



November 20, 2020  
Office of General Counsel

## Form & Execution, Software Contracts and How You Can Help

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Amanda Bohnhoff, Legal Assistant

MINNESOTA STATE

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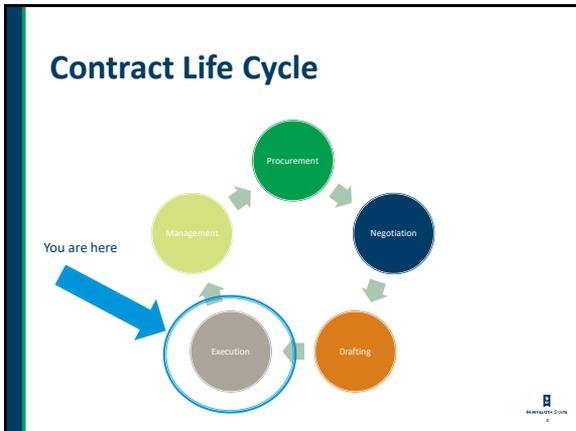
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## Form and Execution (F&E)

MINNESOTA STATE

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## What is it?

### **FORM: Ensuring the proper procedure was followed**

- Examples:
  - If not on Minnesota State Template, was there legal review?
  - Have funds been encumbered?

### **EXECUTION: Ensuring the document was properly signed**

- Examples:
  - Does the person who signed have authority to sign?
  - Is the signature dated?




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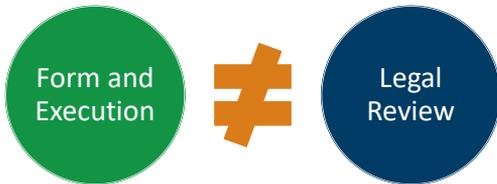
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## What Form and Execution is Not

It is not the same as legal review. Legal review happens during drafting (external and internal review stage in Marketplace) while form and execution is the final signature.

- At this last signature stage, the contract supervisor already made certain the contract was brought into conformity with board policies (procurement, delegation of authority, reviews by IT, legal, HR, insurance, etc.)




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## Who Can Sign Form and Execution?

### Those with a delegation of authority for System Office:

- Heidi Slegers
- Amanda Bohnhoff
- Gary Cunningham

### All campuses have at least one person

- Most often this is someone in the business office
- Know your campus contract process



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## Common Reasons F&E is Declined

- Incorrectly spelled or sequenced name of contractor
  - Example: "Minnesota Design Company Inc. The" should be "The Minnesota Design Company, Inc."
    - Watch for this in Marketplace and correct it when you see it
- Date typos
- Poor drafting
  - Missing sections
    - Phase I and III (no phase II?)
- Missing attachment(s)
- Incorrectly or not labeled attachments
- Inconsistent terminology
  - e.g. using both vendor and contractor
  - Incorrect party references



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## Common Reasons F&E is Declined (2)

- Compensation section drafting errors
  - Math errors, lack of compensation breakdown or prepayment language
  - e.g. Flat rate if \$45K for a one year term but another section of the contract has "monthly invoices"
    - Revision needed: insert breakdown to show how the \$45k was calculated/determined. Important to do for cancellation reasons
  - e.g. "Minnesota State will pay half of the total amount of this contract upon final signature"
    - Minnesota State cannot agree to prepayment except in very limited situations
- Missing Signature/Title/Date



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### Common Reasons F&E is Declined (3)

- Obvious lack of delegation to sign for amount
- Skipped review from Legal, Insurance, IT Security, Business Office, etc.
  - Remember that all reviews are to be completed prior to routing for signatures
  - Attachment of a vendor’s form requires legal review
- Mention of Confidential or Trade Secret



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### Amendments: Common Reasons F&E is Declined

- Missing or incorrect underline/strikethrough
  - e.g. ~~\$40,000.00~~ \$46,000.00 should be ~~\$40,000.00~~ \$46,000.00
- Inadvertent strikethrough of services already performed
  - IMPORTANT NOTE: amendments are NOT a checklist to show what was already provided. Strikethrough is a method to indicate what will not be provided/delivered.
- Striking language that wasn’t in original contract
  - The amendment should be a mirror of the contract
  - You may need to revise the amendment template to match your original contract



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### Amendments: Common Reasons F&E is Declined (2)

- Incorrect amendment number
  - You cannot have two amendments numbered 1 for the same contract
- Skipped procurement related action (approvals, RFP, etc.)
  - e.g. Amendment adds additional time and money putting the value of the contract over \$50K and the term over 5 years
- Contract already expired
  - Needs to be fully signed PRIOR TO the current expiration date
- Missing revisions
  - Affirmative Action and Equal Pay are added when applicable



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## We are Here to Help

Drafting amendments can be difficult. Please contact us if you need final drafting assistance or have questions.



