

July 2008 Business Counsel Update

Contract Review and Approval Procedures

One of the most important elements of the control environment is any business is the establishment and use of formal policies and procedures for reviewing and approving contractual arrangements with third parties that will create legal rights and obligations for the company. Ideally some sort of contract review and signature authority policy will be put in place very early in the company's existence since contracts of various types will be needed from the time that the company first opens its doors. Many times all of the contracts under consideration during the start-up phase will be discussed by all of the founders because it is easy to do so in light of their close proximity and the absence of layers of management personnel when the company is still small. The problems begin to arise, however, when founders and other senior managers start to assume more responsibility for particular areas of the business and the input from other founders and managers becomes more limited due to the lack of time, problems with communication and the fact that the other persons are themselves preoccupied with their own projects. While the senior managers in a particular functional or business area presumably have the most skill and experience with respect to contracts that they initiate it is nonetheless important to have some independent review of the business case for the contract and the potential risks to the company of assuming the legal and operational obligations included in the contract. For example, all functional areas that might be involved in fulfilling the company's duties under the contract should be consulted in advance to verify that they will be able to perform as anticipated. Contract review is also necessary to avoid conflicts with commitments that someone else in the company may have already made with other parties. Finally, contract review is needed to be sure that independent parties are reviewing the terms of each proposed transaction and that persons initiating a contract do not have some "vested interest" in the selection and use of the contract partner.

Procedures for contract review and signature authority should accomplish at least two main purposes—establish the process for the review and approval of proposed contracts by various departments (e.g., legal, finance and other departments involved in the fulfillment of obligations created under the contract) and identifying which persons within the company have the authority to approved specified transactions or activities and thus execute a proposed contract on behalf of the company. Ideally the contract review process will also provide an opportunity for evaluating the proposed contract in the context of the company's overall business strategy. This can and should occur through the creation of a business case for each proposed contractual arrangement (or at least those contracts that are "material" in light of the company's business) that describes the key rewards and risks associated with the contract, explains why the contract is important to the company's business plan, establishes performance milestones, and suggests procedures for monitoring performance under the contract after it is executed. The business case process forces the initiating party to think through each proposed contract and become an informed internal champion for the relationship and also serves as an important information and communication tool for senior management to the extent that

they are being kept in the loop as to the specific activities and tactics that are being used to further the company strategy that has been established at the top of the hierarchy.

Creating signature authority, including delegation of authority downward in the organizational structure of the company, is particularly important as the business grows and the company adds management layers and the number of employees multiplies. When the company is small almost all new contracts should be signed only by the president or chief executive officer of the company after review by the senior managers responsible for the departments that will be involved in fulfilling the company's obligations under the contract. As time goes by, however, authority to sign contracts can and should be formally delegated by the president and chief executive officer to competent officers and managers within the company subject to specific conditions and limitations defined in the delegation instructions. In all cases, for example, authority to sign contracts should be conditioned upon creation of a written record that all steps in the review process have been completed (e.g., review and approval by other interested departments). Delegation of authority is generally limited to contracts that do not create a financial exposure for the company that exceeds specified amounts. For example, a department manager may be allowed to commit the company to provide cash or services up to \$50,000; however, any commitment above that amount would need to be reviewed and executed by someone more senior in the hierarchy. Business relationships with third parties based on "standard contracts" that have been drafted by the company's legal department may also get "fast track" treatment and not require separate review by the legal department. Managers may also be given more leeway to enter contracts that have been previously anticipated in the business plan and budget for their particular department provided that the managers have complied with other requirements with respect to solicitation of bids and proposals for contracting.

Policies and procedures for review and execution of contracts are generally prepared and administered by and through the legal department, although it is not strictly necessary that lawyers always be involved in contract administration, and there is always a possibility that the attorneys involved will forget that the concept of a "contract" is not all that well known to the parties subject to the policies and procedures—the officers, managers and other employees of the company. Accordingly, the policy itself, as well as training sessions presented to introduce the policy and educate everyone how it should be used, must include a description of what a "contract" is and how it can be created. A short primer on capacity to contract, consideration and lawful subject matter can be presented; however, the most important thing to emphasize to non-lawyers is that representatives of the company that have "apparent authority" in the eyes of outsiders can bind the company to legally enforceable duties and obligations even though they have not complied with the internal procedures for review and approval of a contractual obligation. For example, if a senior sales manager with the title of "branch manager" or "regional vice president" signs and delivers a document to a customer that describes the terms upon which certain goods will be sold and delivered to the customer the recipient of the document would be entitled as a matter of law to assume that it is in possession of a legally binding contract even if the sales manager failed to comply with the company's own internal contract review and signature authority procedures. The bottom line is that

officers, managers and other employees need to exercise extreme caution not to take any action that might create a reasonable expectation in the mind of another party that the company is willing to be legally bound to perform specified obligations.

When preparing the policy it is important to identify the contractual obligations commonly encountered in the course of the regular business activities of the company and consider what specific steps should be taken to review and approve those types of contracts. This generally means thinking about the best way to deal with all or most of the following general categories of contracts:

- Agreements for the purchase or sale of goods;
- Agreements to provide or obtain services;
- Nondisclosure agreements;
- Leases of personal property, including equipment, furniture and vehicles;
- Leases, deeds, and other conveyances affecting interests in real property;
- Promissory notes and other instruments relating to the payment of money, including security agreements and guarantees;
- Liability waivers and releases;
- Settlements of disputes;
- Software licenses;
- Maintenance agreements;
- Memoranda or letters of understanding or cooperation;
- Contracts with facilities that require a written agreement; and
- Employment contracts.

