I. INTRODUCTION

The Madison College Contracts Manual is a comprehensive guide to the Madison College contracts process. The primary purpose of this manual is to facilitate the contract process by clarifying the steps required to initiate and obtain the required contract approvals and signatures. This manual is divided into the following sections:

I. INTRODUCTION
II. CONTRACTS 101
III. CONTRACT NEGOTIATION
IV. THE ROLE OF LEGAL REVIEW
V. STANDARD CONTRACT TERMS AND PHRASES
VI. MADISON COLLEGE PRE-APPROVED CONTRACTS AND TEMPLATES
VII. CONCLUSION
VIII. APPENDICES

Appendix One: Unique Issues of Software Agreements

The format of this manual is divided into major sections with limited numerical headings so that the document may be expanded as necessary. This manual is periodically updated based on staff feedback and the changing needs of the College. Staff members are encouraged to provide input as to the usefulness of this manual. Readers are also encouraged to visit the web page of Legal Advisor for updates. The main page can be found in the A-Z index under Legal Advisor.

Future additions to this manual will include the following sections: (1) the unique issues of software licensing agreements (completed as in Appendix One); and (2) the unique issues of data sharing agreements, and privacy issues. Project management guidance, as well as sample statements of work have been contemplated, and may be provided in future documents, depending on the College’s project management direction.

This manual interchangeably uses the following terms: District, Madison College, or the College; vendors and contractors; contract or agreement; and staff and managers.

This manual is not a substitute for professional legal advice and should not be construed as such.

II. CONTRACTS 101

1. What is a contract? A contract is an agreement between two or more parties to do something for a period of time. It can be in the form of an oral agreement, or some form of written communication such as a formal contract, a letter, an invoice, a purchase order, a memorandum of understanding, or even a policy. It can be several documents pieced together to make one whole document.
2. **What is the correct form (format) for a valid contract, and what elements are essential for an enforceable contract?** In most instances, but not all, the form of the agreement is irrelevant in the consideration of a valid contract, and enforceable in a court of law. Enforceable contracts need only contain the following elements:

- **Offer** - a promise to do something
- **Acceptance** - acceptance of the offer
- **Consideration** - legal and adequate inducement for the exchange
- **Capacity** - parties must have the legal capacity (age, competency, authorized signature of personnel binding a corporation)
- **Legally permissible** - that is, the subject matter must not be illegal or against public policy
- **Form** - some contracts must be in writing to be valid under the doctrine of Statute of Frauds such as an annual property rental

3. **What are Madison College contracts for staff?** For Madison College staff, a contract is essentially a transaction in writing, whether a business deal or a non-business agreement. Contracts are deals in writing of who, what, when, where, how and how much. Written contracts are necessary and make good business sense when memories get fuzzy, staff move on, and contractors change their minds. Without enforceable written contracts, no one would enter into agreements. Thus, contracts are the backbone of a thriving economy and business. Their protection provides the necessary incentive for investments and transactions. Consequently, all Madison College contracts must be in writing and signed by the authorized personnel (President or Vice Presidents). Thus, it is important for managers to understand basic contract law, and to read their contracts thoroughly to ensure they accurately reflect the intentions and obligations of the parties.

4. **What types of contracts does Madison College have?** Madison College has many types of contracts, such as:

- Clinical affiliation agreements
- 38.14 agreements
- Policy manuals
- Business contracts to procure goods and services
- Real estate contracts, including leases
- Public works contracts for buildings and land improvements
- Memorandum of understandings, letters and other non-formal agreements
- Software licensing agreements
- Copyright licensing agreements
- Employment contracts
- Grants and sub-awards
- Data sharing agreements
- Curriculum and other educational agreements
- Consultant/service contracts
The aforementioned list is non-exhaustive but demonstrates the variety and types of Madison College transactions.

5. **Who may sign contracts?** The only persons who are authorized to sign contracts on behalf of Madison College are the President, and any of the Vice Presidents. The corresponding Administrative Policy is #103.

6. **What happens if someone other than the President or any of the Vice Presidents signs the contract?** There are times when the President or Vice President may delegate a person to sign a contract on his or her behalf. If this is the case, the person will generally have a letter from the President or Vice President stating that he or she may sign a contract or letter (consult with legal if you desire a sample letter). The letter will delineate the scope and limitations of signature authority, as well as the content of the document. Otherwise, contracts not signed by the authorized personnel are not considered valid in the eyes of Madison College management and may not be honored.

7. **What is the District process for getting a contract signed by the President or Vice Presidents?** Managers must review the Contract Review Procedure for the step-by-step guide to the process that triggers legal review and signature. In general, contracts are sent to the Administrative Services, and then forwarded for legal review. It is important that the Contract Review Form be completed as accurately as possible to expedite legal review and ensure uniformity among contracts. Upon approval by legal, the contract is sent to the Administrative Services for signature. The Office will follow up for contract pick up.

