

# Purchase Contracting Basics Training

Joe Kline, Associate General Counsel  
Matt Kopp, Associate General Counsel  
Rich Cummo, OGC Contract Manager

# Today's Presentation

## Topics we will cover

- Contracts for the Purchase of Goods and Services
- Process for Initiating, Negotiating, Finalizing, and Signing Purchase Contracts On Campus
- Basics of Contract Formation
- Checklist of Key Contract Terms and their Importance

## Topics we will not cover

- Other types of Contracts on Campus, such as sponsored research agreements, core facility agreements, employment agreements, etc.
- Specialized contracting terms, such as data privacy compliance, IP licensing terms, or U.S. government contracting

# Goals

Provide guidance and tools that improve the efficiency and quality of contracting for goods and services on campus

Increase compliance with Northwestern's purchasing policies and procedures

Drive greater self-sufficiency for contracting within University schools, departments, and units

Ultimately, help all of you to be more successful in your roles by improving your knowledge / understanding of contracting

# Agenda

- **Introduction**
- **Expectations and Goals**
- **Contracting Process On Campus**
  - Guiding Principle: Purchasers Own Contracting
  - Purchasing and Payment Policy: Contracting Guidelines
  - OGC Review: “Rules of Engagement”
  - Process Work Flow
  - Select Authorized Signatories
  - Key Contracting Do’s and Don’ts
- **Refresher: The Basics**
  - Contract formation
  - Elements of a contract
  - Written vs. Oral
  - Battle of Forms
  - Key Take Aways
- **Checklist of Key Contract Terms**
  - Generally
  - Scope of Work in Services Contracts
  - Pricing and Payment Terms
  - Delivery Terms (Goods only)
  - Inspection of Goods and Services
  - Taxes
  - Term and Termination
  - Representations and Warranties
  - Indemnification
  - Limitations of Liability
  - Insurance
  - Intellectual Property Rights
  - Choice of Law, Dispute Resolution, and Choice of Venue
  - Other Terms / Issues to be Aware Of
- **QA & Wrap Up**

# OGC Team

Joe Kline

Associate General Counsel

Matt Kopp

Associate General Counsel

Rich Cummo

Contract Manager

- Other OGC Members (for select schools, offices, or matters)

# PPS Team supporting University Contracting

Jim Konrad

AVP, Procurement

Tracy Mrowczynski

Contract Manager, Procurement

## Procurement Administrators:

Sheila Watkins

Laura Norton

Dave Zohfeld

Julie Maul

Kim Li

Kathy Koestring

# Contracting Process On Campus

# Guiding Principle: Purchasers Own the Contracting Process

What does this mean?

- With limited exceptions, Northwestern allows individual schools, departments, and units to make their own purchasing decisions for goods and services, so long as University policies and procedures are followed.
- This requires University employees involved in these purchases to take full responsibility for understanding Northwestern's policies and procedures for contracting with vendors, including purchasing, payment, and vendor relations.
- In other words, these are your contracts, and you must know what they say and understand what is agreed in them.
- However, this does not mean that you are expected to be the expert and owner of every provision in every contract.
  - Many parts of our vendor contracts are owned and managed by other stakeholders and subject matter experts within the University.



# Guiding Principle: Purchasers Own the Contracting Process

Purchasers of goods and services must act as the hub in the contracting process on campus.

This includes:

- Knowing and following purchasing and contracting policies and procedures;
- Reading and understanding draft contracts exchanged with vendors;
- Identifying and routing issues and questions to the right stakeholder / subject matter expert; and
- Leading and setting the tone of negotiations with vendors.



# Procurement Environment

- PPS delegates tactical activities and some purchasing authority to departments and schools, and equips them with the tools they need to effectively buy and pay for things to run their operations
  - Determine what products/services they need
  - Solicit bids for purchases of \$25,000 or more **(\$10,000 for sponsored dollars)**
  - Initiate requisitions with support documentation
- Role of Procurement and Payment Services (PPS): help departments/schools make informed, best value purchasing decisions so they can secure the products and services they need in the most streamlined way
  - Strategically source on behalf of the University
  - Assist with the bid process on behalf of and in partnership with departments/schools

# Strategic Sourcing

- PPS looks for contracting opportunities for products and services that all departments and schools need regularly
  - Analyze spend (dollars/number of transactions)
  - Talk to departments and schools
- Issue formal Invitation to Bid (using templates created by PPS)
  - Define requirements
  - Establish timeline
  - Identify vendors
  - Establish evaluation committee
  - Formal proposal assessment
  - Best value award decision
  - Establish contract
- Every step in the process is important

