

Middlebury College Contract Management Policy

Overview

Many Middlebury College employees, in the course of their regular work for the institution, are faced with the need to negotiate and execute contracts which legally bind the College. This policy and contract management guide is intended to provide those employees with a framework for understanding the specifics of the contract creation, review, and acceptance process; the essential elements which should be incorporated into all contracts to which the College is a party; and the limits, constraints, authorities, and approvals required before a contract can be executed on behalf of Middlebury College.

Reason for Policy

Because all contracts create legally binding obligations, entering into a contract exposes College resources and College employees themselves to certain statutory and legal risks. To protect against this risk exposure, it is essential that departments or individual administrators intending to enter into a contract with outside parties follow established procedures with regard to responsibility and authority to execute contracts (including financial limits) as well as review procedures designed to ensure that proper contract requirements and approvals have been satisfied.

(A) Policy Statement

Contracts entered into on behalf of Middlebury College must be reviewed and approved by designated College personnel to ensure compliance with established College policy regarding contract language and stipulations. Contracts may only be executed by College designated signatories as specified in this policy.

The Performance of Work, Ordering of Goods, or Contracting of Services encompassed by a contract between Middlebury College and a third-party vendor should under no circumstances commence prior to the review and approval of a formal contract as set forth in this policy document.

(B) Definitions

Contract - A legally enforceable agreement, contract, lease, or license between two or more parties (*for the purpose of this policy, letters of intent and purchase orders, whether or not legally enforceable, should be treated as contracts*).

Included in this definition are:

- Contracts for the purchase (or the provision by the College) of goods and services (including purchase orders);
- Contracts for the purchase (or sale by the College) of real property;
- Contracts for the construction, renovation or maintenance of new or existing facilities;
- Contracts for the purchase (or sale by the College) of investments;

- Contracts to borrow funds (debt) or establish lines of credit;
- Contracts to establish annuity arrangements with donors;
- Contracts for the engagement of performers or entertainers;
- Contracts for the purchase (or sale by the College) of professional services;
- Contracts for the purchase or use (or sale by the College) of patents or intellectual property;
- Contracts between a governmental agency or private funding source and the College for external funding of research projects or other activities;
- Contracts/agreements for student workers with outside agencies to participate in volunteer activities or “service learning”;
- Contracts for the use of College resources or facilities such as athletic venues, dining facilities, or other owned College properties;
- Contracts to lease facilities for college use.
- Contracts or subcontracts with another educational institution to participate in funding for research (or to subcontract funded research)

Signatory Authority - The authority of specifically designated (groups of) employees/representatives to sign on behalf of the College according to the tiers of financial limits set forth by this Contract Policy.

Delegated Signatory Approval - The delegation of signatory authority to authorized representatives to execute contracts on behalf of a College department where the total contract amount is less than \$25,000.00. Signatory approval may be granted to employees by the terms of this Contract Policy or in letter form by the President or a Vice President of the College.

Sponsored Activities - All grant funding agreements should be signed by the Controller or a designated member of the Controller’s finance staff.

(C) Policy: Contract Requirements, Mandatory Clauses, and Contract Exclusions

Insurance – The College requires certain minimum levels of insurance coverage in each of several areas for any parties contracting with Middlebury College and contracting parties should attest to such coverage within the language of any contract, in addition to providing requisite certificates under Middlebury insurance requirements (see Insurance attachment):

- General Liability including Products and Completed Operations: Minimum \$1,000,000.00
- Automobile Liability: Minimum \$1,000,000 Combined Single Limit (if operating vehicles or driving on Middlebury campus or Middlebury-owned or rented property.
- Workers Compensation: required for all parties performing work on College-owned or rented property.

Insurance amounts required may be higher for architects and contractors or others on major projects whose value exceeds \$ 5,000,000.00 and the College may further require that umbrella liability coverage be in place and acknowledged within contract language.

Note: The College itself may be required to provide general liability insurance when using a third party's real estate or equipment, to insure art work or equipment we are renting or leasing, or to insure vehicles we are renting. Where such insurance is required of Middlebury College by a contract, the initiating employee should be in contact with the Assistant Treasurer/Director of Business Services for guidance and documentation before executing any contract on behalf of the College.

Indemnification Clause - Any contracts executed on behalf of Middlebury College should include an indemnification clause intended to protect the College against negligent acts by the contracting third party. Such clause should contain the following language:

[Contracting Party] agrees to defend, indemnify, and hold harmless Middlebury College, its respective affiliates, contractors, officers, directors, trustee, employees and agents from and against all claims, liabilities, damages, and expenses, including attorney's and other professional's fees, arising out of or related to the intentional or negligent acts or omissions of [Contracting Party], its affiliates, contractors, officers, directors, trustees, employees or agents.