8. **Will the contract process always go smoothly?** Sometimes the contract review and approval process will not go as smoothly or as quickly as all would like. Occasionally, staff will receive a call from the legal clarifying issues or identifying issues of concern. Sometimes terms or provisions in the contract will need to be renegotiated, or language will need to be redrafted; and a back and forth process takes place until an agreement can be reached. In these instances, legal will guide staff through the process.

9. **After the President or the Vice Presidents signs the contract what should I do? And who keeps the original contract?** It depends on who signs the contract first. If the other party (e.g., vendor, contractor, affiliation agency, other entity) has already signed the contract, and then the Vice President signs the contract, it becomes a fully executed contract. Staff members should forward a copy to the other party and keep a copy for their files. In addition, a fully executed copy should be sent to the Administrative Services. If Madison College senior management signs first, it is a partially executed contract. After pick up, staff is responsible for ensuring that the authorized personnel of the other entity also signs off on the contract for complete execution. Staff members must obtain a fully executed contract for their files and forward a copy to the Administrative Services.

Changes to contracts are not allowed after the Vice President signs the contract. A copy of what is actually signed by the Vice President is maintained.
10. **Is it okay to sign a faxed copy instead of an original contract?** In general, a fax copy is sufficient for smaller contracts. In these cases, there is usually a provision in the contract stating that the contract may be signed in “counterparts” and that faxes are to be treated as the original. When sending a counterpart contract component, an email must accompany this type of contract from the authorized party, stating that the intention of the parties is to accept a fax or electronic image as if it were the original. However, for contracts exceeding $100,000, the policy is to have two (2) original copies signed in original ink. Each party signs two (2) originals and each party keeps a copy of the original.

11. **Where can I obtain training in contracts?** The Office of Legal Advisor provides training during the year. The training covers basic contractual terms and vendor negotiation strategies. Contact the legal advisor for the most current training schedule and webcasts.

### III. CONTRACT NEGOTIATION 101

1. **Know the business deal, do not rely on posturing.** Managers will get the best possible deal if they have the technical knowledge to know a good deal or a bad deal. No amount of bluffing or posturing will substitute for technical knowledge. Managers should research their business options and be ready to walk away from inequitable deals in favor of more appealing ones. To do this, it takes knowledge of one’s alternatives. Do the research and discover your options.

2. **Starting negotiations with vendor templates.** In general, most aspects of a deal are negotiable, and vendor templates are the starting points of negotiation, not the final agreement. Of course, this is after verbal discussions have taken place, and you want to begin the formal negotiation process. The negotiation process begins when managers request changes in the contractor’s template by way of redlining or black-lining (underline to insert language and strikethrough to delete language). Even handwritten changes are an acceptable means of communicating such intent.

3. **Changing the vendor’s template.** Major changes to a vendor’s template will require the manager to obtain that template in an unlocked Microsoft Word document (as opposed to a PDF electronic format). Vendor resistance is not uncommon, as vendor templates are often fairly one-sided in favor of the vendor. Some vendors will assert that they cannot change their templates in any respect; however, such business agreements (called “contracts of adhesion”) are rare, and usually are limited to situations where there is no negotiation occurring due to the method involved in the transaction. Examples are agreeing to abide by the terms of an online software licensing agreement by clicking an onscreen box before the software will finish installing; or by tearing open a packaging seal on a product prominently displaying the contract terms, and that by opening the packaging the purchaser indicates his or her acceptance of same. Again, in almost every case where there is human interaction with the vendor in advance of the agreement being finalized, there is the opportunity to negotiate.
4. One-sided vendor tactics. When negotiating contracts, some one-sided vendor tactics include:

- Our management won’t allow us to change the template
- We must use our template (may not use Madison College’s template)
- The sale will only last until the end of the month, and Madison College will not get the discounted price
- Proposals and statements of work (SOW) based on units of time instead of deliverables (reduces vendor accountability)
- Misdirection and deflection from the issues important to the manager
- Inaccurate or non-binding estimate of work which may eventually require change orders and increase the contract amount

IV. THE ROLE OF LEGAL REVIEW

1. Managers should obtain the desirable business deal prior to legal review because the major business terms will dictate the legal terms and legal review. Managers are responsible for obtaining the best business deal on the major terms of the contract such as the price, the deliverables, the time period, the warranty, and the exit plan. Only a manager can determine if he or she is getting the desirable deliverable at the desirable price. However, legal review plays an important supporting role in the details that make the deal feasible and acceptable to the College.

2. Legal will review the contract based on the unique transaction. The legal and business issues specific to software contracts are different from the issues particular to consultant contracts. Each transaction has its own particular exposures, and the business terms and the legal terms have equal potential to impact these exposures.

3. The major business terms will dictate the legal terms. Moreover, the key business terms and the type of transaction will influence which legal terms should be included in the contract, how the terms will be carried out, and which exposures will be acceptable to the College. Legal will review the transaction on a case-by-case basis, determine the acceptable risk level, and determine if further negotiation is necessary, whether by legal or by the business manager.