# Preferred Vendors

- Contract already established based on the results of a thorough and formal competitive bid process managed by PPS
- Maximizes overall best value to the University
- Cost savings, due to consolidating purchasing power
- Less risk, due to improved contract administration
- Reduced transaction costs (total cost of acquisition)
- Improved productivity and efficiency of department personnel
- Minimizes ethical questions about vendors you are purchasing from
- Improved access to information, so PPS can further improve contracts

# iBuyNU

- Integrated part of NUFinancials
- Includes many of Northwestern's Preferred Vendors
- Provides end users with a web-based ordering experience
- Everyone has access to iBuyNU
- Streamlined, electronic processing of purchases and payments:
  - Workflow
  - Dispatch of purchase order
  - Receipt of invoice
  - Payment to vendor
- Improved and consistent pricing
- Will never include all vendors – strategic sourcing, preferred vendor approach

# Policy

- When a department or school needs to purchase a product or service and the total cost is \$25,000 or greater, bids must be solicited from at least three vendors, unless a Preferred Vendor is used **or if it qualifies as a sole source.**
- For bid solicitations, departments/schools have the following options:
  - Department/school can request that PPS conduct a competitive bid/negotiation on their behalf
  - Department/school can perform a competitive bid
- For many purchases, a contract is not needed
  - The Northwestern PO terms are sufficient

# RFP assistance

- Departments/schools are strongly encouraged to engage PPS to assist with the competitive bid process for significant purchases or when a strategic relationship needs to be established with a Vendor
- PPS can provide different levels of support
  - Simple feedback if department/school is conducting a bid
  - Assist in evaluation of proposals if department/school issues RFP
  - **Manage the entire process is our strength**, involving the department/school
    - PPS knows the purchasing process, key vendors in various industries, other customers, what consortium deals we have access to, methods for benchmarking prices, how to negotiate, etc.
    - A more informed decision can be made

# Benefits of working with PPS to conduct RFP

- You don't have to reinvent the wheel
- Consistency and established best practices
- Competition
- Robust list of bidders, including local and diverse vendors
- Informed business decisions
- Impartiality
- Minimizes risk
- Saves time
- Saves money
- Establishing contract using approved templates is part of the process
- Improved contract administration
- Early involvement with PPS is key
- You will end up with a better contract!



# Summary

- Check the [preferred vendor](#) list
- Solicit bids
  - Have PPS help for more complex agreements and when a strategic partner is needed
- Complete the Purchasing Decision Documentation Form ([PDD](#)) if \$25,000 or more
- Present vendor with Northwestern's standard [PO Terms and Conditions](#)
- Submit a requisition so a Purchase Order can be issued
- If an agreement needs to be established (multi-year services, etc.), follow the OGC process outlined on the upcoming slides

# OGC Review: “Rules of Engagement” – Purchase Contracts

Contracts for the purchase of goods or services by Northwestern **MUST** be sent to the OGC for review **ONLY** if they fall into one of the following categories:

- Contracts worth more than \$100,000 in total spend or spend per year (for multi-year contracts)
- Contracts with particularly sensitive or materially risky subject matter, counterparties or terms.
- Renewal or reuse of existing contracts in one of the above categories on either (1) *different* legal terms than those previously reviewed by OGC, or (2) terms last reviewed by OGC more than 8 years ago.

Contracts **do not** need OGC review if they are on NU templates (as approved and maintained by Procurement, OGC, Schools, Departments, etc.) with unmodified legal terms, even if the contract would otherwise fall into one of above categories.

# OGC Review: “Rules of Engagement” – Purchase Contracts

## Examples of Sensitive or Materially Risky Contracts / Terms

IT services contracts where vendors will have access to Northwestern’s sensitive IT systems or sensitive / confidential information (*e.g.*, cloud services vendors that host personally identifiable information of employees, students, or research participants)

Contracts with vendors that will have access to proprietary materials or human biological samples (*i.e.*, lab services vendors)

“Mission critical” software licenses

Contracts for the purchase or lease of real property

Facilities Management contracts (*e.g.*, remodeling, renovating, construction, architecture, or other real estate-related services)

Purchase finance transactions (*e.g.*, contracts involving debt or debt-like obligations, such as capital leases or lease-to-own contracts)

Any contract that must be signed by the Executive Vice President

Restrictive contract clauses that prevent Northwestern from:

- interacting or doing business with certain individuals or entities, or
- undertaking otherwise lawful actions or operations (*e.g.*, non-compete or exclusivity clauses)