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## Before You Route for Signature

- Ensure procurement process was followed
- Proofread and check for typos
- Double check math
- Make sure all required reviews (legal, insurance, IT security, etc.) have been done
- Ensure there is a breakdown of the payment/not a flat fee unless only making one (lump sum) payment
- Check that the person signing for Minnesota State has proper delegated authority to sign



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## Software Contracts



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## Software Contracts

### Also known as:

- Terms of Service
- Terms of Use
- Conditions of Use
- Subscription Agreement
- Master Subscription Agreements
- Click Through Agreements
- End User License Agreements (EULA)
- Etc.



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## Standard Contract Template?

### There is no Minnesota State standard contract template for software

- Do not fill out a Service/PT standard contract template for software
- Software contracts will always be vendor paper
  - This means that all software contracts will require legal review



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## The Review Process

### All software contracts go through at least two types of review:

- IT Security Review
- Legal Review
  - Office of General Counsel
  - Attorney General's Office



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## How to get your Software Contract Processed/Reviewed

1. Obtain all relevant documents that need review in Word format (e.g. Terms of Use, Privacy Policy, Order Form, etc.)
2. Fill out the software contract review questionnaire
  - If you put the questionnaire in marketplace be sure that it is not a contract attachment but a separate document
3. Email all relevant documents in Word format along with the completed software contract review questionnaire to Amanda Bohnhoff ([amanda.bohnhoff@minnstate.edu](mailto:amanda.bohnhoff@minnstate.edu))



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## Software Contract Review Questionnaire

**Purpose:** To inform the Office of General Counsel and System Office IT Security about the product/software you are purchasing and how you are going to use it.

**Where to locate it:**

<https://www.minnstate.edu/system/ogc/contracts.html>

**Who should fill it out:** The individual at the System Office/College/University who is requesting the product and/or has knowledge about the product. It should not be filled out by the vendor. We want to know how you will use the product which may be different than what the vendor created the product for.



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## Check Before You Send



Documents

- Do I have all relevant documents?
- Are all the documents in Word format?



Questionnaire

- Did I or someone else at system office/campus fill out the questionnaire?



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## Software Contracts Best Practices

### What does the software do?

- Help us understand it, so that we can anticipate the risks

### Do you have a contact at the Vendor?

- Will they negotiate? Don't assume that a provision suggested by a party can't be changed or modified

### Do they have a "government" version?

- Have they worked with other state agencies?
- Have you asked them for favorable terms acceptable to other government entities?

### Is another campus already using the vendor?

- Not automatically approved to use again
- Track down the contract for us (no central database or list)

### Get a Word version of everything that makes up the agreement



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## Software Contracts Best Practices (2)

### Read the Agreement

- Don't forward to OGC before reading
- College/university must review for essential elements, prohibited provisions, practicality and business decisions

### Do you have the entire agreement?

- SOWs
- Privacy policies
- EULAs or TOU
- Order Form
- Anything else linked to in the paper

### Understand the obligations the campus is assuming

- Can you hold up your end of the bargain?

### Consult with System Office IT Security

- Can add additional protections if we understand where there may be security concerns.



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## Help Us Help You

Working with the Office of General Counsel



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## You Can Help!

There are a lot of contracts that require legal review. The good news is that by doing a few simple things you can greatly help facilitate legal review of a contract.



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## The Biggest Way You Can Help...

**Time: Providing adequate time for legal review is the biggest way you can help.**

- If something is time sensitive please communicate your timeline to us. Remember, however, not everything can be an emergency.
- Marketplace does not clearly tell us your planned start date.