4. Examples of case-by-case legal analyses.

- Low-risk consultant services contract. A consultant is retained to work on an hourly basis to conduct research and draft a report. Because this is a low-risk endeavor, the legal advisor would eliminate the requirement for one million dollars commercial liability insurance to be carried by the vendor. The liability and damages exposure for the consultant would also be limited to one or two times the amount of the consultant services.
• **A high-impact building labor contract will require more insurance.** A contractor working inside the building on a general labor project will be required to have the following: general liability insurance of a high amount (one million dollars) and adequate insurance coverage in other applicable areas (including the statutorily prescribed amount of worker’s compensation insurance), a payment and performance bond, and an agreement with subcontractors to ensure compliance and contractor liability for non-compliance. The College would also be named as an additional insured on the contractor’s insurance; as well as have the right to check the contractor’s credit worthiness or even audit the contractor’s financial books. Legal may require a contractor to notify the College in the event there is a change in the contractor’s insurance coverage.

• **A software contract that requires pilot/implementation testing.** A software vendor may enter into a deal with the College to provide a license to its software. The legal advisor may negotiate the right to terminate the contract if pilot testing demonstrates that the software is not compatible with the College’s systems (often called a “proof of concept” or “trial license agreement”). Whether or not a proof of concept is successful should always be at the discretion of the College.

• **A software hosting contract where data are housed will be more liable.** In software licensing agreements, legal often agrees to limitations on liability and damages for small, low-risk contracts; but will raise objections to high-risk endeavors where the College is liable to third parties. For example, vendors that provide software where there is the potential for security breaches involving personally identifiable information, will be liable for such breaches, and there will be no limitations on liability or damages.

• **A student project with many owners of the intellectual property.** Twelve students create and film a movie together. Each student owns part of the movie. The students want to allow a museum to use the movie. Legal would negotiate with all students to convey their rights to the College, so there will be one owner of the movie. Then the College will license the movie back to the students, and to the museum, each entity having different licensing rights (how they can use the movie). This type of contract does not involve insurance, payment bonds, deliverables, but rather focuses on how intellectual property may be used by the students or the museum (portfolio use, website posting, Facebook usage, etc.).

5. **Specific legal review.** The legal issues will need to be determined based on the major business terms. Legal will ensure that the appropriate terms and provisions are included in the business deal, as each deal has its own set of particular issues. Legal review entails the following:

• *Ensure the inclusion and resolution of important legal issues as they relate to the transaction.* This sometimes includes research unique to the transaction, and the inclusion of important information missing in the vendor’s template.
• **Negotiate important terms and provisions and specific language to reduce risk.** Often, the parties will agree in concept on the business terms, but the language does not always accurately reflect their intentions. The attorneys will often have to negotiate and agree on the actual language to memorialize the business deal. Specific language must be used to express the parties’ intentions; otherwise, the contract could be litigated in the courts for interpretation, usually an unwelcome occurrence for both sides.

• **Review the contract for internal consistency and realistic processes.** Legal will review a contract for internal consistency as well as look for business processes called for in the agreement which may be unrealistic to carry out in practice. For example, suppose Madison College must notify the contractor within 5 calendar days of a problem occurring in order to exercise its warranty right. Legal would change the notice period to a more realistic timetable, such as 10 business days from the date of the discovery of the problem.

• **Negotiate certain contracts.** All contracts involving intellectual property, real estate, and data sharing agreements, must be negotiated by an attorney.

6. **Other services/actions provided by legal.** Legal may also provide the following services: draft templates, obtain and review vendor templates, forward to outside counsel for review, and assist in contract interpretation for implementation.

V. CONTRACTS TERMS AND PHRASES 101

This section describes some of the most basic and standard contract provisions, phrases, and terms. The purpose of this section is to help managers understand basic terms so they can focus on the business deal. This section only explains the concepts involved and the purposes behind such terms, and does not attempt to provide specific contractual language to be used for the same; such language often varies from contract to contract. Sample language for most terms set forth below can be found in the Madison College Contract Service Agreement.

1. **Terms, conditions, clauses and provisions.** For this manual, these terms are used interchangeably, but they can have different meanings when used in certain contexts. For example, “term” can refer to the length of the contract, “condition” can refer to an “if” clause, a “clause” can be part of a provision, and a “provision” can be a statement setting forth a component of the agreement.

2. **Entity, contractor, vendor, affiliation agency.** These are terms used interchangeably to refer to the other party engaging in the transaction with the College.

3. **Format.** Contract format varies and rarely has legal implications. Contract formats may be in a readable outline form, or in a form with words and phrases without headings.

4. **Title.** All contracts should have a descriptive title that usually identifies the originating entity and type of transaction.
5. **Statement of intent to enter into an agreement.** All contracts must have a statement in which the parties convey they are entering into an agreement involving consideration (or value in exchange for value). The language generally states something to the effect: *NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, and for other good and valuable consideration, the parties agree to the following.*

6. **Party name and legal description.** This statement identifies the names of the parties and a description of the entity type (must be the legal name and legal description) such as a corporation, partnership or sole proprietor business. Madison College has the legal name and description of: Madison Area Technical College, a technical college, authorized and established under Chapter 38, Wisconsin Statutes. It is important that the names, addresses and legal descriptions are accurate.