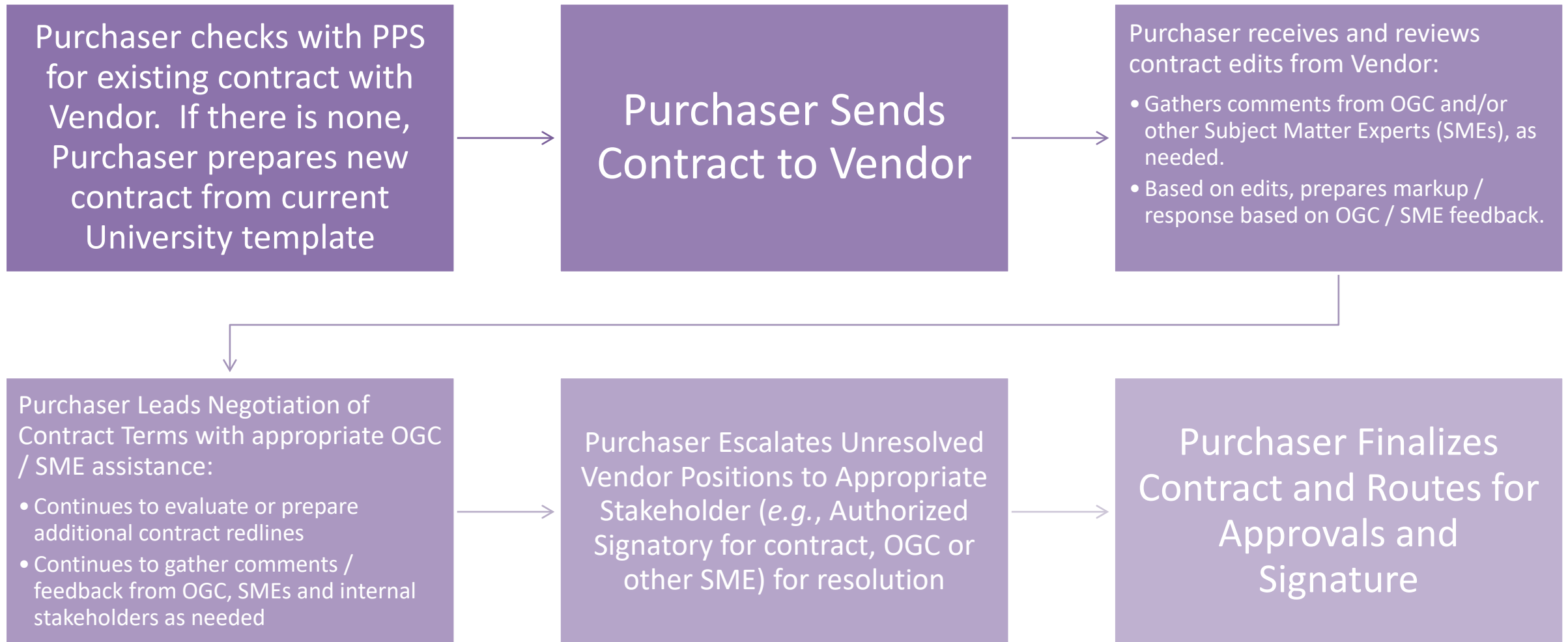
# Contract Management Process Workflow

**Prior to a contract moving far along in the process, and definitely before OGC review (if applicable), ensure that you have sufficient internal buy-in that is “up-the-chain” in your school/dept/unit (i.e., department chair, Dean’s Office, VP, etc. as needed for bigger / more important contracts) to move forward with the contract and have it reviewed.**

**There is significant time, effort and costs to having contracts reviewed, revised, negotiated, etc. To do all of that and then ultimately not have internal approval for final signature is a bad outcome for all.**

# Contract Management Process Workflow

As owners of vendor relationships, purchasers must also own and manage the contracting process. These are your contracts.



# Contract Management Process Workflow: Contract Preparation

Purchaser checks with OGC for existing contract with Vendor. If there is none, Purchaser prepares new contract from current University template

Check the list of Preferred Vendors and iBuyNU to see if we already have a contract with an appropriate vendor for the products or services you need. Then check with OGC to see if a contract is already in place with your vendor. The University has contracts with many common vendors. **Don't re-invent the wheel!**

Purchaser Leads Negotiation of Contract Terms with appropriate OGC / SME assistance:

- Continues to evaluate or prepare additional contract redlines
- Continues to gather comments / feedback from OGC, SMEs and internal stakeholders as needed

