exact dollar amounts).
- Contact OGC with the exact details to draft a new contract
- Complete 16A form



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### Services were provided without a written contract and the vendor sends an invoice

#### What Should I do?



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### Services were provided without a written contract and the vendor sends an invoice

#### What Should I do?

- Contact OGC to get a contract in place ASAP
- Complete 16A form
- Additional training & supervision



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## This Afternoon: Drafting 101

- How to write clearer contracts, with a focus on how to improve the duties sections & payment terms
- How to avoid common ambiguities
- Interactive exercises



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## Acknowledgements

Thank you to Minnesota Department of Administration, Office of State Procurement – Rachel Dougherty & Perry Egertson – for generously sharing training materials.



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