7. **Recitals and “whereas” statements/phrases.** These are statements that provide introductory, historical or background information. This information is not a substantive part of the agreement unless it is explicitly incorporated by reference into the body of the agreement. Recitals are not required, but assist in providing background information and evidence of the parties’ intentions.

8. **Definitions.** Larger and more complex contracts usually have a “definitions” section, and they can be very impactful and deserving of close scrutiny. Definitions may limit or expand the dictionary meaning of a word. A definition is generally a way of using short-hand references for repeatedly referred-to concepts in a document; i.e., a way of stating the same thing in the same manner for consistency and contract interpretation purposes. Sometimes definitions are designed to interact with other definitions to have the effect of disguising their actual combined impact on the agreement. Managers must read the definitions very carefully, especially for high-spend and/or high-risk contracts. It should never be assumed that addendums and amendments have the same definitions as in the main contract.

9. **Contract amount/price.** How much is the contract for? Some contracts are based on a flat fee, some per transaction fee, and others are based on an hourly rate plus vendor costs and expenses (time and materials contracts). Time and material contracts should have a maximum “not to exceed” dollar amount, and a defined project scope, if possible. It is recommended to have a fixed maximum dollar amount and a fixed deliverable when possible. In this way, the risk is shared by both the vendor and the College.

10. **Term.** What is the contract length or services engagement timetable? Contracts should have a definite period of time for performance - a month, a year, or until all the work is completed. It is recommended that contracts have an annual contract period, with an expiration date (a “fixed term”). Madison College contracts cannot exceed five years, with two additional one-year extensions.

11. **Effective date.** When does the contract become effective? Sometimes a contract becomes effective on the date the last party signs the contract. Sometimes a specific date is
selected. Managers should distinguish between when a contract becomes effective and the date the work is expected to begin, or when the actual contract is signed.

12. **Termination verses expiration.** How will the contract end? Termination is when the contract ends before the date specified in the term, because a party cancelled the contract before completion. Expiration is when a contract ends, because the contract term has expired.

13. **Termination provision.** This is one of the most important provisions in a contract. As often as possible, managers should be in a position to cancel a contract at will for flexibility, subject to a variable notice period to the vendor. Conversely, managers want to ensure a contract cannot be ended by a vendor in the middle of the academic year or the College could be liable to a third party (e.g., students). Termination clauses will vary depending on the deal. The College should always have the right to cancel the contract. Termination clauses for managers to beware of: an expensive termination penalty, termination by mutual consent of all parties, termination for cause with unlikely causes, and termination by the vendor in the middle of an academic year.

14. **Termination for any reason at any time.** It is always recommended, with certain exceptions, that either party may be able to terminate the contract at any time for any reason (“termination for convenience”) within 10 business days’ notice, unless the College business will be interrupted. Under these circumstances, vendors should not have that option to cancel with such short notice.

15. **Termination for cause.** This termination provision allows termination by a party ONLY upon certain events such as insolvency, failure to obtain licenses or permits, loss of insurance, or the breach of a particular contract term. These types of termination clauses are not recommended for most types of business deals but are appropriate for leases, public works and construction contracts, and other such transactions that involve a long time to recoup investments (i.e., high initial investment) and high stakes if canceled too early without good cause. Terminations for cause usually include a “cure” period during which the non-terminating party may, if possible, correct the problem and avoid the termination. The key to these clauses is to ensure that the causes for termination would be the events likely to happen that would create the desire to opt out of the contract.

16. **Early termination and payment of work performed.** How will the vendors be paid when the contract is canceled before the project is completed? Some contracts provide for payment based on the following:

- A pro rata share of the work or project completed
- Number of hours worked for contracts on an hourly basis
- Include pre-approved reimbursable expenses

It is important that the contract state how the pro rata share will be calculated, so there will be no dispute on the calculation method.
17. **Early termination penalty.** If a contract is terminated, not only will the vendor receive payment for work performed, but there may be an additional early termination penalty. These penalties may require payment of the entire contract amount, one-half of the contract amount(s), or some other fee. The exact calculation method must also be set forth in the contract if an early termination fee is accepted by the manager. Sometimes a manager is fine with the fee and should proceed with the contract transaction.

18. **Termination notice and procedure.** Somewhere in the termination provision there is a procedure and notice period for how the contract may be cancelled. If the procedure and notice time frame is not followed, the contract cancellation will be compromised. Managers should be wary of impractical cancellation procedures such as an unrealistic notice period that is too long or too short.

19. **Automatic renewal clause.** This is a clause, usually found in the term or termination provision. It states that the contract automatically renews unless cancelled within a certain period of time such as 60 days prior to the contract anniversary date.