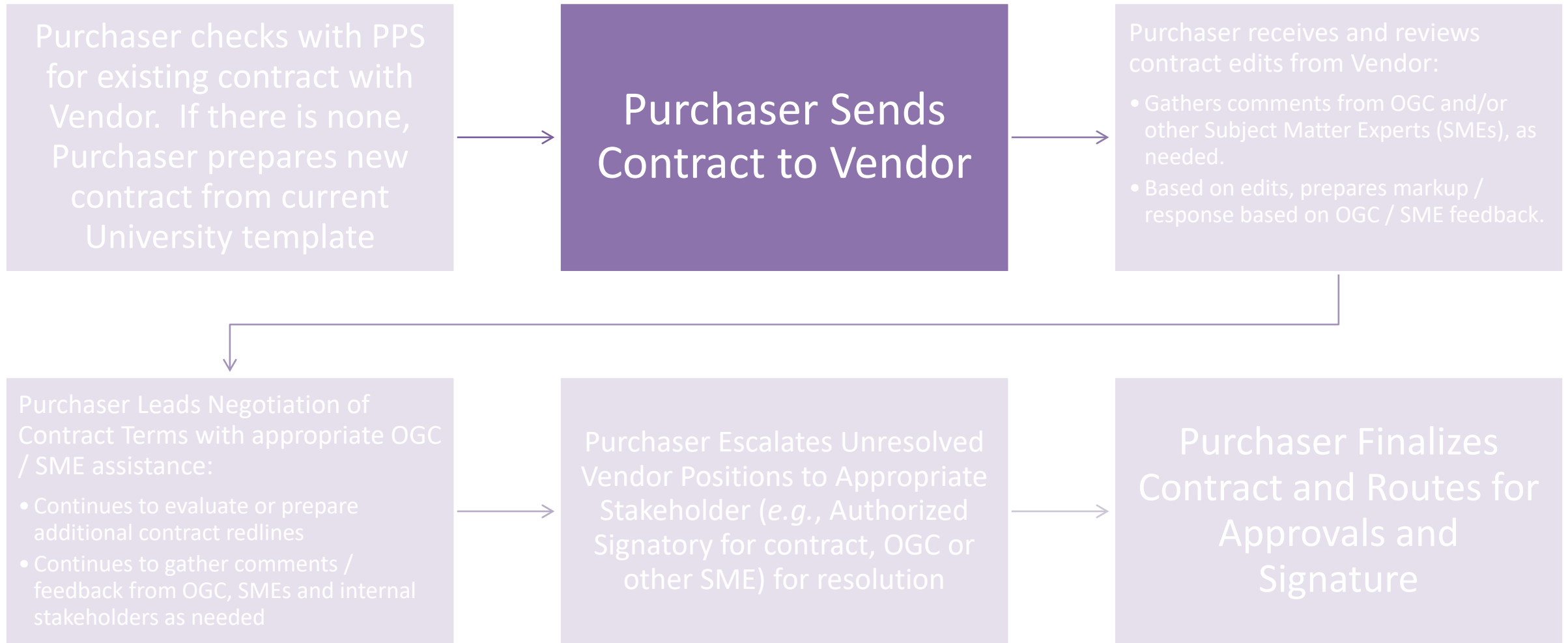
If there is no contract already in place with the vendor, make sure you have the most current contract template by always starting from the template posted to PPS's Contracting Process website

# Current List of Purchase Contract Templates

Go to PPS's [Contracting Process website](#) for copies of these templates.