As companies get larger and the scope of possible contracts expands they opt for a fairly comprehensive form of contract review and signature authority policy. Such a policy might cover the following areas:

- Overview of the contracting procedures;
- Responsibilities of parties initiating contracts;
- Requirements regarding formal bidding procedures (i.e., requests for proposals);
- Subject matter and funding approvals;
- Legal department approval;
- Risk management issues including use of insurance and indemnification provisions;
- Time frames for review and approval process;
- Contracting authority;
- Board of directors' actions and documents evidencing board actions;
- Processing of funding requirements for contracts;
- Retention of contracts and recordkeeping requirements; and
- Contract administration and performance review.

Companies and non-profit organizations may choose from a variety of other alternatives when creating and implementing policies and procedures relating to contract review. For example, a university or hospital may emphasize the use of standardized contracts and create escalating approval requirements based on the dollar amount of the commitment

created by a particular contract. <See New Specialty Form 20 in Compliance Programs.> While standardized contracts prepared by the university or hospital legal and business affairs departments are strongly recommended, non-standardized contracts (i.e., contracts prepared and submitted by potential vendors and other business partners) may be used if they are amended to include certain “required” contract provisions and have been thoroughly reviewed and analyzed using a detailed contract review checklist. <See New Specialty Form 21 in Compliance Programs.>

For-profit companies may use a policy that focuses on providing readers with a clear flow of the steps that need to be taken in order to complete the appropriate level of review for a proposed contract and the procedures for having the contract executed and delivered for safekeeping as required under the terms of the company’s records retention policies and procedures. <See New Specialty Form 22 in Compliance Programs.> In general, any person needing a contract should first determine who has the authority to sign the particular type of contract by referring to the then-current delegation of authority promulgated by the president and chief executive officer of the company. Once the person needing a contract has determined who has the authority to sign the particular type of contract a determination should be made as to whether the signing party has his or her own requirements with respect to contracts that are to be entered into by a specific department or unit of the company. These requirements would be in addition to requirements that are established in any delegation of authority and would typically be designed to ensure that a contract fulfills the goals and objectives of the department or unit, that funds are available and have been properly encumbered, and that other resources necessary for the completion of the contract will be available. Among other things, a determination should be made as to whether or not the subject matter of the contract requires completion of any company requirements relating to use of a formal bidding process. In the event that bidding is required, the person needing a contract should work with all the departments involved in implementation of the proposed to contract to develop a comprehensive request-for-proposal.

The person needing a contract and the person who has the authority to sign the particular type of contract, referred to in this discussion as the “sponsoring parties”, should determine what, if any, additional approvals may be required before the signing party is permitted to execute the contract. Depending on the circumstances, a particular contract may require as many as three separate types of approval, including subject matter approval (i.e., approvals must be obtained from all departments that will be involved in the fulfillment of the obligations of the company under a particular contract), funding approval (i.e., approvals from senior management and finance department because of the amount of money involved in fulfilling the company’s obligations under the contract) and legal approval. The sponsoring parties should prepare a business case relating to the proposed contract and present it to the president, chief executive officer or any officer who has been delegated authority to review and approve a business case. Among other things the process of review and approval of the business case should include identification of required subject matter, funding and legal approvals. The sponsoring parties should consult with all departments that would be involved in the fulfillment of obligations under any contract covered by the business case to identify material issues

and concerns that should be addressed during the contract negotiation and drafting process. Once the business case has been approved a copy should be submitted to the legal department along a list of departments from which approvals of the contract will be sought. As a general rule, approvals must be obtained from all departments that will be involved in the fulfillment of the obligations of the company under a particular contract (i.e., the “subject matter approvals” referred to above).

The policy should emphasize that contract review is much more than simply following a series of formal steps and procedures and it is essential that all officers, managers and employees initiating a contract be held personally responsible for reviewing and understanding the proposed terms of the contract and ensuring that appropriate insurance requirements and indemnification provisions are included therein. In addition, every effort should be made to remove undue pressure from the review process and persons initiating a new contract should allow sufficient lead time to allow for completion of any required review and approval process described in the policy. In many cases a complex contract may require several months of negotiation and preparation and departments that may be impacted by a contract should be notified well in advance of the expected start date for the contract. As a general rule, six to eight weeks should be set aside for legal review and review by other departments.

Once the sponsoring parties have received an initial draft of the contract they should review the contract to determine whether it conforms to any specific requirements included in the approved business case. If there is a conflict between the contract terms and the business case the sponsoring parties should attempt to resolve those conflicts with the other party before a draft of the contract is circulated to other departments for subject matter approval. Once the sponsoring parties have a draft of the contract that they wish to circulate for subject matter approval it should be submitted to the legal department for review and circulation. The legal department should circulate the contract to all involved departments for subject matter review and approval and will collect comments from all departments; however, the sponsoring parties remain primarily responsible for ensuring that all departments respond on a timely basis. The legal department should collect and consolidate all comments and transmit them to the sponsoring parties for review and further action.

The sponsoring parties should be primarily responsible for reviewing and clearing all comments received from other departments through consultation with those departments and with the other party. The sponsoring parties should arrange for a revised contract and will provide an explanation in writing to the legal department of how each of the comments has been cleared. The legal department should circulate the revised contract and explanation to all departments and request their review and approval. In the event that comments remain outstanding after the process described above has been completed the sponsoring parties and the parties responsible for the outstanding comments should meet with the president and chief executive officer (or the officer to whom they have delegated authority with respect to such contract) to determine what action the company should take with respect to the contract on the terms offered and a written record of the decision should be prepared and transmitted to the legal department.