20. **Amendments, exhibits, addendums and attachments, schedules.** These documents are attached to the main/master contract and incorporated by reference. These terms are often used interchangeably. In addition, these documents should be labeled and referred to accurately. For example, Attachment One should be incorporated into the contract as Attachment One (not as Attachment 1). Some additional guidance:

- **Amendments.** These are changes to an existing contract already signed and in effect. The first amendment should be labeled First Amendment, and so forth. One caveat: if there are definitions in the amendments, do not assume the definitions are the same as in the original contract. The definitions in the amendment will override the original definitions, and may produce unintended contract changes. Amendments will have a statement of consideration and a signature block.

- **Exhibits.** These are generally used in leases, public works contracts, construction projects or other projects with drawings. Exhibits are usually floor plans, drawings, blue prints or maps. Exhibits must be accurate and approved by the appropriate staff before a contract is signed.

- **Addendums and Attachments.** Addendums usually contain additional contract provisions that do not override or change the provisions in the main contract. Attachments are generally additional supporting documents and may include vendor contracts that become part of the entire contract.

- **Schedules.** Schedules are attachments that generally have spreadsheets, price schedules, or some other price structure. They are often used with insurance contracts.
21. **Statement of relationship.** This provision describes the relationship of the parties, whether a partnership, joint venture, independent contractor or employment relationship. All Madison College contracts are independent contractor relationships, as provided in the Contract Service Agreement, and this fact should be clearly and prominently stated in the contract if a vendor template is used. Contracts should never imply an employment relationship. Contracts with a project management component overseeing staff should never use the word “supervise.” Instead, managers and contracts should use words such as approval or control for directing the work performed.

22. **Conflicting terms provisions.** Contract review may take longer, because a contract may be inconsistent in its terms. For example, one provision may set forth a condition, which is then overridden by another provision in the main contract. This often happens when a contract is developed from several templates by way of the cut and paste method. The Contract Service Agreement contains a provision setting forth the order of precedence for conflicting terms when several documents are joined together to make one whole contract. Nevertheless, the contract must be reviewed in its entirety, as there may still be conflicting terms within the main document.

23. **Notwithstanding phrases.** This means “regardless of what you read earlier (or even later), this provision trumps all.” When several provisions have the phrase, it may be necessary to make changes to establish which provision will take precedence.

24. **Insurance clauses.** In general, a contractor must have adequate insurance to cover liabilities that could result while working for the College. For example, what if a contractor damages Madison College’s property while working at Truax, or causes harm to a person? The contractor must have insurance to cover these liabilities. We also negotiate that the vendor’s insurance will be the primary insurance so we do not have to cover the deductible. In general, large contractors are required to have commercial liability insurance of $1 million dollars per occurrence, and $3 million dollars aggregate per policy year. Some vendors have insurance on a per claims basis. Risk management would have to approve of this insurance. Some general rules:

- Insurance coverage needs are determined by the type and risk level of the transaction
- The insurance coverage must be of an adequate amount and involve the appropriate type(s) of coverage
- For large contracts, the College may have to approve the insurance company, coverage(s), and amount
- A Certificate of Insurance is proof of insurance
- Liability, insurance, and indemnification provisions must be reviewed and analyzed together, as they impact one another (conducted by legal)
- Any tenant must provide worker’s compensation insurance for its employees
- Some contracts may require us to obtain business interruption insurance to cover expenses in the event a particular venture (e.g., computer system) shuts down, and affects the College financially, especially to third parties
25. **Additional insured.** It is suggested that Madison College be named an additional insured on a contractor’s insurance policy for contracts of high risk or high amounts such as labor contracts, public works contracts, or contracts where there is an increased liability to third parties. This provides additional protection for the College. Suggested language: *College (District) shall be named as additional insured on [the vendor’s] policy.*

26. **Force Majeure.** What happens if there is a fire or some other catastrophe that causes a delay in the performance of work? This provision means that if a project is delayed by the non-performance of one party for some reason outside of its control, such as a catastrophic event, there is no contract breach. The provision may also allow the parties to terminate without penalty within a specified time frame. Failure to obtain financing or materials is not uncontrollable, and should be stricken from the contract language force majeure events. This is a contractor tactic to shift certain risks of the venture to the College.

27. **Cumulative rights.** This provision means that the exercise of one remedy (for breach of contract) does not preclude the exercise of another remedy. Without this provision, the courts could interpret a contract to mean that if the wronged party exercises its right to one remedy, it gives up other remedies. This provision ensures that the College will have all the legal remedies available to it under the law.

28. **Indemnification.** In general, Madison College does not indemnify or hold harmless the other party to a contract. Every effort should be made to strike such provision from the proposed contract. These are very complicated provisions that require legal review and approval. To oversimplify, this provision means one party will make the other whole, sometimes exceeding the damages a court would award. It could also include the obligation to provide the defense, and defense costs, in the event of a third party suit. Sometimes, a contractor adds indemnification clauses where the College accepts all liability regardless of the negligence of the contractor. These are sometimes called absolute indemnification clauses and should never be allowed in College’s contracts, unless explicitly approved by legal (which is rare). Legal review will identify and strike these provisions.

