

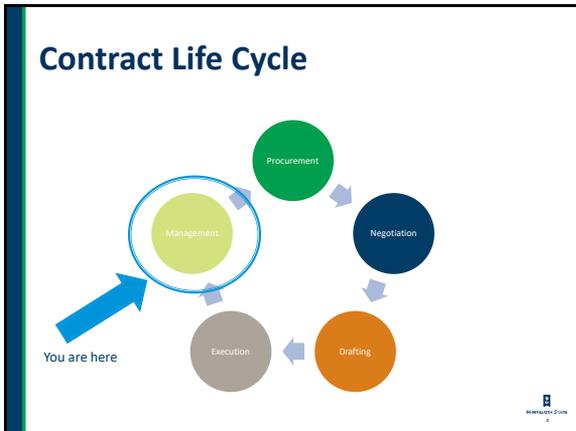


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Office of the General Counsel

So You've Signed a Contract: Now What?

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Contract Performance Topics

- Recordkeeping
- Managing Performance & Conflict Resolution
- Amendments
- Ending the Contract



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Performance Issues

- Missed Deadlines
- Poor Quality Work Product
- Unresponsive Contractor
- Understaffed Contractor
- Missing Deliverables
- Requiring Too Much Handholding/Attention
- Contractor Turnover
- Contractor's Regrets

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Points of Emphasis

You can use a contract to hold the contractor to task and solve performance problems.

As we have discussed during this training series, using standard terms, quality drafting, and skilled negotiation on the front end can prevent many performance issues before they occur.

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Recordkeeping

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Organizing Your Contract Files

Importance of Organization

- State law requires us to keep records “in such an arrangement and condition as to make them easily accessible for convenient use.”
- These issues may become especially acute in a “work from home” environment.
- Backup using OneDrive, not personal devices.
- Contract Managers should maintain well organized, complete, and up-to-date contract files with easily understood, searchable labels. This will comply with state law and help you:
 - Respond to data requests;
 - Manage the contractor’s day to day work; and
 - Navigate internal staff transitions.

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Organizing Electronic and Hard Files

Contract Managers should apply organization best practices to both electronic and hard copies of contract files.

- Contract Managers should maintain at least one copy of the “official” contract in an easily accessible manner.
 - The “official” copy might refer to a contract signed by hand, or a contract signed by DocuSign or another approved electronic signature method.
- Examples of legally valid signatures include “click-through” signatures.
- The complete contract record should include:
 - important correspondence such as emails
 - documentation of any approvals (e.g., Board of Trustees minutes)
 - all attachments, including sample order forms/work orders/SOWs

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Record Retention

Statewide Schedule

- Contracts, other than construction, and related documents such as certification, evaluation, violation (16A.15-16C.05) and other forms:
 - Six (6) fiscal years after the expiration or termination of the contract or the last payment date, whichever occurs last.
- Construction contracts and related documents such as certification, evaluation, violation (16A.15-16C.05) and other forms:
 - Current year plus eleven (11) fiscal years after end date or last payment date, whichever occurs last.
- Litigation holds may require longer retention periods.
- Retention schedules only apply to “official” records.

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Contract Data is Public Data

State law classifies most data related to contracts as public data.

- Exceptions include:
 - Trade Secrets
 - Examples of trade secrets include the Coca-Cola Recipe and some software source code.
 - We do not accept requests from contractors to define pricing data as trade secret data.
 - Security Data
 - The law defines security data as data that, if revealed, can jeopardize the safety of persons or property, including IT systems.
 - Contracts occasionally contain other non-public data.
 - During an RFP evaluation, some data may be not public until the contract is signed

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Data Requests

Who can receive them?

- You or any government employee can receive a data request.
- However, colleges, universities, and the system office have established processes for responding to data requests.

Who handles them?

- Colleges and Universities
 - Campus designated DPCOs. The General Counsel's Office helps campus DPCOs when needed.
 - Campus DPCO list: <https://www.minnstate.edu/system/ogc/dataprivacy/index.html>
- System Office
 - System Data Practices Compliance Official (DPCO)
 - Daniel McCabe, Assistant General Counsel
 - Contact OGC with any questions

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Recordkeeping Scenarios

- A software company responds to an RFP, claiming that its code, and all of its contract language are trade secrets. Which is a trade secret?
- A unsuccessful respondent to an RFP asks for the winning respondent's proposal. What can they receive? When can it be disclosed?
- A contract expired six years ago. You would like to destroy it, but you remember there being a lawsuit involving this contract. What should you do?
- You paid the wrong contractor. How did it happen? How do you prevent this? What do you do now?