If, after following the procedures described above, the person authorized to sign the contract has determined that company should enter into the contract the sponsoring parties should transmit a final version of the contract to the legal department. The legal department will review the document and if it fulfills the requirements of these procedures will arrange for the contract to be signed and transmitted to the other party. As a general rule, prior to the execution of any contract by any manager, employee or other agent of company, there should be approval as to legal form and validity by the legal department. When the approval of the legal department is required, it must determine that: the contract does not violate any law, regulation or company policy, or conflict with any other contractual obligation of company; the individual signing it has the authority to do so; and any risk management concerns associated with the proposed contract have been considered by the signing party. When required, the approval of the legal department should be endorsed on the contract.

All signed contracts should be maintained and managed in accordance with the company's contract retention and administration requirements which should include maintenance of a contract log and regular reports to the senior executives of the company regarding contracts completed and signed since the date of the last prior report. Arrangements should also be made for storage or disposal of supporting and background materials relating to the contract including interim drafts and e-mail and other written communications that include information on the negotiation of the terms of the contract. In addition, the person signing the contract should maintain a copy of the contract for consultation during the contract term and a copy of the signed contract should also be disseminated to authorized persons in each department responsible for performing activities on behalf of the company under the terms of the contract.

The contract review policy should be supplemented by training and educational programs that actively impress upon officers, managers and employees the importance of the procedures and provide those persons with the information necessary to easily and efficiently complete the process so as to not unduly slow the pace of business. Among other things the legal department can draft and disseminate a short memorandum that highlights the basic steps that a person initiating a new contract would need to take in order to obtain approval. <See New Specialty Form 23 in Compliance Programs.>

International Registration of Industrial Designs

Industrial design rights are another form of recognized intellectual property right that can be used to protect the visual design of objects that are not purely utilitarian. The World Intellectual Property Organization ("WIPO") provides the following definition of an "industrial design": "[a]n industrial design is the ornamental or aesthetic aspect of an article. The design may consist of three-dimensional features, such as the shape or surface of an article, or of two-dimensional features, such as patterns, lines or color. Industrial designs are applied to a wide variety of products of industry and handicraft: from technical and medical instruments to watches, jewelry, and other luxury items; from housewares and electrical appliances to vehicles and architectural structures; from textile designs to leisure goods. To be protected under most national laws, an industrial design

must appeal to the eye. This means that an industrial design is primarily of an aesthetic nature, and does not protect any technical features of the article to which it is applied.”

The Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs was adopted at Geneva on July 2, 1999 under the auspices of the World Intellectual Property Organization (“WIPO”) to simplify the process of seeking protection for industrial designs in multiple countries. The current form of the Hague Agreement traces its roots to the Hague Agreement Concerning the International Deposit of Industrial Designs done at The Hague, Netherlands, on November 6, 1925, which entered into force in 1928, and was revised numerous times. For the 47 current member states of the Hague Union (including the European Union’s membership to be effective as of January 1, 2008), these existing agreements facilitate the obtainment of intellectual property protection for industrial designs by allowing multinational patent protection in a number of countries through a single “international deposit” procedure. However, these agreements did not meet the needs of countries, such as the United States, that review each application individually. The Geneva Act was intended to encourage countries such as the United States that were not parties to the Hague Agreement to partake in the benefits of facilitating multinational design protection for applicants while continuing its system of individual review. As of November 23, 2007, 25 of the member states of Hague Union has either become a party to the Geneva Act or indicated a date certain in January 2008 when they would become a party to the Geneva Act. The United States has been considering whether to become a party to the Hague Agreement, including the Geneva Act.

The goal of the Geneva Act is simple and straightforward—create a mechanism that would allow parties seeking multi-country protection for an industrial design to seek such protection efficiently by preparing a single design application can give rights to protection for that design in several countries while still preserving the sovereign rights of individual countries to deny protection to designs covered by an application that would not otherwise qualify for protection under their own national laws. The Geneva Act therefore makes no attempt to set out particular standards for registration of a design and leaves that issue to national laws. The applicant must specify the countries in which protection is sought in the international design application and the Geneva Act includes procedures for transmitting applications to the national review bodies for consideration under their specific registration standards. If and when a design is registered under the Geneva Act processes the registration will have the same effect as a national design registration in those countries designated by the applicant in the international application that have not refused to give effect to the application.

The Geneva Act permits a design applicant from a Contracting Party to file for protection in any of the Contracting Parties, including the applicant’s own country, by filing a single standardized application in either English or French. Pursuant to Articles 3 and 4(1) of the Geneva Act, any person who is a national of or is domiciled in a Contracting Party may file an international design application at the applicant’s national office or directly with the International Bureau (“IB”) of the WIPO. If the application is filed with a national office it must generally be transmitted to the IB within one month from the

date on which the national office receives it; however, if a security clearance is required by law, then an extended period of time will be allowed for transmittal of the application provided that the Director General of WIPO (Director General) is notified.

Article 5(1) of the Geneva Act sets forth the mandatory requirements as to the contents of an international design application. Article 5(2) of the Geneva Act provides additional mandatory contents as to Contracting Parties that have an intellectual property office that is an Examining Office, such as the United States Patent and Trademark Office (“USPTO”). In its presentation to the Congress recommending ratification to the Geneva Act, the Department of State recommended that the following declaration be included in the U.S. instrument of ratification: “Pursuant to Article 5(2)(a) and Rule 11(3) of the Agreement, the United States declares that it is an Examining Office under the Agreement whose law requires that an application for the grant of protection to an industrial design contain: (i) indications concerning the identity of the creator of the industrial design that is the subject of the application; (ii) a brief description of the reproduction or of the characteristic features of the industrial design that is the subject of the application; and (iii) a claim. The specific wording of the claim shall be in formal terms to the ornamental design for the article (specifying name of article) as shown, or as shown and described.”