Contract Number	Contract Name	Assigned Approver	Submitted Date/Time
ATCC-2020-003773	KEN MOBERG CAREER & VOCATIONAL	Not Assigned	10/11/2019 2:04 PM
SHCC-2020-003847	Sonocent Audio Notetaker	Not Assigned	10/9/2019 3:40 PM
NHCC-2020-003943	Candace Whitaker FY20 10.16.19	Not Assigned	10/9/2019 9:23 AM
NCTC-2020-003747	Copy of Thrifty White Contract 2019	Not Assigned	10/2/2019 9:37 AM



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## How You Can Help

**Before submitting a contract for legal review**

- Read the contract and be aware of any legal or business concerns- communicate these to the OGC
- If the contractor will not sign our standard template contract be sure they are open to changes in their contract; Ask if they have a government version of their contract
- Ensure all data is accurately entered into contract
- Check spelling and grammar
- Determine if private data is involved
- Know who is involved with the contract and who can answer questions about the contract



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## How You Can Help (2)

### When submitting a contract for review

- Send all documents to legal counsel in a single email
- Submit document for review far in advance of deadline
- Voice any concerns you have about the contract
- Communicate your deadline(s)
- Submit the document(s) to be reviewed in Word format
  - In Marketplace submit via internal review round
- Provide contact information for person on campus who can answer questions and make decisions about the contract



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## Sending Emails to OGC

### Best Practices

- **Do:** use your campus name and vendor or product name in email subjects and document titles for easy sorting
- **Don't:** create new email threads to "check in"

SUBJECT	RECEIVED	SIZE
RE: Draft Contract	Tue 10/18/2016 3:02 PM	77 KB
FW: contract form	Tue 10/18/2016 2:47 PM	164 KB
FW: Draft Contract	Tue 10/18/2016 7:15 AM	235 KB
contract question	Mon 10/17/2016 4:48 PM	129 KB
FW: Checking in on status	Wed 10/12/2016 2:28 PM	112 KB
RE: question 1	Mon 10/10/2016 1:08 PM	27 KB
RE: contract form	Mon 10/10/2016 3:18 PM	59 KB
FW: Updated SoW	Mon 9/26/2016 2:19 PM	266 KB
RE: Agreements	Thu 9/15/2016 11:54 AM	99 KB
Contract Review	Thu 9/15/2016 9:40 AM	602 KB
Contract Question	Thu 9/8/2016 12:17 PM	97 KB



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## Common Red Flags Legal Review is Needed

- **Minnesota State will indemnify or hold harmless**
- **Jurisdiction outside of Minnesota**
  - Subject to the laws of another state or country
- **Minnesota State will pay attorney's fees**
- **Private Data**
  - e.g., Surveys often have student data
- **Installation of electrical, plumbing, etc.**
  - Prevailing Wage
- **Indefinite Termination Dates and Automatic Renewals**
- **Vendor's contract/PO is attached to Minnesota State contract**
- **Prepayment**
- **Dispute Resolution**
  - Arbitration, mediation
- **Cloud Services**
- **Insurance**
  - Risk Management
- **Modifications**
  - "As may be modified at Contractor's sole discretion"



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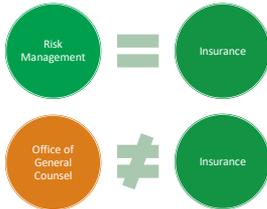
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## Remember...

Risk Management reviews and provides guidance on contract insurance provisions and questions.



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## Office of General Counsel Contract Contacts

- Gary Cunningham, General Counsel**  
 • [Gary.Cunningham@minnstate.edu](mailto:Gary.Cunningham@minnstate.edu), 651-201-1818
- Mary Al Balber, Assistant General Counsel**  
 • [MaryAl.Balber@minnstate.edu](mailto:MaryAl.Balber@minnstate.edu), 651-201-1752
- Sarah McGee, Assistant General Counsel**  
 • [Sarah.McGee@minnstate.edu](mailto:Sarah.McGee@minnstate.edu), 651-201-1410
- Daniel McCabe, Assistant General Counsel**  
 • [Daniel.McCabe@minnstate.edu](mailto:Daniel.McCabe@minnstate.edu), 651-201-1833
- Heidi Slegers, Legal Assistant**  
 • [Heidi.Slegers@minnstate.edu](mailto:Heidi.Slegers@minnstate.edu), 651-201-1755
- Amanda Bohnhoff, Legal Assistant**  
 • [Amanda.Bohnhoff@minnstate.edu](mailto:Amanda.Bohnhoff@minnstate.edu), 651-201-1676



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