

CONTRACT BASICS AND BEST PRACTICES

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<http://www.ogc.mnscu.edu/>

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Session Overview

CONTRACT BASICS

- When required
- MnSCU templates and highlighted terms
- Legal issues, review and modification
- Software Licenses

BEST PRACTICES for your contracts

- Sharing Best Practices and Contract Organizational Highlights:
Minnesota State University, Mankato Process

There will be a question and answer session at the end of the presentation.

Within a few business days, the recording link and PDF PowerPoint link will be posted on the OGC website: www.ogc.mnscu.edu.

MnSCU Board of Trustees Policy

5.14 Procurement and Contracts

Part 1. Authority. It is the policy of the Board of Trustees that contracts, including real property leases, shall not exceed five years, including renewals, unless otherwise provided for by law or approved by the chancellor or the chancellor's designee.

Procedure 5.14.2

Consultant, Professional or Technical Services

Contracts must be prepared on forms approved by the system office to assure that they include all state required contract language. Any modification of forms approved by the system office or the use of a non-system office form requires the review of the system legal counsel and approval of the vice chancellor-chief financial officer.

Delegation of Authority

- Board Policy 1A.2.2
<http://www.mnscu.edu/board/procedure/1a02p2.html>
- Process and forms on Finance website
<http://www.finance.mnscu.edu/about/delegationofauthority/index.html>
- **Must have delegated authority to sign contracts to legally bind college/university**

Access Approved Contract Templates Here!

(Your FIRST stop for a Contract -- Bookmark!)

MnSCU Finance Contracts website:

<http://www.finance.mnscu.edu/contracts-purchasing/contracts/index.html>

What Contracts/Agreements are on the Site: Hotel Contract* Professional/Technical* Prof./Tech. Amendment* Services Contract* Guest Lecturer* Joint Powers* Inter and Intra Agency Agreements* Various Lease Agreements* Maintenance Service Master Contract* Occupancy/Facility Use Agreements* Clinical Affiliation Agreements* Income and Customized Training* Payment Card Industry (PCI) Amendment Template...and more!!

MnSCU Board Policies and Contract and Procurement Procedures:

<http://www.mnscu.edu/board/policy/index.html>

- Board Policy 5.14 Procurement and Contracts
- Procedure 5.14.2 Consultant, Professional or Technical Services
- Procedure 5.14.5 Purchasing

FACILITIES & CONSTRUCTION RELATED CONTRACTS

- http://www.finance.mnscu.edu/facilities/design-construction/pm_emanual/index.html
- NOTE: Policies and procedures relating to facilities design and construction contracts are addressed in Board Policy 6.5, Capital Program Planning.
- Every campus has a construction program manager in the system office assigned to their campus to assist individual campus staff with policy, procedural, technical, and contract items related to design or construction.
- **Construction Program Managers names and contact information, list of assigned campuses can be found at:**
 - <http://www.finance.mnscu.edu/facilities/design-construction/responsibilities/index.html>

NOT A MnSCU FORM OR TEMPLATE?

- College/university must review for essential elements, prohibited provisions, practicality and business decisions;
- Don't assume that a provision suggested by a party can't be changed or modified;
- If other party wants to use its contract form, consult with MnSCU Office of General Counsel or Attorney General's Office for legal review and possible negotiation and recommended changes, or drafting addendum or amendment;
- Avoid "We'll sign yours, if you'll sign ours."

LEAD TIME

- **Plan accordingly – expect the best and plan for the worst.**
- **Use system templates and forms.**
- **Allow time for negotiation.**
- **Answer questions; WHO, WHAT, WHEN, WHERE, HOW MUCH.**
- **Not every contract can be an emergency.**

Necessity of Written Contract

- Clarity, completeness, and common understanding is essential;
- Supersedes previous oral discussions or “how we’ve always done it;”
- After contract signed, if wish to change it, conversations or e-mails to change the contract are not sufficient. Changes to contracts (amendments) must be in writing and signed by the parties;
- Contract must be signed **before** (!) the parties begin performing duties under the contract -
 - Good practice and state law requires
- Good contracts are preventative care:

Easier to work out issues before signing contract than to leave things unaddressed or “silent” and risk breaching the contract and/or litigation later.

Amendments, Addenda and Exhibits

When parties want to modify terms of existing contracts:

- A superseding Amendment or Addendum is drafted -
 - May modify, add, or supplement existing contract;
- Signature and date by authorized representatives of both parties needed for validity;
- Amendments/Addenda reference existing contract, and state how it is changed;

(cont.)