According to Article 10(1) and Rule 15 of the Geneva Act, the IB will register each design that is the subject of an international design application immediately upon receipt by the IB of the application. The general rule under Article 10(2) of the Geneva Act is that the date of the international registration will be the filing date of the application, provided it is complete and complies with the mandatory requirements of the Geneva Act. The IB will normally publish the international registration within six months of the registration date, unless the applicant requests that the publication be made immediately after the registration [Article 10(3) and Rule 17 of the Geneva Act]. In addition, applicants may also request deferment of publication, which shall be granted for a period of less than 30 months from the filing date if such deferment is allowed by the laws of all the Contracting Parties designated in an application [Article 11 (1) and Rule 16(1) of the Geneva Act]

Once an international registration has been published by the IB, a copy of the publication will be sent by the IB to each of the countries designated by the applicant in the international design application and those countries will normally have six months within which to advise the IB that the registration does not meet its national requirements and thus will not be given effect in that country. However, if the national laws of a country provide for examination of design applications for novelty or allow for oppositions, then the country will have one year from the date on which it is advised of the international registration within which to advise the IB that it will not give effect to an international registration [Article 12 of the Geneva Act]. Article 14(1) of the Geneva Act provides that the international registration has the same effect in a national office, such as the USPTO, as a regularly-filed application for the grant of protection of the design under national law and that the applicant has the same remedies as if the design had been the subject of a national application. Article 15 of the Geneva Act provides that invalidation by the

competent authorities in a designated Contracting Party may not be pronounced without the right holder having, in good time, the opportunity to defend his rights. Article 16 of the Geneva Act provides that the IB must record changes of ownership and other matters regarding international registrations and that any such change will have the same effect as if the recording had been made in the examining of the concerned Contracting Party.

Pursuant to Article 17 of the Geneva Act, an international registration shall be in effect for a term of five years from the date of international registration. Registrations may be renewed for at least two additional terms of five years in all countries and renewal for longer periods may be possible in respect of designated countries that provide for longer periods of protection under their national laws. Renewal may be effected for some or all of the countries originally designated and requires the payment of fees to the IB as specified in Rule 24 of the Geneva Act. Invalidation proceedings may be brought against a registration on the ground that it does not qualify for protection against the national law of any of the countries designated in an international application and, if this is found by the examining office in such country to be the case, such office may hold that the registration ceases to have any legal effect in that country.

Specialty Form 20: Policies and Procedures for Negotiating and Entering into Contracts or Leases

This form is an example of a template for a set of policies and procedures to be followed by a university, hospital or other non-profit organization with respect to negotiating and execution of contracts or leases. In this type of business environment there is a good deal of emphasis on standardized procedures and documents and this policy emphasizes the need for parties initiating contracts or leases to follow bidding procedures and encourage vendors to use standardized contract language developed by the organization's legal and compliance groups. Any policy of this type should be easy to understand and follow and this includes a specific description of each of the steps that will need to be followed for reviewing and approval of contracts. The policy also refers to the timetable that will usually be involved in the contracting process and it is important to put all managers and employees on notice that they are expected to allow sufficient time for all interested departments to carefully review any proposed contract. This form discusses the procedure for review of non-standard contracts (i.e., contracts that are initially prepared by the other party to the proposed relationship) and refers to the need to use and complete a Contract Review Checklist such as the one appearing as Specialty Form 21.

Purpose

To ensure timely and appropriate formulation and internal review of contracts and leases entered into by [~ name of organization ~] (the "Company").

Review and Approval Process – General

Contracts and leases will generally involve either the Company's obtaining or supplying of goods or services. Depending on the planned arrangements, contracts or leases may have been preceded by a Request for Proposal (RFP) and both may require review and revision by Business Affairs, Compliance and General Counsel. Contracts or leases for goods or services totaling over [~ dollar amount ~] must be approved by the Company's Board of Directors. Only a Company Officer shall have authority to sign non-standard contracts or lease agreements as discussed below. Appropriate time frames need to be incorporated into planning processes, leading up to contract or lease signing, as discussed herein.

Types of Agreements and Contracts

In addition to contracts or leases involving the purchase or supply of goods or services, other examples may involve the maintenance of capital equipment or affiliation with another organization. Contracts or leases can also involve, but are not limited to, the following: licensing arrangements; property leases; research agreements; contracts involving special services; event-related arrangements; and agreements involving consultants or other "independent contractors".

In general, all types of contracts or leases mentioned above will hereby be classified into two (2) main types:

- (1) Standard – those entered into by the Company that will contain standard terms and conditions as developed by the Company and previously approved by Legal Counsel, Compliance Officer and Business Affairs.
- (2) Non-standard – those entered into that do not contain standard terms and conditions as developed by the Company. These are typically agreements where the vendor selected presents their own terms and/or agreement to the Company for review and approval.

Requests for Proposals

When formulation of a contract or lease is preceded by a Request for Proposal (RFP), a formal bidding process will take place. The need for bidding will be determined by the level of financial commitment in question, and on the outcome of discussions between the requesting department and the Procurement Department. If an RFP is contemplated in connection with a business arrangement that will result in a contract, discussions with Procurement and initial formulation of the RFP needs to begin at least three (3) months prior to the planned effective date of the contract, so as to ensure appropriate time frames for review by the Board of Directors (if required), Procurement, General Counsel and Business Affairs.

All acquisitions of goods or services (with or without a contract or lease involved) that total over [~ dollar amount ~] must be transacted with at least two (2) bids being obtained. It is recommended, however, that for orders over [~ dollar amount ~] that a total of between three (3) to five (5) bids be obtained, but two (2) shall be the minimum. Bidding can be waived if the item or service being provided is being provided by a preferred vendor of the Company (i.e. a vendor listed on the Procurement Department's preferred vendor list) or if the vendor is a sole provider of the good or service in question. Additionally, bids involving contracts or leases that total over [~ dollar amount ~] must be approved by the Board of Regents.