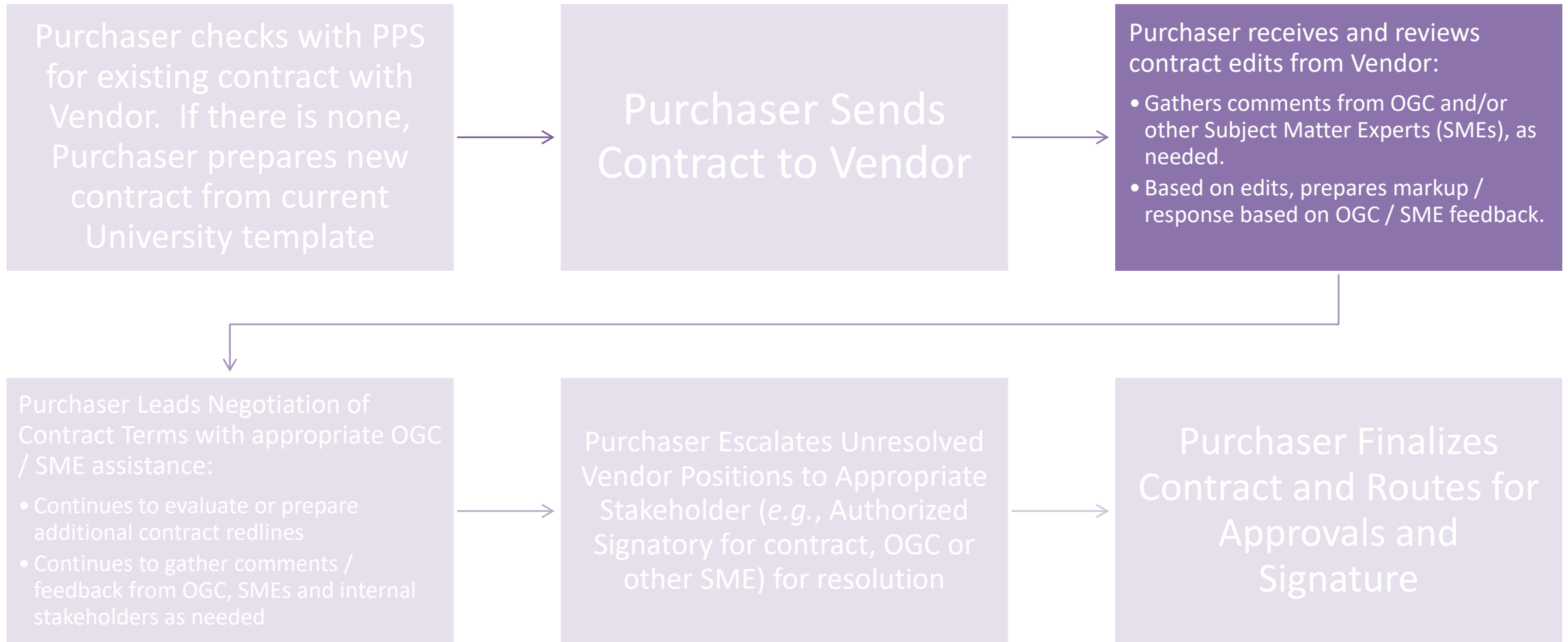
Template Name	Description
Purchase Order Terms and Conditions	Standard terms used for purchases of equipment/goods and low risk, one-off services (equipment installation, training etc.)
Professional Services Agreement	Designed to be used with outside consultants or service providers that will provide general services to NU (beyond just installation or training).
Research Services Agreement	Designed to be used with outside consultants or service providers that will provide services to NU connected to a NU research study or project, such as laboratory testing or analysis services, data analysis, or other research-related services. It has the same terms as the Professional Services Agreement, but also includes terms specific to more complex or sensitive research projects, such as data privacy and material handling terms.
Speaker Contract	Standard agreement for use with outside speakers at NU-sponsored events (off and on-campus).
Catering Rider	Designed to be used when NU is contracting with a caterer/restaurant to provide catering services on/off campus. Rider should be attached to the underlying vendor agreement.
Equipment Rental Rider	Designed to be used when NU is renting pieces of equipment. Rider should be attached to the underlying rental agreement with the vendor.
Event Venue Rider	Designed for events on or off campus. Rider should be attached to the underlying agreement with the event venue.
On-site Contractor Rider	Designed to be used when a vendor/service provider will be coming on NU premises to provide one-off, low risk or low value services (such as equipment maintenance or installation services) where we do not otherwise have a NU Services Agreement with the vendor. Rider should be attached to the underlying vendor agreement.
Speaker Rider	Designed to be used without outside speakers at NU-sponsored events where the speaker insists on using their own form of contract for the arrangement. Rider should be attached to the speaker's own agreement.
Transportation Rider	Designed to be used when NU is contracting for charter transportation services (Bus, Boat, Air). Rider should be attached to the underlying vendor agreement.

# Contract Management Process Workflow: Contract Distribution





# Contract Management Process Workflow: Initial Contract Review



# Contract Management Process Workflow: Initial Contract Review

- If vendor accepts our form of contract without changes to the legal terms, you **do not** need to contact OGC or any SME.
- If the vendor returns our form with legal changes or insists on its form of contract, please do the following **before** sending a document to others for review:

**Review it**

**Insert your comments/changes**

If the contract does not reflect one or more of Northwestern's standard positions for the key terms discussed in this presentation, ask the vendor to accept Northwestern's position using the rationale provided below

Call out issues for "business" (e.g., PI, VP, etc.) or SME review

**Review it with any applicable "business" stakeholders and/or SMEs, and insert their comments/changes**

**If OGC review is required, send the draft and answers to the contract intake questions provided below to **Rich Cummo** ([richard.cummo@northwestern.edu](mailto:richard.cummo@northwestern.edu)). Typical turnaround is 2-3 weeks.**

# Contract Management Process Workflow: OGC Standard Contract Intake Questions

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1. Brief description of the product/service to be purchased.
2. Total contract spend or spend per year (for a multi-year contract).
3. Will the vendor have access to:
  - a. Northwestern's sensitive IT systems?
  - b. Northwestern's sensitive or confidential information (*i.e.*, Level 2, 3, or 4 Data under Northwestern's [Data Classification Policy](#))?  
If so:
    - (1) How much of this data will the vendor have access to?
    - (2) Will such data be stored or manipulated by the vendor?
    - (3) Will such data be exchanged between countries?
  - c. Proprietary University materials or human biological samples?
4. If the vendor is providing IT services / software:
  - a. Is the vendor hosting the software remotely on their servers / systems (e.g., Software-as-a-Service or "cloud-based" product), or is the software installed locally on our systems?
    - (1) If installed locally, when will the hardware, network, or database be ready for deployment?
  - b. If the vendor is providing a cloud-based or on-premises software solution, has NUIT completed a Service Provider Security Assessment of the vendor's product?