EXHIBITS

- Sometimes parties refer to Exhibits and incorporate them by reference so that the exhibit is part of the contract, e.g.:
 "Exhibit A, attached herein, and is incorporated by reference in its entirety as part of this Agreement."
- Frequently used to describe details of responsibilities or other matters too lengthy or complex for the contract.
- AVOID attaching Vendor's proposal or contract and incorporating it by reference. WHY: Often contains terms and language in conflict with agreed upon contract; includes other terms not negotiated; is not specific in detail ("happy language"); or includes terms that MnSCU is prohibited from agreeing to.

Consideration and Terms of Payment

- Compensation (Negotiate cost savings. It's okay.)
 - By deliverable or task, when possible.
 - Include rate of pay, how much for the services listed in the duties.
- Reimbursement of travel and subsistence expenses
 - Contractor's expenses need to be identified before the contract is written and included in the total cost.
 - Per diem defined by Commissioner's Plan.
- Terms of Payment
 - Use "every other week" or "twice a week" or "monthly" after each specific task is completed.
 - Agree to pay 30 days after invoice is received.
 - **Ensure we are not prepaying for services.**

PREPAYMENT

IF NOT LISTED BELOW, PREPAYMENT IS NOT ALLOWED.

MN Statutes 16A.065 Prepay Software, Subscriptions, U.S. Documents.

- Board Policy 5.14.5 Part 6 allows prepayment:
 - 1) Software or software maintenance contracts;
 - 2) Sole source maintenance agreements;
 - 3) Exhibit space;
 - 4) Subscription fees for newspapers or magazines;
 - 5) Registration fees where advance payment is required or there is a discount for advance payment;
 - 6) Payment for materials from the Library of Congress.

INDEMNIFICATION AND LIABILITY

- a. Be alert for sections in other parties' contracts headed: ***Hold Harmless; Indemnification; Limitations on Liability; or Liabilities.***

Indemnification: a provision in the contract in which one party agrees to pay damages or claims that the other party may be required to pay to another.

Hold Harmless: a type of indemnity provision or clause that would require one party to fully protect the other party from a claim asserted by another. This may also include payment of costs and/or attorneys fees.

- b. Colleges and universities prohibited by law from agreeing to indemnify the other party to a contract (reference: Minnesota Constitution article XI, section 1 and Minnesota Statutes section 16A.138). Minnesota Statutes prohibit insurance of an obligation without an encumbrance and the Minnesota Constitution provides that no money is to be paid out without an appropriation.

DATA PRACTICES ACT

- "The CONTRACTOR and MnSCU must comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to all data provided by MnSCU in accordance with this contract, and as it applies to all data, created, collected, received, stored, used, maintained, or disseminated by the CONTRACTOR in accordance with this contract. The civil remedies of Minnesota Statutes §13.08 apply to the release of the data referred to in this clause by either the CONTRACTOR or MnSCU.
- "In the event the CONTRACTOR receives a request to release the data referred to in this clause, the CONTRACTOR must immediately notify MnSCU. MnSCU will give the CONTRACTOR instructions concerning the release of the data to the requesting party before the data is released."
- -- **Don't delete or revise data practices language included in the template. If you have questions, please seek guidance from OGC or AG Office.**

CONFIDENTIALITY

Often, a CONTRACTOR will ask that MnSCU promise to maintain the confidentiality of CONTRACTOR's materials or even the terms of the contract itself.

- We can't do that unless the materials in question are classified as private, confidential or protected nonpublic under the Data Practices Act.
- "Trade Secret Information" may also be withheld from disclosure. It is defined in Minn. Stat. § 13.37, subd. 1 (b).

GOVERNING LAW AND VENUE

- MnSCU contracts provide that Minnesota law governs the contract and interpretation.

*If other party is outside Minnesota or is another state, tribal or federal entity and wants its law to apply, OGC and AG's Office can assist in negotiating or providing additional contract language.

- Venue for litigation of a contract (preferred):

"Venue for all legal proceedings arising out of this contract, or breach thereof, shall be in the state or federal court with competent jurisdiction in Ramsey County, Minnesota."

Encumbrance** Mn. Stat. 16A .15 Subd. 3

- Has work begun prior to contract's full execution?
That is not allowed, per Minnesota Statutes MS16.A.15.
- Process an MS16A.15 Form, found at:
[#1](http://www.finance.mnscu.edu/contracts-purchasing/contracts/forms/index.html)
- No signed contract without encumbrance.
- Payment made in violation of statute is illegal.
- Statute says: Employee authorizing payment is liable to the State for amount paid.
- Statute says: If an employee knowingly incurs an obligation or authorizes or makes an expenditure or payment in violation of statute, the violation is just cause for removal.