Insurance and Indemnification

The type(s) and levels of insurance coverage required for a given contract or lease will be determined based on discussion between the requesting department and Business Affairs.

The Compliance Officer is also available for technical assistance, in determining appropriate terms of insurance and indemnification.

The indemnification provision of a contract or lease outlines the management and transfer of risk, by establishing the circumstances in which parties to the contract will hold each other harmless in the event of a claim or suit that results from the activities or transactions specified in the contract. Typically each party to the contract or lease agrees

to hold the other party harmless if it is determined that the issue that triggered the claim or suit was the result of the sole negligence of one or another signatory to the contract.

The wording of an indemnification provision will be determined through discussion between the requesting department and Business Affairs, and, in turn, with the Compliance Officer and General Counsel.

Specific Steps to be Taken Prior to Contract or Lease Signing

1. The first step in initiating a contract or lease is to determine if bids are required. To make that determination, review the bid policy terms mentioned above or contact the Procurement Department for assistance. If a lease is requested, the department and Procurement must additionally work with the Controller to determine if a lease or purchase is the better financial option for the Company to entertain. After conducting the bid process (if necessary), a vendor is selected and contracted for product/services using either a non-standard agreement or a standard agreement.
2. If a non-standard agreement is entered into, a discussion concerning the intended business arrangement should take place with the Office of Business Affairs. That office will assist relative to contract language/format, and clarify, if required, the contract review process. Any and all proposed non-standard contracts or leases must be forwarded with a completed Contract Review Checklist and a Contract Review Routing Form to the Director of Business Affairs. The Checklist assists in ensuring that all relevant and necessary contract provisions have been incorporated into the draft document. The Director of Business Affairs will forward all non-standard contracts or leases to the Company's Office of General Counsel. A concurrent financial review will be carried out by Procurement and the Controller if necessary. If the contract or lease is for goods or services over [~ dollar amount ~], it must additionally be approved by the Company's Board of Directors.
3. If a contract is to be entered into and it is a standard contract, the agreement should be forwarded to the Office of Business Affairs for review and approval. Any and all standard contracts or leases must be completed and include a Contract Review Routing Form. Since the agreement is of standard format and it has been previously approved by Legal Counsel a Contract Review Checklist is not necessary. All standard contracts should be signed by the parties being contracted prior to Company approval and signature.
4. Upon completion of review, the General Counsel will forward the non-standard contract to the Office of the President for signature. Only members of the senior executive team of the Company are authorized to enter into and sign any contracts or leases for goods or services.
5. Original signed contracts or leases and pertaining documents are to be kept on file in Business Affairs. Copies of all signed contracts or leases are to be forwarded to the Office of General Counsel and the Controller's Office.

Time Frames for Steps within Review Process

Planning for a contract or lease requires adherence to the following time frames:

- (1) If it is planned that a Request for Proposal will precede the review process, it should be anticipated that a period of lead time of at least three (3) months prior to the expected contract or lease start date would be appropriate to begin bidding, but contact the Procurement Department for assistance and advice.
- (2) The review process for a standard contract or lease in which standard contract language (as currently approved by the Office of General Counsel) is used does not require Legal, Business Affairs or Compliance review but should commence at least two (2) weeks prior to the anticipated effective date of the contract.
- (3) The review process for a non-standard contract or lease for a new agreement that does require Legal Counsel, Business Affairs or Compliance review needs to commence at least one (1) month prior to the anticipated effective date of the contract.

Specialty Form 21: Contract Review Checklist

This form is an example of a contract review checklist that should be used and completed during the course of a formal review of a proposed contract that has been drafted and presented for consideration by a potential vendor or other business partner of the business organization. In general the preferred approach for any business organization entering into a new contract is to rely on a standard contract form that has been prepared by the legal and compliance departments of the organization. In that way the organization can be sure that all important risk management issues are covered and that the initially proposed contract language reflects the strongest possible position for the organization. Standardized contracts also simplify the contract review and approval process because the need for extensive legal department involvement is minimized—and may be eliminated all together if the other party is willing to accept the standardized contract “as is.” Unfortunately, however, it is not always possible to force a contract partner to use the organization’s standard form and the relationship may be based on a contract or agreement prepared by the other party. In that case the officer, manager or employee initiating the contract should be required to carefully read the contract and attempt to complete a contract review checklist that covers all of the major risk management and liability issues that typically arise. The completed checklist should be submitted along with a copy of the contract to the responsible senior manager within the company who can then arrange for review by other departments and facilitate negotiation of contract points that are particularly problematic.

[~ name of company ~]

CONTRACT REVIEW CHECKLIST

(FOR NON-STANDARD CONTRACTS/AGREEMENTS ONLY)

TODAYS DATE: [~ date ~]

CONTRACT DUE DATE: [~ date ~]

TO: [~ name of director of business affairs ~], Director of Business Affairs

FROM: [~ name of employee initiating contract ~]

Department: [~ name of department ~]

Phone #: [~ phone number ~]

CONTRACT PURPOSE/CONSIDERATION:

“Consideration” describes what is being provided by whom, to whom, at what cost. What is the purpose of the proposed contract, and what are the terms of consideration? [~ description of purpose and terms of consideration ~]

CONTRACT TERMS

Date Commencing: [~ commencement date ~]

Date Expiring: [~ expiration date ~]

Cost: [~ description of cost ~]

APPROVED INITIAL: _____

All questions must be answered.