# Contract Management Process Workflow: OGC Standard Contract Intake Questions (Cont'd)

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5. Will the vendor be developing or creating custom work product, materials, goods, software or other custom deliverables that should be owned entirely by Northwestern?

If so, please provide a description of the custom items to be delivered by the vendor

6. Is the vendor the single source (or one of few sources) of the product/service?

7. Are there any significant deadlines or timing constraints for completing the contract?

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# Contract Management Process Workflow: Initial Contract Review

## Examples of preparing contract for review by business stakeholder(s), SMEs and OGC

¶ 4022-400-43841 CIP-Brno / Named place of destination in North America (T-4)¶  
Carriage and Insurance Paid to named place of destination in North America Incoterms 2020. The Seller is responsible for the cost of freight up to the point where the goods are delivered to a specified destination. The risk of loss or damage passes to the Buyer at the moment the goods have been delivered to and put under the custody of the first carrier or Buyer. The Seller shall also procure insurance against Buyer's risk of loss or damage during transit. In accordance with Thermo Fisher Scientific's standard terms and conditions of sale, title transfers at the same point that risk of loss transfers.¶

¶ 1152408 → Site Preparation Support for Existing Facility¶  
As the specifications of high-performance microscopes ("Systems") are constantly being improved, the demands on the location where the System is installed have become more critical. Environmental factors, such as, acoustics, floor vibration and AC/DC electromagnetic interference (EMI) can have a negative impact on the overall System performance. In order to meet the specifications of these high-performance Systems for optimal performance, the environment in which the System is installed should be evaluated for such environmental factors whether it is an existing facility or building a new one.¶

any or the terms hereof).¶  
2. → **Prices.** Prices do not include any duties, freight, shipping, insurance or taxes unless specifically noted. Buyer shall pay such amounts directly or reimburse Company for all such amounts.¶  
3. → **Payment Terms.** Invoices will be issued by Company as follows, each due thirty (30) days from the date of invoice:¶  
(i) 30% of the purchase price invoiced upon receipt of order document from Buyer ("Order Retainer");¶  
(ii) 60% of the purchase price invoiced upon delivery in accordance with the Incoterm; and¶  
(iii) 10% of the purchase price invoiced upon acceptance ("Acceptance Payment").¶  
Notwithstanding the foregoing, with respect to orders totaling less than US\$100,000 (or local equivalent), 100% of the purchase price shall be due and payable within thirty (30) days from the date of invoice, which will be issued by Company upon shipment. In case of late payment, Buyer shall pay Company interest on unpaid invoices at the rate of one and one-half percent (1½%) per month (but in no event greater than the maximum rate allowed under applicable law).¶

## Service Terms and Conditions¶

¶ **SERVICE AGREEMENT¶**  
**SCHEDULE OF SPECIFIC TERMS AND CONDITIONS -- PREFERRED 48 HOURS COVERAGE¶**  
These Specific Terms and Conditions are part of the Service Agreement ("Agreement") between Customer and FEI ("Company"). All capitalized terms used herein shall have the same meaning as set forth in the Agreement.¶  
1. → **"PREFERRED 48 HOURS" SERVICE AGREEMENT:** Includes labor, travel, living expenses and parts coverage.¶  
2. → **CONSUMABLE COVERAGE AND EXCLUSION:** For FEG systems, the FEG source is covered under this Agreement and will be replaced upon failure. All other system consumables are excluded from coverage. Consumables include column sources, depositing and milling materials, GIS and other chemicals, gases and liquids, calibration and testing samples, wearable vacuum parts (Hot/Cold Cathode Gauges, pump seals), sample

JD Joseph David Kline  
**WCAS Team:** We generally prefer DDP delivery terms as those require the seller to retain risk of loss on products until they are safely delivered to the buyer, though many sellers do not accept these terms. However, what FEI has proposed here is frequently a compromise that our teams accept: even though we take on risk of loss when they give the equipment to the carrier / shipper for delivery to us, FEI is still required to insure the equipment during transport.¶  
¶  
**Please let me know if these delivery terms are acceptable, or if you would like to request DDP for this order.**¶

JD Joseph David Kline April 13, 2021  
**WCAS Team:** Are you OK with these installment payment terms?¶

Reply Resolve

JD Joseph David Kline April 13, 2021  
**NU Team:** Please confirm that this description of this service plan meets your expectations and needs.¶

Reply Resolve

¶ **EXPORT -- [NU Export Controls: Please review and advise of any questions, comments or concerns with this provision.]¶**