CONTRACT EXECUTION

- Ensure original signatures (in ink)
- Contractor signs first
- Each party needs delegated authority to enter into the contract. (Board Policy 1A.2.2)
- Follow your internal campus contract process for contract encumbrance, approvals and execution.
- **All required signatures from both parties for contract to be effective.**

Contracting Best Practices

- Use most current template directly from Finance website each time you draft to avoid use of outdated forms. **Never modify or omit required clauses without AGO or OGC review. Ensure no changes are made. If there are changes by the contractor, contact our office.**
- Understand your campus contract process for reviews, approval, and contract management and post contract evaluation.
- Follow the template instructions, proofread, check your math, and delete any instructions.
- **Never modify or omit required clauses without AGO or OGC review. Ensure no changes are made. If there are changes by the contractor, contact our office.**
- Don't agree to jurisdiction in another state or country without further legal review and approval.
- Be alert to attempts by the other party to change MnSCU contract template language to limit their liability to "negligence" or "willful negligence." Never modify or omit the required liability clause without AGO or OGC review.
- Don't agree to indemnify the other party or to a mutual indemnification clause.
- Colleges and universities are prohibited by law from agreeing to indemnify the **other** party to a contract (reference: Minnesota Constitution article XI, section 1 and Minnesota Statutes section 16A.138). Minnesota Statutes prohibit insurance of an obligation without an encumbrance and the Minnesota Constitution provides that no money is to be paid out without an appropriation.
- Avoid "we'll sign yours if you sign ours."

The Minnesota State Colleges and Universities Employee Code of Conduct

- Our Code is a compilation of various existing statutes and policies that govern employee conduct.
- Adopted as a system procedure
<http://www.mnscu.edu/board/procedure/1c0p1.html>
- Frequently Asked Questions are linked on the above website.
- Effective July 1, 2008.

WHY IS EMPLOYEE ETHICAL BEHAVIOR IMPORTANT?

- We are obligated to comply with law.
- Violations can result in
 - criminal penalties;
 - employment sanctions-including termination.

REQUEST FOR PROPOSAL TEMPLATE RESOURCES

MnSCU Request for Proposal Template

<http://www.finance.mnscu.edu/contracts-purchasing/contracts/forms/index.html>

Near bottom of Contracts page:

Additional links and documents

- Procurement dollar threshold table (.pdf) (52KB)
March 2010 – Office of General Counsel
- Request for Proposal Template(.pdf) (155 KB)
Updated: 2009

An RFP Includes:

- | | |
|--|---|
| ○ A description of the work; | ○ Insurance or bond requirements; |
| ○ Deliverables; | ○ Human Rights requirements; |
| ○ Timeline or deadlines for deliverables, tasks; | ○ Evaluation process or criteria for vendor's performance if awarded; |
| ○ Copyright or intellectual property ownership; | ○ Information to potential responders in neutral manner. |
| ○ Payment terms; | |

Significant Distinction Between Request for Bid (RFB) and Request for Proposal (RFP) Solicitation

RFB: solicitation describes the terms, conditions and specifications, and responses are **not** subject to negotiation.

RFP: solicitation in which project is described and not all actual, detailed requirements are set at time of solicitation, and responses **may be negotiated** with any vendor other than the one with lowest cost.

- **A PROPOSAL IS:** the Vendor's response to the RFP explaining how he/she plans to carry out and complete the project described in the RFP. The Vendor must address all terms and conditions in the RFP.

Data Practices Act: Applicable to RFP/RFB

- RFP/RFB data is subject to the Minnesota Government Data Practices Act, Minn. Stat. Sect. 13.591:
<https://www.revisor.mn.gov/statutes/?id=13.591>
- Generally, during the selection/evaluation process, vendor data is nonpublic, but much becomes public after that process is completed. Requests for RFP/RFB data from the public should be referred to your campus DPCO.
- Data submitted by vendors that meets the strict definition of "trade secret data" under Minn. Stat. Sect. 13.37, subd. 1 (b) may be withheld, but vendors must identify and we must independently verify that the criteria are met; otherwise the default rule of all data being public applies. Consult your campus DPCO for assistance.