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Performance Monitoring and Conflict Resolution

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Signs of Contractor Problems

Watch for common performance problems:

- Not delivering on contractual duties
- Missed deadlines
- Skipped invoices
- The contractor is not keeping contact information up to date

Watch for signs of contractor financial distress:

- Requests for advanced payment
- Press reports
- Payment processing irregularities
- Missed or irregular payments (income contracts)

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Informal Dispute Resolution

- First, review what the contract says about the disputed issue.
- Next, attempt to resolve the dispute informally.
 - The earlier the better
 - Don't pay for unsatisfactory work
 - Document contract problems and communicate with a problem contractor in writing.
 - Reminder – emails (internal and external) are public data.
- Bring OGC into the process if informal negotiation fails.
 - Contact OGC immediately if a contractor's attorney contacts you.

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Termination

- You should consider termination as a last resort.
- Minnesota State templates allow for termination by the college, university, or system office, with or without cause, with thirty days written notice to the contractor.
 - However, some contracts may contain different termination provisions. Read the contract carefully before you consider termination.
 - Non-template contract may contain different termination timeframes (e.g. 60 days instead of 30 days), "cure periods," and "termination windows."
- Contract terminations involve legal issues. Consult with the Office of the General Counsel before terminating a contract.

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Pre-Litigation

- We define "pre-litigation" as the period before one of the parties to the dispute files a lawsuit with a court.
 - Litigation holds during the pre-litigation time period prevent destruction of documents.
 - Many times, we resolve problems before either party files a formal lawsuit.

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Litigation Generally

- Litigation begins when one party to a dispute files a complaint with a court.
- Litigation doesn't always solve problems, and may create additional expense without a positive resolution.
 - Litigation may take years to resolve.
- Litigation is handled by the Attorney General's Office.

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Conflict Scenarios

How could you address the following contract problems?

- A musical artist fails to show up for a scheduled concert.
- A printing contractor can't get the shade of blue you want after five attempts.
- You read in the newspaper that one of your contractors has filed for bankruptcy.
- A software contractor has experienced a data breach involving your student data.

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Changing Contracts: Work Orders and Amendments

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Work Orders and Other Attachments

- Some contracts, such as "Master" contracts, allow for changes to duties via "work orders" or other attachments.
- Use only approved forms.
- These attachments should not change the underlying terms and conditions.

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Amendments in General

An amendment must:

- Amend an existing contract, not an expired or terminated one.
- Be a separate document.
- Reference the existing contract.
- Describe what sections of the existing contract are changing, and how.
- Describe what sections of the existing contract are not changing.
- Have signatures from both parties.

There are [amendment templates](#) available for your use.

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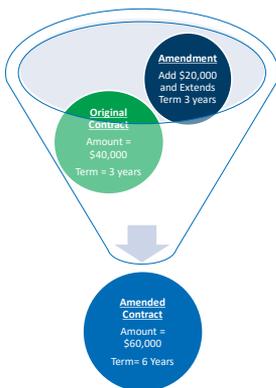
Amendments and Legal Review

- Term extensions, budgetary changes, and changes to duties do not require legal review, but may require additional approvals such as:
 - Term extensions beyond five (5) years requirement VC-CFO approval.
 - Budget increases beyond pre-approved financial thresholds may require VC-CFO or Board approval.
 - Give extra scrutiny to amendments that increase the price with no additional duties.
- Amendments to any other terms and conditions require legal sufficiency review.

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Amendment Scenarios

- You need to extend a three year contract another year. The contractor sends you a signed amendment three months after the contract expired. What should you do?
- You've amended a contract six times in three years. You still need additional work from the contractor to be done this year. Should you do another amendment?
- A contractor asks that you extend a contract beyond five years. How can you do this? When should you do this?

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Ending the Contract

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Keeping Track of the Contract End Date

- Don't let contracts expire or renew without your knowledge.
- Keep well organized files.
- Set reminders for the contracts you administer.
- Don't keep paying on an expired contract.

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Monitor and Evaluate Performance

- Minn. Stat. 16A – we only pay for satisfactory performance.
- If the contract allows for renewal, does it warrant renewal?
- How has the contractor performed?
- How has the relationship functioned?
- Has the contractor followed directions?
- Have you and the contractor resolved any disputes amicably?

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When to Renew, When to Re-Bid

- Plan ahead.
- Survey the market for new contractors and new concepts.
- If you “single-sourced” a contract, determine if you can still justify single-sourcing.
- Implement new system procedures for equitable contracting.
- If there are new duties or substantive changes, you should consider starting a new competitive process.
- If you determine that you do not need to change contractors, obtain any required VC-CFO or Board approvals before you renew the contract.

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End of Contract Scenarios

- You kept paying a contractor after a contract expired. How did that happen? What do you do? How do you prevent this situation from occurring in the future?
- A contractor has under-performed, but you feel stuck because it was designated as a single source contractor. What options are available to you now that the contract will soon expire?
- You have a good relationship with your contractor, and the contract will soon expire. Do you really have to do another RFP?

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