29. **Confidentiality agreements.** It is not the policy of Madison College to enter into any confidentiality agreements protecting the vendor except under limited circumstances where it is necessary to achieve the transaction and protect the parties (and in any event, the documents would be subject to Wisconsin Open Records Law). On the other hand, a contractor should maintain complete confidentiality of any Madison College information obtained or created in the performance of an agreement, as stated in the Contract Service Agreement.

30. **Wisconsin (Open) Public Records Law.** Madison College is a public entity and therefore contracts, deliverables, and responses to bids and RFPs are subject to these laws, and may be disclosed if requested by a citizen or another vendor. Contractor trade secrets and proprietary data, as defined by Wisconsin Statutes, are exempt from
disclosure. Legal must be contacted for any requests that may include contractor proprietary information.

31. **Ownership of reports and deliverables.** In the performance of a contract, consultants and vendors create recommendations and reports. But who will own these reports? If the contractor owns the reports, it could reproduce and disseminate the reports for the benefit of the College’s competitors, as well as charge the College for copies. All contracts must ensure that Madison College owns all the final reports with full copyrights to copy, redistribute and produce derivative works. The contractor owns its own proprietary data.

32. **Advertising.** Some provisions allow a contractor to use the name of the College in its advertising to demonstrate or imply endorsement of the contractor. This is not allowed by the College, and all endorsement provisions must be stricken. Sometimes contractor documents create the impression of endorsement, although not explicitly expressed. Any such documents should be forwarded to legal for an evaluation, and if appropriate, a cease-and-desist letter will ensue.

33. **Assignment and delegation.** This provision allows the contractor to assign the contract to someone else, or delegate its responsibility. The Contract Service Agreement provision requires written approval by the College for assignment or delegation. There may be instances where a particular vendor or industry is just too risky to allow for an assignment. Legal will negotiate this provision.

34. **Limitations on liability and damages.** This provision allows the contractor to limit its liability or damages, usually in the amount of two times the consultant fees. Also, the vendor will not be liable for inconsequential or business interruption damages (College’s business is interrupted due to the vendor and is liable to students). These provisions are only appropriate for low-risk projects.

35. **Attorneys’ fees.** This provision states that if legal action is taken to enforce the contract, or resolve a dispute, the prevailing party will be awarded legal fees including attorneys’ fees. The purpose of this clause is to prevent the worst case scenario: the cost of legally enforcing a contract exceeds what is awarded in court, and the prevailing party essentially still loses. For example: Jon sues Sally for $30,000 for damages for breach of contract. Jon prevails in court and wins $30,000, but then he has to pay his attorneys $20,000, and his net win is $10,000. This provision allows Jon to recoup the $30,000 and the $20,000 for attorney fees.

36. **Choice of governing law and venue.** This provision declares which state law will be applied to the dispute, and where the dispute will be resolved (state and county). All Madison College contracts should set forth the State of Wisconsin as the governing law and venue.

37. **Compliance with all laws.** This provision should be included in all Madison College contracts. It adds additional protection to ensure that contractors comply with all laws, whether state, federal or local ordinance.
38. Amendment and modification. This provision states that the contract may only be modified in writing and by mutual agreement. This prevents contractors from using emails, correspondences, notes and verbal assertions from changing the terms of the contract.

39. Severability. This provision means that if any part of the contract is held invalid by a court of competent jurisdiction, it is the intent of the parties that the remaining lawful parts of the contract would still be in effect. This prevents a court from throwing out the entire contract due to one provision. It is required in all Madison College contracts.

40. Counterparts. This provision means that each party can sign an exact copy of the same contract, fax the copies to one another, and the counterparts (all the pieces) become one fully executed contract. This saves time because an original does not have to be circulated to all the parties for signature. Counterparts are never allowed on contracts exceeding $200,000.

41. Warranty. Contractors should provide some type of warranty for the goods or services the College is purchasing. When evaluating a warranty, the manager should ask the following:

- What is the warranty for (parts, labor or service, or both)?
- How long is the warranty (1 year or less)?
- What is the remedy if the warranty is exercised (return the goods, re-performance of the work, repair the machine, online technical assistance, etc.)?
- Notification requirements to exercise the warranty rights

Managers are responsible for deciding if the initially provided warranty is adequate, and if not, they should try and negotiate a better one. The Contract Service Agreement has a performance warranty for labor contracts. This provision states that if the work is not performed at the level of professional standards, then it must be re-performed. This additional attachment may be obtained from the legal/templates web page.