MnSCU Notice to Vendors

Under no obligation to award a contract, complete the project, and reserves right to cancel the RFP if considered to be in its best interest:

This Request for Proposal (RFP) does not obligate the Minnesota State Colleges and Universities (MnSCU) system, its Board of Trustees or [INSERT NAME OF COLLEGE/UNIVERSITY/OFFICE OF THE CHANCELLOR] to award a contract or complete the proposed project and each reserves the right to cancel this RFP if it is considered to be in its best interest.

Notice--(No Mind Reading Required):

Proposals must be clear and concise. Proposals that are difficult to follow or that do not conform to the RFP format or binding specifications, may be rejected. Responding vendors must include the required information called for in this RFP. MnSCU reserves the right to reject a proposal if required information is not provided or is not organized as directed.

Notice (cont.)

Changes by MnSCU allowed, but need to be posted for all to see:

MnSCU also reserves the right to change the evaluation criteria or any other provision in this RFP by posting notice of the change(s) on [list name and address of website, i.e. the MnSCU Finance Division website, www.finance.mnscu.edu]. For this RFP, posting on the captioned website above constitutes written notification to each vendor. Vendors should check the site daily and are expected to review information in the site carefully before submitting a final proposal.

Additional RFP Response and General Contract Requirements

- Review and complete in full if applicable. These provisions may provide additional protection for your campus and MnSCU.
- Problem Resolution Process (optional and not to be confused with legal disputes)
- Affidavit of Non-Collusion
- Human Rights Requirements
- Preference to Targeted Group and Economically Disadvantaged Business and Individuals

(cont.)

Additional RFP Response and General Contract Requirements (cont.)

- Insurance Requirements
- State Audit
- Minnesota Government Data Practices Act
- Conflicts of Interest
- Organizational Conflicts of Interest
- Physical and Data Security – If your RFP involves payment or credit cards, then additional contract language must be added for compliance with Payment Card Industry (PCI) standards. Contact MnSCU OGC for additional PCI contract language.

Human Rights Requirements

For all contracts estimated to be in excess of \$100,000, all responding vendors are required to complete Exhibit B, the Human Rights Certification Information and Affirmative Action Data Page, and submit it with the response. All responding vendors shall comply with the applicable provisions of the Minnesota Affirmative Action law, Minnesota Statutes §363.A36. ***Failure to comply shall be grounds for rejection. (Contact OGC or AGO if questions of applicability or non-Minnesota vendor applicability.)***

Deviations and Exceptions

- Deviations from and exceptions to terms, conditions, specifications or the manner of this RFP shall be described fully on the vendor's letterhead stationery, signed and attached to the proposal submittal page(s) where relevant. (If applicable, attach the appropriate MnSCU contract template with your RFP for vendor to review prior to response submission.)
- In the absence of such statement, the vendor shall be deemed to have accepted all such terms, conditions, specifications and the manner of the RFP.
- A vendor's failure to raise an issue related to the terms, conditions, specifications or manner of this RFP prior to the proposal submission deadline in the manner described shall constitute a full and final waiver of that vendor's right to raise the issue later in any action or proceeding relating to this RFP.

Types of Software License Agreements

- **Written Agreements** -Signed by the Licensor and Licensee
- **Click Agreements** – Licensee must affirmatively agree to the license terms by clicking “Yes” on a pop-up on the Licensor’s website
- **Installment Agreements** – Licensee agrees to the EULA upon installing the software
- **Shrink-Wrap Agreements** – Licensee agrees to the EULA by opening the packaging of the software

What is an End User License Agreement (EULA)?

- A legal contract between you as the user (Licensee) and the owner (Licensor) of the software in which the Licensor grants the Licensee the right to use the software
- Spells out the terms and conditions for Licensee’s use of the software, including the Licensor’s right to terminate the software license agreement if the Licensee is in default of the license agreement
- Contains terms which restrict the Licensee’s use of the software (no reverse engineering, restricts copying of software except for backup)

Elements That Make a Click Agreement More Enforceable

- Provider Notice regarding terms
- Place User clicks on the "Accept" option at the end of all terms
- Require an affirmative act for User to convey assent and if User clicks on "Reject" the registration process terminates
- Record and maintain date and time of acceptance
- Allow user to exit the process at any time