I. Initial Review

1. Have you read contract in its entirety and approved of its contents?
2. Are all attachments and exhibits referred to in the contract attached?
3. Is a cover letter attached with department approval?
4. Does the contract require expenditure in excess of [~ dollar amount ~]? If this contract is approved has it also been approved by the Board of Directors?
5. Does the contract require expenditures more than [~ dollar amount ~]? If so, have a minimum of two bids been obtained?

II. Identification of Parties

Proper identification of parties includes full and appropriate name of the organization(s) and/or individual(s) involved, and complete addresses.

1. Is the Company properly identified?
2. Is other party properly identified?
3. Are abbreviated descriptions of parties throughout the contract consistent?

III. Consideration/Business Terms

1. Is the consideration properly and accurately stated?
2. If cash payments are to be made by the Company, does the contract specify when and where payments are due?
3. Have the consideration and business terms of the contract been reviewed and approved by department supervisor or other Company official?

IV. Duties and Obligations

1. Where will proposed contract activities take place?
2. Is each obligation described with sufficient clarity so that the parties know how it will be performed?
3. Does the contract properly identify the responsibility for national, state and local code requirements?

V. Term and Termination

1. Does the contract contain a clearly ascertainable starting and ending date?
2. Does the contract provide for a “no-fault” termination by the Company prior to the termination date?
3. Have you ensured that there is no automatic renewal provision?

4. Are there other termination provisions, such as:
- Termination for unsatisfactory performance?
 - Termination upon unexpected changes in contract terms?
 - Termination upon payment of stipulated sum?
 - Automatic termination?

VI. Insurance Clause

1. Is there an insurance clause in the Contract?
2. Does the clause specify the types of insurance required?
3. The Company requires the following limits: \$1 million per occurrence; \$3 million annual aggregate. Are those limits specified?
4. Does the contract require exchange of information via Certificates of Insurance (COI)?
5. Is the other party required to name the Company as an additional named insured under its policies of insurance?

VII. Indemnity Clause

1. Does the contract contain an indemnity clause? Indemnity clause should indemnify, defend and hold harmless the other party or parties from and against all claims and liabilities as a resulting from a negligent act or omission.
2. Does the indemnity include “reasonable attorney fees”?
3. Are all parties subject to an indemnity clause? Indemnity provisions should be reciprocal and mutual among all parties.

VIII. Events of Default Clauses

1. Does the contract provide termination in the event of default?
2. Are the events of default described with clarity and specificity? The default should be applied with equal force to both parties.
3. Is there a provision for written notification of default to the defaulting party?
4. Is there a provision to remedy default?
 - Does it cure default upon initiation of corrective action?
 - Does it require that corrective action be completed before default is cured?
 - Does the contract provide for written notification of termination?

IX. Dispute Resolution

1. Does the contract contain a “dispute resolution” provision?
2. Have you ensured that mediation is not specified as a means of dispute resolution? Mediation is not an approved method by the Company, so this would need to be changed.

X. Force Majeure Clause (Causes Beyond the Parties’ Control)

1. Does the contract contain a force majeure clause?
2. If so, does the contract address delay in performance caused by forces beyond the parties' control?

XI. Confidentiality Clause

1. Does the contract contain a confidentiality clause?

XII. Remedies Clause

1. Does the contract clearly specify the remedies available in the event of breach?
2. Does it provide for money damages? Are they related to the actual facts of the contract?
3. Does it provide for cumulative remedies?
4. Does it provide for recovery of attorney's fees, court costs, etc.?

XIII. Miscellaneous Provisions

1. Does the contract contain an entire agreement clause? The written contract is to be the whole agreement. There are no "off the record", verbal or "side" agreements.
2. Governing law: is the choice of law governed by the State of [~ name of state ~]?
3. Can the contract be assignable to a third party?
4. Is there a section for Notices (name and address)? Be sure to include necessary "with copies to." Any notices should be sent via Certified Mail, Return Receipt Requested and regular mail.

XIV. Execution

1. Does person signing have authority as an Officer of the Company?
2. Is the vendor's representative authorized to sign the contract?
3. Is there provided space for the data of each signature, but clarify "effective date", whether "date of last signature" or "as contained in the agreement."

SUBMITTED BY:

Sign: [~ signature of person initiating the contract ~]

Name: [~ name of person initiating the contract ~]

Date: [~ date ~]

Specialty Form 22: Procedures for Review and Approval of Proposed Contracts

This form is an example of a policy and related procedures for review and approval of proposed contracts implemented by a company engaged in manufacturing and product distribution activities. The form provides a solid template for preparing a contract review policy including identification of the persons impacted by the policy (i.e., all employees initiating contracts, all departments involved in performing obligations under the proposed contract, the legal department, and those officers and managers who have authority to execute contracts on behalf of the company). The last section of the policy sets out detailed step-by-step procedures for reviewing and negotiating a proposed contract and relies heavily on the involvement of the legal department to facilitate the process in order to make sure that comments are collected and evaluated on a timely basis. Parties advocating a new contract should prepare a business case that describes the economic terms of the relationship and identifies all the departments that will become stakeholders in the performance of the contract. The process described in this form can be supplement by a contract review checklist such as the example appearing as Specialty Form 21 and the essential elements of the review process should be explained to officers, managers and other employees through training and written materials such as the memorandum appearing as Specialty Form 23.

1. Purpose

To define and describe the procedures to be followed by officers, managers and other employees of [~ name of company ~] (“Company”) to ensure timely and appropriate formulation and internal review of contracts to which Company will be a party and to designate who within Company has the authority to execute and deliver contracts on behalf of Company.

