

# GENERAL ADVICE

## *from General Counsel*



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## FAQ's About Contract Approval and Signature Authority

### 1. What is a contract?

Every "deal" or agreement where each party commits to do something for the other is a contract. Most commonly, one party agrees to pay for goods or services and the other party commits to deliver those goods or services, but many contracts do not involve an exchange of monetary payment at all. For a contract involving NMSU to be enforceable, it must be in written form, but in the private sector context, verbal agreements are often enforceable as contracts. Contracts create legally enforceable obligations.

### 2. How is a Memorandum of Agreement (MOA), or Memorandum of Understanding (MOU), or Letter of Intent (LOI) different than a contract?

Generally, there is no difference. If the terms of the agreement or understanding include an exchange of commitments by the parties, then the document is a contract. If the parties do not want the document to create a contract, then they must be very careful to explicitly state that the document does not create any legally binding rights or obligations on either party.

### 3. How does the approval and signature authority process control legal and financial risk at NMSU?

Individuals who are not trained or educated on the meaning and consequences of contract terms are unable to identify or evaluate whether the risks posed by the contract are acceptable for NMSU. Through the formal approval process, we can insure that those with the most expertise on particular issues have an opportunity to negotiate to reduce and inform management of the often hidden contract risks of any given agreement. Executive management can then undertake a risk/reward analysis to decide whether the contract is appropriate for NMSU.

### 4. What kind of risks can be created in a contract that a typical NMSU employee might not recognize?

While it is impossible to create a comprehensive list, here are some examples that help illustrate the need for a review process:

- *Entertainment/concert contract provides that NMSU will provide sufficient security to ensure the safety of the artist.*

**Problem:** If a crazed fan is successful in attacking the artist, or any of many other adverse events beyond the control of NMSU were to occur, NMSU would be liable for a potentially unlimited amount of

damages, which might not be covered by our insurance, because we assumed this liability by contract. If this term is removed, or modified so that we commit only to exercise reasonable care for the safety of the artist, THEN, NMSU is protected by state law which grants us partial immunity from liability, and the State Risk Management Division (RMD) will provide coverage.

- *Contracts which place specific insurance requirements upon NMSU or require NMSU to name the other party as an additional insured.*

**Problem:** Again, such a term can override state law which ordinarily gives NMSU immunity from liability for amounts exceeding a statutory cap, and converts the liability into an uninsured risk. NMSU does not carry liability “insurance” but rather has “coverage” for tort liability allowed under the NM Tort Claims Act. Also, RMD will not issue a certificate naming an additional insured – so if the other party wants to back out of the deal at the last minute, they may be able to do so because NMSU breached the contract by not providing the promised certificate.

- *Contracts which include “hold harmless” or indemnification terms which provide that NMSU will indemnify the other party for any damage or liability caused by the acts of NMSU’s agents, employees, students or invitees.*

**Problem:** NMSU’s liability coverage does not extend to the acts of students or invitees. If this was in a facility rental, and an NMSU student set fire to the building, we can assume the student won’t have resources to pay – and NMSU may be liable for the cost to replace and will not have insurance to cover. Absent the indemnification agreement, NMSU would not be liable for the criminal acts of a student. Indemnification terms are always problematic, but sometimes unavoidable. Legal counsel evaluates each indemnification term to determine whether the indemnified risks are ones that NMSU would have irrespective of the indemnification, and whether they are risks we can afford to accept.

## 5. Aside from liability issues, what other kinds of legal concerns arise from contracts?

Well, again, it is impossible to create a comprehensive list, but here are some common situations:

- *Purchase of goods and services*

**Potential problems:** As a public entity, NMSU is subject to the New Mexico Procurement Code which imposes many complex regulations for different types of purchases. While there are many exemptions, in some instances we are required to get competing quotes, and in others we are required to put the purchase out for bids. Some procurement code violations are crimes, and all place NMSU at risk. Any contract that requires a payment by NMSU (other than hiring an employee), needs to be sent through the NMSU Purchasing Office so that their staff can determine compliance with the Code and other legal requirements. The Purchasing staff also has authority to determine which contracts require legal review.

- *Purchase of computer software*

**Potential Problems:** In addition to the Procurement Code issues, there are other concerns regarding software purchases that necessitate review by ICT. These include: (1) the software may be incompatible with other software systems on the NMSU servers; (2) NMSU may have already purchased a license making the software available at no cost or a lower cost; or (3) the software may not satisfy various data security regulations that apply to NMSU.

- *Data sharing terms*

**Potential Problems:** NMSU is governed by a wide variety of privacy laws that limit our ability to share data with outside entities. Any agreement under which NMSU agrees to provide or allow access to NMSU's information to a third party requires review by ICT's information security office, as well as general counsel, so that we can avoid prohibited disclosures.

