

GENERAL ADVICE FROM GENERAL COUNSEL

Issue: February 10, 2015



ESSENTIAL CONTRACT FORMALITIES

1. **Proper Legal Name:** All contracts must be entered into by an individual or a legally recognized entity. The proper name should be used to identify the parties at the beginning of the contract, and then again at or above the signature line. For New Mexico State University, this means:

The Board of Regents of New Mexico State University (*preferred*) -or

New Mexico State University (*accepted*)

Not: New Mexico State or NMSU

IMPORTANT: Programs and units of NMSU are not legally recognized and cannot enter into contracts in their own name – but see point 4 below.

2. **Short Name:** For convenience, the proper legal name can be shortened after the initial correct usage through a parenthetical:

(NMSU) (*preferred*) - alternatively, other logical short forms may be used, for example: **(“NMSU”)** or **(“University”)**.

3. **Entity Type:** Contracts, in the introductory paragraph, often include some explanatory verbiage establishing the legal status of the parties to enter in to the contract. This language is not essential but can add clarity for the other party. Example:

This contract is entered into by and between The Board of Regents of New Mexico State University (NMSU), a state institution of higher education established under Section 11 of Article XII of the constitution of the State of New Mexico, and [second party].

NOTE: New Mexico State University is not a non-profit organization or a “501.c.3”, nor should it be described as a state agency.

With respect to **the other party to the contract**, if it purports to be a corporation or limited liability company, the introductory paragraph should indicate the type of entity and the state in which it was organized, and due diligence requires checking to see if the corporation was duly formed and authorized in that state, and remains in good standing. If the entity is organized out of state, it may also be required to register as a foreign corporation doing business in New Mexico, and it is good practice to verify that as well. Checking is usually relatively simple because most states **make corporate and entity records available online, typically through the Secretary of State’s office.**

4. **Identification of Responsible Sub-Units:** While contract law requires that contracts be made by legally recognized entities, it is often desirable to identify the responsible sub-unit within NMSU that will be responsible for the contract performance. In such cases, the introductory language can include a reference to the sub-unit. Example:

This contract is entered into by and between The Board of Regents of New Mexico State University (NMSU), a state institution of higher education established under Section 11 of Article XII of the constitution of the State of New Mexico, on behalf of its Athletics Department, and [second party].

Or if a shorter less formal version is preferred:

This contract is entered into by and between New Mexico State University (NMSU), on behalf of its Athletics Department, and [second party].

5. **Signatures:** The contract must be signed by the parties. Except in the case of parties who are individuals who can sign for themselves, the signature should be by a legally authorized representative. In the case of a corporation, evidence of that authority is typically found in either the corporate by laws or in a corporate resolution. **Only the Board of Regents or their designees can sign for NMSU.** The authorized Board of Regents designees are set forth in the Signature Authority Table which is approved by resolution of the NMSU Board of Regents. The signature block should clearly identify that the designee is signing for NMSU and in what capacity. For example:

The Board of Regents of New Mexico State University

By _____ Date: _____
Angela Throneberry, Senior VP for Administration and Finance

Signatures do matter. Individuals who sign contracts without proper authorization may be held personally liable on the contract, and the intended parties to the contract may not be legally bound by it. Contracts often include a warranty stating that the person signing warrants he/she has authority to do so. Due diligence may include examination of the documentary evidence of authority from the other party. (Banks routinely do this whenever anyone seeks to open an account in an entity name.)

6. **Term:** The term (period of effectiveness) for some types of contracts made by state entities is limited by statute (NMSA Section 13-1-150). Generally, professional services contracts (for any amount) may not exceed 4 years. Contracts for tangible personal property, construction or services under \$25,000 may not exceed 4 years, while those for over \$25,000 may not exceed 8 years. Such term limitations include all extensions and renewals. Within these restrictions, all contracts should have a specific date on or by which performance is to occur, or a specific term after which the contract obligations expire or are terminated. No contract should be completely open ended, however, it is acceptable to indicate that a contract continues in effect until terminated by one of the parties giving notice to the other.
7. **Effective Date:** Contracts are presumed to be effective once signed by authorized representatives of both parties, and so the statement of an effective date is generally unnecessary and can lead to ambiguity. Typically, a contract remain in effective until the parties have fully performed or the contract is terminated according to its own terms. Where an “effective date” is stated, the contract should clearly indicate the significance of the “effective date”. For example, do parties have the right to rescind the contract before the effective date?
8. **Public Entity Limitations:** In addition to the term limitations described in paragraph 6 above, public entities, such as NMSU, are subject to a number of other important restrictions on their ability to contract. Terms that typically raise legal concerns for public entities include: insurance requirements, indemnification, exclusivity, confidentiality, automatic renewals or extensions, and donations or gifts. These terms will be the subject of a future General Advice statement. All public contracts must be in compliance with the New Mexico Procurement Code. Direct purchase orders are allowed for contracts or purchases up to \$20,000; all others must be approved by the NMSU Purchasing Department.