Independent Contractor Clause – Any contracts executed on behalf of Middlebury College should include an independent contractor clause to ensure against the contracting party alleging employment status with the College. Such clause should contain the following language:

Neither [Contracting Party], nor any person assisting [Contracting Party] in its obligations under this agreement, shall be deemed to be an employee of Middlebury College. Furthermore, the arrangements contemplated by this agreement shall not be deemed to constitute a partnership or joint venture between [Contracting Party] and Middlebury College. Neither [Contracting Party], nor any other person assisting [Contracting Party], shall be covered by an employee benefit program maintained by Middlebury College including, but not limited to, health insurance and worker's compensation benefits.

Identification of Middlebury College - The College shall be identified as **Middlebury College** in all contracts and agreements. The **official address** for the College shall be **Office of the VP for Administration & Treasurer, 84 South Service Road, Middlebury College, Middlebury, Vermont 05753.** Contracts executed on behalf of the College should specify a **primary contact person** for all subscribing parties as well as phone and fax numbers for such contact persons.

Legal Counsel Review - If a prospective contract/agreement includes provisions:

- that pose substantial monetary , legal, or physical risks to the College;
- that contain non-standard clauses with which the College representative is not familiar or comfortable;
- that touch upon highly technical conditions, scope of work, or specific guarantees of performance

the Office of Business Services should be contacted to ascertain if outside counsel should be consulted prior to execution of the contract.

Contact with outside counsel, for the purpose of contract review, should only be initiated through the Office of Business Services.

Entire Agreement Clause - The College requires that contracts include an entire agreement clause that clearly states that the written contract constitutes the whole agreement and that no verbal or side agreements will be acceptable or enforceable.

Force Majeure Clause - Contracts should contain a “force majeure” clause that addresses delay in performance or inability to perform caused by forces beyond the parties control (war, acts of god, natural disasters, etc.).

Governing Law Clause - The College requires that contracts specify that all contract provisions are governed by the laws of the State of Vermont.

Termination in Event of Default Clause - The College requires that contracts incorporate a “termination in event of default” clause. Such clause should define the events of a default clearly and should apply equally to both parties. Included in such events would be unsatisfactory performance, non-payment, unexpected change in contract terms, and any others as applicable to a specific contract. Such clause should also incorporate a provision for written notification of default to the defaulting party, including exact address and method of communication acceptable for such notice of default. Additionally, such clause should contain provision(s) for remedy of default, specifying acceptable corrective action and time allowed for completion of such corrective action.

Mandatory Clause Exclusions: The College **will not** execute contracts which contain the following clauses or limitations:

- Automatic Renewal – No contract should include an automatic renewal clause
- Single Indemnification Clause (benefiting third party only) – The College does not allow single indemnification clauses that only protect the outside contracting party
- Limitation of Liability – No contract should contain language allowing the outside contracting party to limit their potential liability.
- Serving of alcohol – Except for approved Caterers, no contract should specify the provision of alcoholic beverages.

Payments Under a Contract: Where possible, contract language should specify that payment of College obligations under the contract will be made by College Procurement Card. If the contracting party cannot (or will not) accept VISA card payment, then payment will be made by College check under terms specified in the contract, preferably with early payment discount options.

When the College agrees to reimburse expenses of the contracting party for such items as meals, mileage, hotels, airfares, copies and documents, third party consultants, etc., contract language should specify that such reimbursements will **only be made** upon presentation of full original receipts for such expenses by the primary contracting party.

Specific Performance: Wherever possible, contract language should carefully specify the obligations of the contracting party to perform a service for Middlebury College including defined outcomes such as operation standards for equipment or objective measures of workmanship on construction as well as absolute timeframes for completion of work. Where contracts involve the delivery of products or systems, specifications related to such products or systems should be carefully and completely defined and provisions for testing and standards for formal acceptance should be embedded in the contract language.

(D) Policy: Signature Authority and Review Process

Three levels of signature authority and approval govern the execution of contracts on behalf of Middlebury College. The signature of one of the following officers and administrators is required on any contract binding the College according to the schedule of monetary value below:

- (1) Contracts with value **in excess of \$100,000*** : President; Vice President for Administration & Treasurer; Executive Vice-President and Provost.
- (2) Contracts with value **in excess of \$10,000 (\$25,000 for Facilities Services) but less than \$100,000*** : Asst. Treasurer/Director of Business Services ; Vice Presidents; Facilities Management Project Managers .
- (3) Contracts with **value up to \$10,000 (\$25,000 for Facilities Services):** Directors, Managers and Deans with signatory approval delegated by a Senior Administrator to whom they report.

**Exception: Currency forward contracts for funding of Middlebury Schools Abroad in amounts up to \$500,000 per month for periods up to three months in the future and #6 fuel oil contracts for future delivery in amounts up to \$500,000 per month for delivery up to three months in the future may be committed by the Assistant Director for Business Services or by the Controller. All such contract commitments must be executed in final contract form or authorized for final settlement by the President, VP for Administration and Treasurer, or the Executive Vice-President and Provost*

(E) Policy & Practice: Contracts Prepared and Submitted by Vendors and Performers/Contracts Not Easily Changed

Administrators charged with managing contract activity for Middlebury College will frequently find themselves faced with pre-formatted contracts prepared by vendors, their attorneys, and/or their agents and presented to Middlebury as the terms under which they (the vendor) will perform or deliver goods and services. Managing this aspect of the contract relationship for the College is as important as negotiating a brand-new agreement with a vendor and poses the additional difficulty of securing the interest of the College in the context of another party's contract language which often overtly favors the outside contracting party.