- *Facility remodeling, modifications or improvements*

**Potential problems:** Again, in addition to the procurement code issues, any contract involving alternation of the physical plant at NMSU will raise a wide variety of other concerns and must be approved by Facilities and Services (FS). FS is expected to maintain current plans and records for all facilities, they coordinate fire code, disability and many other compliance concerns.

## **6. Who can sign contracts at NMSU?**

In order to ensure that the wide variety of concerns and risks created by contracts are properly addressed, signature authority is closely controlled at NMSU – as it is in virtually every well managed large organization. By law, all authority at NMSU initially rests with the Regents acting as the “body corporate” for NMSU. For most types of contracts – but not all – the Regents have delegated authority to the Chancellor. In turn, by using the “Signature Authority Table” the Chancellor has further delegated that authority to a limited number of other individuals at NMSU, mostly those in executive management. The table, as signed by the Chancellor, also requires that those given signature authority seek advance review from listed offices before signing. The signature authority table is linked from the UGC “Policy and Procedures” webpage. While the University General Counsel does not have authority to sign any contracts, the Chancellor has authorized the General Counsel to make decisions regarding proper signatories when the table does not provide a clear answer.

## **7. What happens if someone who does not have authority signs a contract?**

From a legal perspective, while unlikely, an individual who signs a contract without proper authority may be held personally liable. From an NMSU policy perspective, that individual can be disciplined or removed from an administrative post. On a few occasions, where the terms were particularly problematic, NMSU General Counsel has had to notify the other party that NMSU would not honor a contract signed by an employee without authority. We do this with great reluctance because it damages NMSU's reputation and could result in litigation over whether NMSU had proper signature controls in place.

## **8. What is a routing form and why do we need to use one when sending a contract for signature?**

Before signing, each authorized signatory is responsible for ensuring that all necessary reviews have been conducted, and that NMSU is in a position to fulfill the legal requirements contained in the contract. Routing forms help everyone involved in the process know where the contract needs to go next for review, to know who has already reviewed and what concerns they had, and provide the information needed by the signatory to make a decision about the contract.

Each signatory (typically Chief Procurement Officer, Senior Vice President for Administration and Finance, Provost or Chancellor) has their own routing form which includes boxes for signatures by the common reviewers for the types of contracts they typically sign. Routing Forms may be altered to fit a particular contract or situation.

### **Every routing form should include:**

- First, a signature block for the department head of the initiating unit. This signature is a commitment by that individual that they have reviewed the contract and that their unit is prepared to fulfill the requirements of the contract (including any necessary budget).
- Second, a signature block for the individual at the Dean or VP level for the unit. This signature ensures that these higher level administrators are aware of and support the activities of their subsidiary departments.
- If the contract involves a procurement, the routing sheet will send the item directly to Purchasing, and Purchasing will determine if any further reviews (like legal, ICT, FS, etc.) are required. If the contract is to be signed by some other signatory, then their routing form will indicate other necessary reviews.

## **9. What can I do to make sure that my contract is routed expeditiously?**

Those initiating a contract review and signature are often concerned about the amount of time that the routing process will take. There are a few things that the initiating department can do to make sure that the contract routing moves smoothly:

- The initiating department should prepare the routing form, and provide signatures of initiating department and next level supervisor (usually Dean or AVP). The routing form and attached contract can then be routed in hardcopy, or scanned and delivered by email to the next reviewer.
- If there is a short deadline, the initiating unit should highlight the deadline in the comment box on the routing form to alert subsequent reviewers.
- Ensure that every blank in the contract has been completed or is marked N/A. Legal will not approve any contract with open blank terms because these can later be completed in ways that were not agreed upon and it is difficult if not impossible to resolve the disputes that can result.
- Ensure that any attachments, exhibits, riders, addendum, or any other document referenced or made part of the agreement is included with the contract. Again, legal cannot approve any contract where we have reviewed only a part of the terms. These extraneous “add on” documents often raise some of the most serious legal concerns.
- Have a digital MS WORD version of the contract and attachments available upon request, in the event edits are required.



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**Procurement Services**  
**Signature Authorization & Routing Form**  
*for Contract Approval*

Date:
College/Major Unit:
Department:
Summary of Contract:
Term:

*Please Expedite and Forward to Next Approver.*

<b>Approved By:</b>	<b>Date of Approval</b>	<b>Comments:</b>
<b>Department Head – Unit Director</b> <i>Signature:</i>  _____  _____ <b>Printed Name</b>	Date Approved:  _____	By signing, the Department Head or Unit Director signifies that the unit is capable and willing to fulfill all obligations of the contract and has identified any necessary budget.
<b>Dean or Vice President</b> <i>Signature:</i>  _____  <b>Printed Name:</b>	Date Approved:  _____	
<b>Chief Procurement Officer or Designee</b>	Date Approved:  _____	

Additional reviews will be obtained as determined necessary by Procurement Services staff.