2. Revision History

Created date: [~ creation date ~]

Revision date: [~ revision date ~]

3. Persons Affected

- All officers, managers and other employees who initiate a contract
- All officers and managers responsible for reviewing and approving a contract including approval of the funding obligations associated with fulfilling of the contract
- The Legal Department
- All other Departments involved in performing Company obligations in a contract

4. Policy

4.1 Officers, managers and other employees of Company must always follow the procedures described herein with respect to the review, approval and execution of all

contracts to which Company is a party, including any renewals or other amendments to existing contracts.

4.2 As a general rule, only the President and the Chief Executive Officer have the authority to contract for Company. However, the President and Chief Executive Officer may approve and issue written delegations of authority to sign Contracts on behalf of Company. Each such delegation of authority must be filed with the Legal Department and must identify the specific person to whom authority is being delegated, explain the dollar and other limits of authority, and describe the purpose for the delegation of authority. The Legal Department shall arrange for internal publication and dissemination of all then-current delegations of authority to provide guidance to officers, managers and other employees who initiate contracts.

4.3 As a general rule, prior to the execution of any contract by any manager, employee or other agent of Company, there must be approval as to legal form and validity by the Legal Department. When the approval of the Legal Department is required, it must determine that: the contract does not violate any law, regulation or Company policy, or conflict with any other contractual obligation of Company; the individual signing it has the authority to do so; and any risk management concerns associated with the proposed contract have been considered by the signing party. When required, the approval of the Legal Department should be endorsed on the contract. The signatory authority of any signing party within Company is not valid with appropriate approval, if required, from the Legal Department.

4.4 All signed contracts should be maintained and managed in accordance with the contract retention and administration requirements promulgated from time-to-time by the Legal Department. All original copies of contracts and supporting document relating thereto shall be maintained as provided herein for the period specified by the Legal Department. In addition, any other provisions of any contract requiring retention of records by the parties must be satisfied.

5. Responsibilities

5.1 All officers, managers and employees initiating a contract:

- Are responsible for reviewing and understanding the proposed terms of the contract and ensuring that: the language in the contract accurately reflects the business goals and objectives of Company and the department or unit initiating the contract; the contract is in the best interest of Company; Company will be able to fulfill all of its obligations under the contract in a cost-effective and timely fashion; and the language in the contract is clear and consistent and addresses all material contingencies that can be reasonably foreseen for the life of the contract.
- Are responsible for ensuring that all of the necessary approvals described herein are obtained and that sufficient time is allocated to allow all persons involved in the review and approval process to fulfill their responsibilities in an orderly fashion.

- Should, before Company invests time and resources in the contract review process, prepare a description of the business case for the contract, including the goals and purposes of the contract, the reasons for contracting with the particular party, and the expected benefits and costs associated with performance of the contract.
- Should expect to be required to execute and deliver to the Legal Department and officers of Company a certification that the requirements described herein have been completed by such person with respect to a specific contract.

5.2 The Legal Department:

- Approves the legal form and validity of any contract prior to the execution of that contract by any officer, manager or employee of Company.
- Ensures that the contract does not violate any law, regulation or Company policy, or conflict with any other contractual obligation of Company.
- Assists in the preparation of customized contracts or modifies either a standard Company contract or a contract that has been proposed by the other party.
- Issues internal rules and regulations with respect to the form and content of contracts that may be entered into by Company in order to provide the officers, managers, employees and other agents of Company with guidance during negotiations with other parties.
- Promulgates definitions of the term “contract” for purposes of this policy including descriptions of exceptions and exclusions from the procedures described herein (e.g., contracts involving *de minimis* financial exposure for Company or contracts on standard forms approved in advance by the Legal Department).
- Obtains approvals from the Board of Directors for any actions sought from the Board of Directors by any officer, manager or employee or other agent of Company.
- Is responsible for administering the records retention rules and policies that apply to all contracts entered into on behalf of Company.
- Prepares regular reports to the Board of Directors and the President and Chief Executive Officer on the status of contracting activities within Company.

5.3 All Other Departments

All Other Departments involved in performing Company obligations in a contract are responsible for timely and full review of the proposed contract and participating in the comment and discussion procedures described in this policy. Without limiting the foregoing, authorized representations of each department are responsible for reviewing and understanding the proposed terms of the contract and ensuring that the department will be able to fulfill all of its obligations under the contract in a cost-effective and timely fashion and the language in the contract relating to the duties and obligations of the department is clear and consistent and addresses all material contingencies that can be reasonably foreseen for the life of the contract. In addition, all Other Departments are responsible for complying with all other Company policies and procedures relating to post-signing administration of contracts and fulfillment of contractual obligations.

5.4 Sponsoring Parties

The Sponsoring Parties (see below) for any contract are fully responsible for ensuring that Company fulfills its duties and responsibilities, and asserts its rights, under the contract. In addition, the Sponsoring Parties are fully responsible for compliance with all internal conditions imposed by various departments, officers and managers within Company regarding administration of the contract including, without limitation, regular reviews of the costs and risks associated with compliance with the duties and obligations imposed on Company under the contract.

6. Procedures

6.1 Any person needing a contract must first determine who has the authority to sign the particular type of contract by reviewing the then-current delegation of signature authority within Company promulgated from time-to-time by the Legal Department upon direction of the President and Chief Executive Officer. Any person needing a contract must also determine whether or not the subject matter of the contract requires completion of any Company requirements relating to use of a formal bidding process.

6.2 The person needing a contract and the person who has the authority to sign the particular type of contract (the “Sponsoring Parties”) should prepare and present a business case relating to the proposed contract to the President, Chief Executive Officer or any officer who has been delegated authority to review and approve a business case by the President and Chief Executive Officer.