The Buyer represents that it is not a Restricted Party, which shall be deemed to include any person or entity: (1) located in or a national of Cuba, Iran, Libya, North Korea, Sudan, Syria, or any other countries that may, from time to time, become subject to U.S. export controls for anti-terrorism reasons or with which U.S. persons are generally prohibited from engaging in financial transactions; (2) on the U.S. Department of Commerce Denied Person's List, Entity List, or Unverified List; U.S. Department of the Treasury list of Specially Designated Nationals and Blocked Persons; or U.S. Department of State List of Debarred Parties; (3) engaged in activities involving nuclear materials or weapons, missile or rocket technologies, or proliferation of chemical or biological weapons; or (4) affiliated with or a part of any non-U.S. military organization.¶

The Buyer shall strictly comply with all applicable export laws, controls, and regulations. The Buyer shall not export, re-export, divert, transfer or disclose, directly or indirectly, any Goods or related technical data, materials or documents or any product thereof to any Restricted Party or to any country (or any national or resident thereof) which the U.S. Government determines from time to time is a country (or end-user) to which such export, re-export, diversion, transfer or disclosure is restricted, without obtaining the prior written

4. → **Insurance Coverage¶**  
**[NU Risk Management: Please review and advise of any questions, comments, or changes.]¶**

Vendor agrees to maintain at all times during the term of this Agreement the following Insurance: (i) Workers' Compensation insurance as prescribed by the laws of the state in which Services are provided; (ii) Employer's liability insurance with limits of at least \$3,000,000 for each occurrence; (iii) Comprehensive Automobile Liability insurance for Non-owned and Hired Car coverage if the use of motor vehicles is required, with limits of at least \$3,000,000 combined single limit for bodily injury and property damage for each occurrence; (iv) Commercial General Liability ("CGL") insurance coverage of at least \$3,000,000 for each occurrence; and (v) Cyber/Network Security/Professional Errors and Omissions Liability insurance which includes network security and privacy liability, of at least \$1,000,000 for each claim. Limits required herein as to be considered minimum and in no way limits the liability of Vendor.¶

5. → **Certificates of Insurance¶**

Vendor shall provide Northwestern with two (2) original Certificates of Insurance, naming Northwestern as an additional insured, and providing, at a minimum, the coverage shown above (Section 4) with an insurance provider acceptable to Northwestern. The Certificates of Insurance for Comprehensive Automobile Liability and Commercial General Liability shall state that coverage provided is primary to any other coverage available to Northwestern, and shall contain a provision that coverage afforded under the In the event a policies will not be cancelled or non-renewed, until Kvyndryl agrees to provide at least thirty (30) days prior written notice has been

# Contract Review Subject Matter Experts (SMEs)

Subject Matter Expert / Department	Contact	Contract Review Responsibility
Northwestern IT	<ul style="list-style-type: none"> <li>Lester Greenman (<a href="mailto:lester.greenman@northwestern.edu">lester.greenman@northwestern.edu</a>)</li> <li>Farhan Hasan (<a href="mailto:f-hasan@northwestern.edu">f-hasan@northwestern.edu</a>)</li> <li>Brandon Grill (<a href="mailto:bgrill@northwestern.edu">bgrill@northwestern.edu</a>)</li> </ul>	<ul style="list-style-type: none"> <li>Assistance with contracts for the purchase of software, internet-based applications (e.g., Software-as-a-Service or “cloud-based” products) and other IT-related systems or services</li> <li>Risk assessments of vendor information security practices for IT / software solutions through NUIT’s SPSA process</li> <li>Review of IT and data security terms (including NUIT’s Information Security Addendum or ISA) in contracts with vendors that will have access to Northwestern University’s information technology systems, or sensitive / confidential information (i.e., Level 2, 3, or 4 Data under Northwestern’s <a href="#">Data Classification Policy</a>)</li> </ul>
Digital Accessibility	The <a href="#">Digital Accessibility Liaison</a> for your school / unit	Assist schools / units in the evaluation of web-based / software tools for compliance with Northwestern’s <a href="#">Digital Accessibility Policy</a> and related accessibility standards.
Real Estate All other Facilities matters	Peter Buhl <a href="mailto:peter.buhl@northwestern.edu">peter.buhl@northwestern.edu</a>  Amy Zaman <a href="mailto:amy.zaman@northwestern.edu">amy.zaman@northwestern.edu</a>	<ul style="list-style-type: none"> <li>Contracts for the purchase or lease of real property</li> <li>Contracts for the purchase of building remodeling, renovating, construction, architecture, maintenance or other real estate-related services</li> </ul>