State Statutes Relevant to Software License Agreements

- **Data Practices Act** - Minn. Stat. § 13.02, subd. 7 defines Government Data as data received by the State regardless of conditions of use
- **Trade Secret** – All data received from Licensor can only be protected from disclosure if it meets Trade Secret as defined by Minn. Stat. § 13.37, subd. 1(b) and Minn. Stat. § 325C.01, subd. 5
- **Prepayment** – Minn. Stat. § 16A.065 allows for the prepayment of software and software maintenance
- **Attorney General Review** - Minn. Stat. § 16B.483 require State agencies to seek review and comment by the Attorney General's Office prior to review (optional for MnSCU)

Incorporating Terms by Reference

- EULA provides link(s) to terms of the EULA posted on Licensor's website. The terms posted can provide links to other terms and policies which govern the EULA.
- Agreements are incorporated by reference. Beware of references to "Master Agreement," "Supplemental Agreement," "Customer Agreement," "Nondisclosure Agreement," "Agreement" that are incorporated into the EULA. These "Agreements" can be referenced anywhere in the EULA including the signature block of the EULA.
- References to agreements that are capitalized are referring to specific agreements that you are automatically agreeing.
- Request copies of the "Other Agreements" that are incorporated by reference into the EULA.

Minnesota State, Mankato Overall Highlights

- Coordination between Contracts and Purchasing/AP Staff is crucial:
 - Good communication allows Purchasing staff to work with Departments and Contract Staff to ensure contracts are created where applicable.
- Internal Contracts Webpage is source of information for faculty and staff.
 - <http://www.mnsu.edu/finadm/contracts/>
 - Sample document links on internal MSU site are actually linked to MnSCU site to ensure users use latest templates.
- Annual email to faculty/staff to remind them of contracts requirements and link to contracts webpage as resource

Minnesota State, Mankato Organizational Structure

- VP Finance and Admin Delegated Authority for Form and Execution
 - Very limited Exceptions (i.e. Library Subscriptions)
 - President signs all agreements > \$100,000
- Contracts Coordinator Reports to VP Finance and Admin.
 - Responsible for coordinating all Non-Service/Construction Contracts
- Service and Construction Contracts Coordinator Reports to Asst. VP for Facilities
 - Vast majority of these agreements are facility related.

Minnesota State, Mankato Processing Highlights

- Persons with Intermittent Contract Processing Rely on Contract Coordinator to Create Documents
 - They begin process using an online Contract Generation Form:
http://www.mnsu.edu/finadm/contracts/contract_form.pdf
 - Contract Coordinator uses data to create contract
- Persons/Depts. who generate large volumes of similar agreements are trained to create form to be reviewed by contract coordinator
 - Ex. Nursing Clinical Agreements, Student Teacher Agreements

RESOURCES

MnSCU Finance Contracts website:

<http://www.finance.mnscu.edu/contracts-purchasing/contracts/index.html>

MnSCU Board Policies and
Contract Procedures:

<http://www.mnscu.edu/board/policy/index.html>

OGC Webinars page (to access past
contracts-related Webinars):

<http://www.ogc.mnscu.edu/events/workshops.html>

Contract Contacts/Resources

System Office, Office of General Counsel:

- Mary Al Balber, Assistant General Counsel
maryal.balber@so.mnscu.edu, (651) 201-1752
- Heidi Slegers, Legal Assistant
heidi.slegers@so.mnscu.edu, (651) 201-1755

Attorney General's Office:

- Michele Owen, Assistant Attorney General
michele.owen@ag.state.mn.us, (651) 757-1322
- Patty Nolte, Paralegal
patty.nolte@ag.state.mn.us, (651) 757-1285

Assistance for RFP, Sole Source, Procurement & Tax:

- Mike Nordby, Campus Assistance Supervisor
michael.nordby@so.mnscu.edu, (612) 548-2059
- Steve Gednalski, System Director- Tax & Financial Services
steve.gednalski@so.mnscu.edu, (612) 548-2043

System Office, Real Estate:

- Betty Ewens, Real Estate Manager
betty.ewens@so.mnscu.edu, (651) 201-1911
- Greg Ewig, Director, Real Estate
gregory.ewig@so.mnscu.edu

System Office, Facilities, Program Managers:

- <http://www.finance.mnscu.edu/facilities/design-construction/responsibilities/index.html>

System Office, Intellectual Property:

- Gary Hunter, MnSCU System Director of Intellectual Property
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Contact Information

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Please take a few minutes to
 complete our poll!

How to Access Today's Materials

- Within a few business days, the recording link and PDF PowerPoint link will be posted on the OGC website:
www.ogc.mnscu.edu.
- Click Webinars in the left hand column.
- The links can be accessed in the Second Thursday schedule.