42. UCC warranty disclaimer. The Uniform Commercial Code, Article 2, adopted by the State of Wisconsin, provides for implied warranties for the sale of goods; unless expressly waived in the contract in prominent fashion (usually bold in all capital letters). Typical waiver language:

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UNLESS AS OTHERWISE EXPRESSLY PROVIDED FOR IN THE AGREEMENT, VENDOR HEREBY DISCLAIMS ALL WARRANTIES AND CONDITIONS WITH REGARD TO SOFTWARE, INCLUDING ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, OR STATUTORY, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT.
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This language means the College is waiving the warranty even though it is provided for by law (UCC). This language should be stricken from the contract, and a warranty should be negotiated.

43. **Signature block.** All College contracts must be signed by the Vice President on the signature block line. The signature block should always demonstrate that the Vice President is signing on behalf of the College, as opposed to a vice president signing the document as himself or herself, which could lead to personal liability.

44. **Payment information.** How will the contractor be paid? Typical examples are: upon receipt of invoice, quarterly, or only after completing milestones approved by the Madison College project manager. In general, the College pays the contractor within 60 days of invoice receipt. For labor contracts, or where the work progresses from one stage to the next, the manager may want to establish a payment plan based on milestones.

45. **Scope of Services (SOS) or Statement of Work (SOW).** A Scope of Services (SOS), or a Statement of Work (SOW) are attachments to the Contract Service Agreement that detail the work and process under the contract. They contain information not included in the RFP or RFB, proposal or vendor contract. The SOW is an opportunity for the manager to fill in the details important to the manager such as:

- Hours for working
- Overtime pay
- Right to replace consultant on demand
- How the work will be accomplished
- The specifics of the job that are not provided in other documents
- Exact description of the deliverables
- Other items important to the project manager

The SOW is very project specific. In the future, this manual will contain samples and guidelines. These are project management documents.

### VI. MADISON COLLEGE PRE-APPROVED CONTRACTS AND TEMPLATES

Standardized contracts and templates are posted on the legal web page such as waivers. You may find the various forms at:

[http://matcmadison.edu/in/templates-forms](http://matcmadison.edu/in/templates-forms)

New templates and forms are added on an as needed basis. Suggestions from staff and managers are welcome.

### VII. CONCLUSION

This concludes the body of the Madison College Contracts Manual.
Unique Issues for Software Licensing Agreements

Software licensing agreements are licenses to use software. That is, we are borrowing the software for a period of time. We do not own the software. It’s like renting an apartment.

The software licensing agreement tells you how you can use the software. For example, the agreement may tell you that you can borrow the software for several years, you may make copies, you may not reverse engineer the software, and how many people in your organization may use the agreements.

Some issues to consider are listed below. With the exception of IT managers, staff members are not expected to understand all the issues, and should work with the IT representative responsible for its implementation. Legal and IT will review the software licensing agreements contract.

1. **Product/Price.** What are you getting? How many copies can you make? How long are you getting the license?

2. **Upgrades.** Are you required to purchase upgrades at a reasonable price? Sometimes the initial package is very inexpensive, sometimes even free, but the agreement requires you to purchase an expensive upgrade, and the price is not revealed to you in advance.

3. **Installation/copies.** Where is the software installed? On the College’s network, hardware, or vendor’s hosting site? How many copies can you install? Is that enough?

4. **End-users.** Who are the end-users? That is, who can actually use the software? End-users are generally defined as the person(s) who uses the software, and the end point of use. That is, where the software is used by the customer. This can be a student, a faculty member, managers, administrators, and guests. If the contract defines end-users too vaguely, you could allow persons to use the software that are not supposed to use the software, and you could end up breaching the contract. For example, let’s suppose software is purchased for students to use in an educational setting. Let’s suppose end-user includes students in the definition, but doesn’t include the faculty members who need to use the software to teach the students. If the faculty member uses the software, he or she could be violating the contract.

5. **Reverse engineer.** Can you reverse engineer? Most agreements do not allow for this, but you may need to in certain circumstances. If so, this should be negotiated.

6. **Conflict with other agreements.** Does the agreement conflict with other software agreements? This is unlikely, but there are times when some agreements do not allow you to use the software, with competing software for interfacing.

7. **Audits by vendors.** Sometimes the agreement allows the software company to perform audits, in their discretion, as to whether the licensed software has been used according to the agreement (installation, copies, etc.) In these instances, the agreement should never allow the
company to audit or have findings in their discretion. An audit must be made by mutual consent, with a college representative present. Sometimes a violation found during the audit can result in a fine. These provisions are generally negotiated by legal, or depending on the activity, will be allowed (acceptable risks).

8. **Malware.** Will you get a refund if there is malware (virus in the software)? Malware isn’t likely to happen, but it is an issue to be aware of.

9. **Pilot testing/implementation.** For expensive software, which impacts the entire College, the manager may want to negotiate a pilot testing/implementation period before the agreement is finalized, and the agreement begins. In these instances, the agreement is negotiated such that IT has discretion in determining the time frame, and whether the testing worked. The software company should not be allowed to make a judgment of compatibility or utilization.

10. **Interface/compatibility.** For expensive software that impacts the college, pilot testing may require the determination that the software is compatible with the network, and other software necessary for its implementation.