In order to guarantee the College interest is well served and that risk to the College is adequately managed within the context of a vendor-prepared contract, an administrator should follow these steps:

- Read the contract fully and carefully and understand the College's risks and the contracting party's obligations under the contract.
- Consider the terms of the contract in the context of the College requirements outlined above:
 - Does the contract provide for adequate insurance coverage by the vendor?
 - Does the contract provide for indemnification of the parties – if so, is the indemnification only to the vendor?
 - Does the contract contain an 'Entire Agreement' clause?
 - Does the contract provide (unacceptable) Limitation of Liability for the outside contracting party?
 - Does the contract conform to the other provisions outlined in **'contract policy'** above?

Where vendor-submitted contracts contain language unduly favoring the outside contracting party, it is important to remember that such contracts can and should be amended by negotiation and by adding clauses to secure College interests which satisfy the contract policy requirements noted above or, alternatively, striking out unacceptable clauses which pose excessive risk to the College.

In such cases, an administrator acting as the initiator or principal contact for such a proposed contract should seek the review and guidance of the Office of Business Services. After such review, an amended contract may be executed by Middlebury and returned to the vendor for final acceptance and signature/initialing of College initiated changes/clauses. This process is most likely to be successful with smaller and mid-sized local and regional vendors.

There also may be vendor prepared agreements, especially those from very large corporate entities like IBM, Microsoft, Oracle, Siemens, Sunguard, etc. related to site licenses, service agreements, software packages and on-line software services, and/or major construction where vendors will not be flexible as to the alteration of the contractual terms offered to Middlebury. In these cases, the review of the contract by the Office of Business Services, by the Office of the VP for Administration and Treasurer, and even by outside counsel prior to execution *is essential* to assure that College interests are not unduly compromised by the terms of the contract.

(F) Contract Checklist (for initiators and reviewers)

Before embarking on a contract finalization process have you:

- Reviewed **Middlebury College Procurement Policy**?
- Reviewed **Contract Management Policy**?
- Thoroughly read and understood the contract?
- Tried to identify (and quantify) the risks inherent in the contract?
- Determined the approvals required to complete the contract process?

Check List:

1. Does my level of signatory authority or approval allow me to execute this contract? Do I need to obtain the signature approval of a supervisor or senior manager to finalize this agreement?
2. Has the budget for expenses associated with this contract been approved?
3. Will delivery of goods or services under this contract fall in the same budget year as the funding?
4. Do the vendors under this contract have a history with the College; if not, have the vendors been reviewed and approved by the Office of Business Services?
5. Do other departments need to be involved in the review or implementation of this contract?
6. Does the contract contain special requirements or unique clauses? If so, have they been reviewed by the next levels of management? What special risks do they pose to the College?
7. Are the performance standards for services provided or goods/systems delivered clearly set forth in the contract?

8. Will this contract give rise to annual price increases, ancillary contracts and/or recurring costs to the College such as maintenance agreements, contract renewals, or requirements for additional equipment? If so, have such additional/ongoing costs been reviewed by the budget office and funded?
9. If the contract is the result of a Request for Quotation or a Request for Bid, is that documentation a part of the contract or attached as an exhibit?

(G) Other Considerations

As noted preciously in this document, many contracts executed by College personnel in the course of supporting the College mission originate not with Middlebury College but with the vendor or contractor providing a good or service to the College.

It is important to emphasize that the use of common sense, careful practices, and thorough communications should be the guiding principles for personnel whose College responsibilities extend to negotiating, approving, and executing contracts on behalf of Middlebury. All of the aspects of good contract management defined elsewhere in this policy document will not necessarily apply collectively in each and every situation and to each and every contract.

For example, software licenses and usage contracts as well as contracts for access to online resources or databases do not involve vendor personnel on College property and may render considerations of insurance coverage irrelevant. The complete absence of indemnification clauses for both parties might well not constitute a fatal flaw in contract language structure. Liability limitations may well be excluded if the monetary risk inherent in the contract is effectively inconsequential. Such a list of caveats and nuanced considerations around contract requirements could be extensive.

What is of paramount importance in the execution of contracts is that the standards of review and approval outlined here be sensibly adhered to in order to assure that appropriate oversight has been exercised before the College is legally bound. Additionally, it is crucial that the monetary thresholds for approval authority be followed in order to meet the requirements of our outside audit firms for prudent administration and strong management controls.

Office of: Patrick J. Norton
Vice President for Administration and Treasurer