- The Sponsoring Parties are expected to consult with all departments that would be involved in the fulfillment of obligations under any contract covered by the business case to identify material issues and concerns that should be addressed during the contract negotiation and drafting process.
- In addition, if funding approval will be required it should be obtained before the business case is finalized and approved.
- Once the business case has been approved a copy it should be submitted to the Legal Department along a list of departments from which approvals of the contract will be sought.

6.3 Once the Sponsoring Parties have received an initial draft of the contract they should review the contract to determine whether it conforms to any specific requirements included in the approved business case. If there is a conflict between the contract terms and the business case the Sponsoring Parties should attempt to resolve those conflicts with the other party before a draft of the contract is circulated to other departments within Company for approval.

6.4 Once the Sponsoring Parties have a draft of the contract that they wish to circulate for subject matter approval it should be submitted to the Legal Department for review and circulation. The Legal Department will circulate the contract to all involved departments for review and approval and will collect comments from all departments; however, the Sponsoring Parties remain primarily responsible for ensuring that all departments respond

on a timely basis. The Legal Department will collect and consolidate all comments and transmit them to the Sponsoring Parties for review and further action.

6.5 The Sponsoring Parties will be primarily responsible for reviewing and clearing all comments received from other departments through consultation with those departments and with the other party. Where appropriate, the Legal Department should be involved in discussions with other departments and the other party to ensure that the language in the contract clearly and correctly states the rights, duties and obligations of Company. The Sponsoring Parties will arrange for a revised contract and will provide an explanation in writing to the Legal Department of how each of the comments has been cleared. The Legal Department will circulate the revised contract and explanation to all departments and request their review and approval.

6.6 In the event that comments remain outstanding after the process described above has been completed the Sponsoring Parties and the parties responsible for the outstanding comments will meet with the President and Chief Executive Officer (or the officer to whom they have delegated authority with respect to such contract) to determine what action Company should take with respect to the contract on the terms offered. A written record of the decision should be prepared and transmitted to the Legal Department.

6.7 If, after following the procedures described above, the person authorized to sign the contract has determined that Company should enter into the contract the Sponsoring Parties should transmit a final version of the contract to the Legal Department. The Legal Department will review the document and if it fulfills the requirements of these procedures will arrange for the contract to be signed and transmitted to the other party.

Specialty Form 23: Memorandum to Officers, Managers and Employees Regarding Contract Review and Approval Procedures

This form is an example of a short memorandum to officers, managers and employees of a company regarding the essential elements of the procedures for review and approval of contracts to which the company will be subject. The steps in this memorandum generally follow what is laid out in the actual contract review and approval policy appearing as Specialty Form 22. The memorandum should be just one part of the training program for all employees involved in the contract process that focuses on educating them about the provisions typically found in contracts and the steps that they can take to manage the risks and liabilities associated with contracting.

Officers, managers and other employees of [~ name of company ~] (“Company”) must always follow the Company’s procedures with respect to the review, approval and execution of all contracts to which the Company is a party, including any renewals or other amendments to existing contracts. In order to fulfill their duties and responsibilities, officers, managers and other employees should regularly consult [~ identification of contract review procedures ~] which is available for viewing at [~ description of location of procedures ~]. The following is a brief summary of the key steps that need to be taken for obtain approval of a proposed contract:

1. Any request for a new contract should be submitted to the senior executive of the department to which the person initiating the contract is assigned (the “Department Executive”). The Department Executive should determine what approvals are necessary for the proposed new contract.
2. With respect to material contracts, the Department Executive should prepare a business case that outlines the benefits and duties associated with the contract and identifies all departments that will be involved in fulfilling obligations imposed on the Company under the terms of the contract.
3. The business case should be reviewed and approved by the President and/or CEO (or the COO if authority has been delegated to the COO by the President and/or CEO) (the “Responsible Executive”). During the review, and prior to approval, or the business case the Responsible Executive should consult with all departments that will be involved in fulfilling obligations imposed on the Company under the terms of the contract to identify any issues or concerns that should be addressed during the contract drafting and negotiation process. Once the business case has been approved a copy should be forwarded to the Legal Department and the Legal Department may include additional departments on a list of department that will need to review and approve the final contract.
4. The initial draft of the contract should be reviewed by the Department Executive and the Responsible Executive before it is circulated to other departments for review. If the initial draft of the contract includes language that would raise concerns discussed during the review of the business case it is the responsibility of the Department Executive

and the Responsible Executive to attempt to address and mitigate those concerns before the contract is circulated. If necessary, representatives of the department impact should be brought into the discussion process at this point.

5. Once initial concerns have been addressed the draft of the contract should be delivered to the Legal Department for review and circulated to all involved departments. All departments should review the contract and transmit comments to the Legal Department and the Department Executive. The Department Executive is primarily responsible for ensuring that all involved departments review and comment on the contract on a timely basis.

6. The Legal Department will consolidate all of the comments and transmit them to the Department Executive and the Responsible Executive and the Department Executive and Responsible Executive will be responsible for clearing all comments through discussions with the involved departments and the other party and generating a revised contract.

7. If the Department Executive is unable to clear all comments a meeting will be held among the Department Executive and the involved departments in the presence of the Responsible Executive and the Responsible Executive will decide whether or not to proceed with the contract and what actions should be taken with respect to comments that have not been cleared. A written record of that decision should be transmitted to the Legal Department

8. If a decision is made to proceed with the contract the Department Executive should procure a final version of the contract and send it to the Legal Department. Assuming the final version of the contract is consistent with the decisions made while following the process outlined above the Legal Department will arrange for the contract to be executed and delivered to the other party. The Legal Department will maintain a record of all executed contracts. The Department Executive will be responsible for ensuring the Company complies with all its obligations under any executed contract and for providing all involved departments with reports and other information as may be required as a condition of approving execution of the contract.