11. **Warranty.** A warranty tells you what you get if the product doesn’t work. Sometimes you can get a refund, or get the vendor to fix a problem at their own costs. Sometimes a warranty consists of phone consultation, or technical assistance. For inexpensive, low-impact contracts, it is fine to waive a warranty. However, for software with substantial long-term investments, a warranty is recommended such that the product conforms/functions to the written product specifications; and if the software does not, you can get a refund from the date that the product defect was discovered. For consultation services, if the services are below industry standards, in the discretion of the in-house IT representative, you should negotiate re-performance at no cost.

12. **Software Using the Vendor’s Hosting Site.** Sometimes Madison College licenses software that is hosted on the vendor’s website. These agreements require special attention regarding data. If confidential data is housed on a vendor’s website, then the College will review and approve of the vendor’s security. Issues that may be negotiated include:

   - requiring reasonable security standards against hackers and the vendor’s employees
   - prohibiting data disclosure by the vendor to a third-party
   - requiring notification by the vendor if there is a data breach
   - requiring indemnification by the vendor in the event it there is data breach
   - requiring the vendor to comply with FERPA and other privacy laws
   - setting forth the expectations for the safe data return and data destruction issues
   - clarifying that the data belongs to the College

Before legal review, these issues are reviewed by an IT representative involved in the software implementation. Legal and IT will consult with one another on any issues that require special attention.
13. **Software Contracts That Require Vendor Consultants for Implementation and Initial Management.** Sometimes software agreements also require a special consultant to assist in the installation of the software. This is especially true for expensive and high-impact contracts. In these instances, there will be a software contract (subscription to the software) and a professional services contract. Issues to consider for the professional services and the statement of work include:

- Should there be an in-house IT representative or project manager?
- Does the consultant have access to non-production (draft, non-final data) or to production data, and is there an in-house IT representative monitoring the access to data?
- Before final changes are made to the software/data, should there be a sign-off by the in-house program/IT manager?
- Should payment be made to the consultant based on milestones based on time?
- In rare circumstances, intellectual property ownership may need be negotiated by legal for derivative products

14. **Maintenance/Service Agreements.** Finally, when you are deciding upon costs, you may want to consider if you want to or are required to purchase maintenance agreements. What do you get in the maintenance agreement? Phone consultation only, with technical assistance, and/or free or expensive upgrades, or in-person 24/7 maintenance? For activities that impacts the College (e.g., software that students need to conduct their educational learning), you may want to negotiate a 24/7 service. For example, suppose a system that impacts student enrollment data goes down. This is an important activity such that maintenance or problems must be fixed immediately.

15. **Cloud Issues.** Specific issues regarding cloud servers are under construction and will be posted as soon as the information becomes available.
IT HOSTING CHECKLIST

This checklist below was developed by the College’s IT department.

<table>
<thead>
<tr>
<th>Requirements</th>
<th>Vendor Response</th>
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<tbody>
<tr>
<td>SSAE 16 Report</td>
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<td>Business Continuity Plan</td>
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<td>• Exists</td>
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<td>• Is routinely reviewed</td>
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<tr>
<td>Disaster Recovery Plan</td>
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<td>• Exists</td>
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<td>• Is routinely reviewed and tested</td>
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<td>• Includes off-site storage of back-ups</td>
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<tr>
<td>• Includes tape back-up</td>
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<tr>
<td>• Steps taken to prevent cascading failures</td>
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<tr>
<td>Description of Physical Security</td>
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<td>Description of Logical Security</td>
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<td>Description of Procedural Security</td>
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<tr>
<td>• Hiring/Firing practices</td>
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<tr>
<td>• Security Awareness training</td>
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<tr>
<td>• Background checks/Drug screening</td>
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<tr>
<td>Security Incident Response Plan</td>
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<tr>
<td>Single Sign-on</td>
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<tr>
<td>Off-line back-ups</td>
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<tr>
<td>Hosted environment support:</td>
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<tr>
<td>• Provide an overview of the typical support process for a customer</td>
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<td>• Provide the normal hours of support operations</td>
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<tr>
<td>• Provide the contact methods available for support (e.g. phone, WebEx, electronic posting)</td>
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<tr>
<td>• Provide the priority levels and definitions of the priority levels</td>
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<tr>
<td>• Provide the guaranteed turn-around time for fixes to problems at the different priority levels</td>
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<tr>
<td>• Provide the escalation process used to expedite logged issues</td>
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<tr>
<td>• Provide the vendor capabilities to test issues on all supported versions of the software.</td>
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<tr>
<td>Contract Requirements</td>
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<tr>
<td>Site visit prior to contract signing with annual “right to audit” that includes a site visit if we so desire</td>
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<tr>
<td>Language related to accountability for notification and cost of data breach</td>
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<tr>
<td>Service level agreement addressing:</td>
<td></td>
</tr>
</tbody>
</table>
- System availability calculations
- Issue resolution
- Issue escalation procedures
- Enhancement request process