# Contract Review Subject Matter Experts (SMEs) - Continued

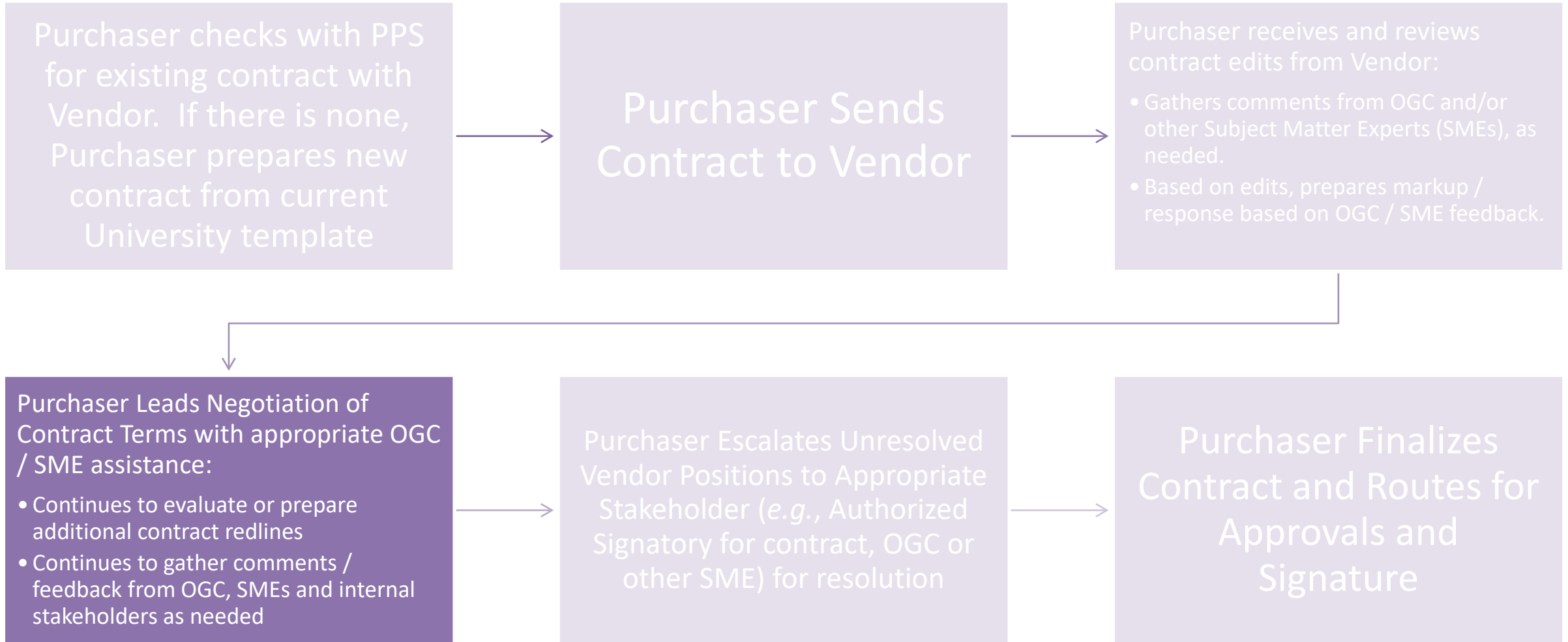
Subject Matter Expert / Department	Contact	Contract Review Responsibility
Export Controls Compliance & International Compliance	Amy Weber ( <a href="mailto:amy.weber@northwestern.edu">amy.weber@northwestern.edu</a> )	<ul style="list-style-type: none"> <li>• Export control terms in purchase contracts including but not limited to: Sanctions or Embargoes, International Traffic in Arms Regulations (ITAR), Export Administrative Regulations (EAR), Office of Foreign Asset Controls (OFAC)</li> <li>• Export controls compliance in relation to the purchase and use of goods and services by the Northwestern community, including sanctioned / excluded party review of vendors</li> <li>• Export controls which may limit the export or reexport of items (equipment, software, materials, etc.)</li> <li>• Export controlled “end-user” agreements that may include limiting the use of an item by non-U.S. persons.</li> </ul>
Office of Risk Management	Angela Piersanti ( <a href="mailto:angela.piersanti@northwestern.edu">angela.piersanti@northwestern.edu</a> )	<ul style="list-style-type: none"> <li>• Purchase contracts for goods or services, or with vendors, that present unique exposure to Northwestern (e.g., contract for the purchase of mental health services for Northwestern community members)</li> <li>• Insurance terms in purchase contracts or vendor agreements that deviate from standard requirements</li> </ul>
Office of the Controller / Office of Treasury Operations	<a href="mailto:ccard@northwestern.edu">ccard@northwestern.edu</a> , <a href="mailto:support@arrowpayments.com">support@arrowpayments.com</a>	<ul style="list-style-type: none"> <li>• Contracts with credit card / payment processors</li> <li>• Credit card / payment processing terms in other vendor contracts (e.g., PCI-DSS compliance terms)</li> </ul>

# Contract Review Subject Matter Experts (SMEs) - Continued

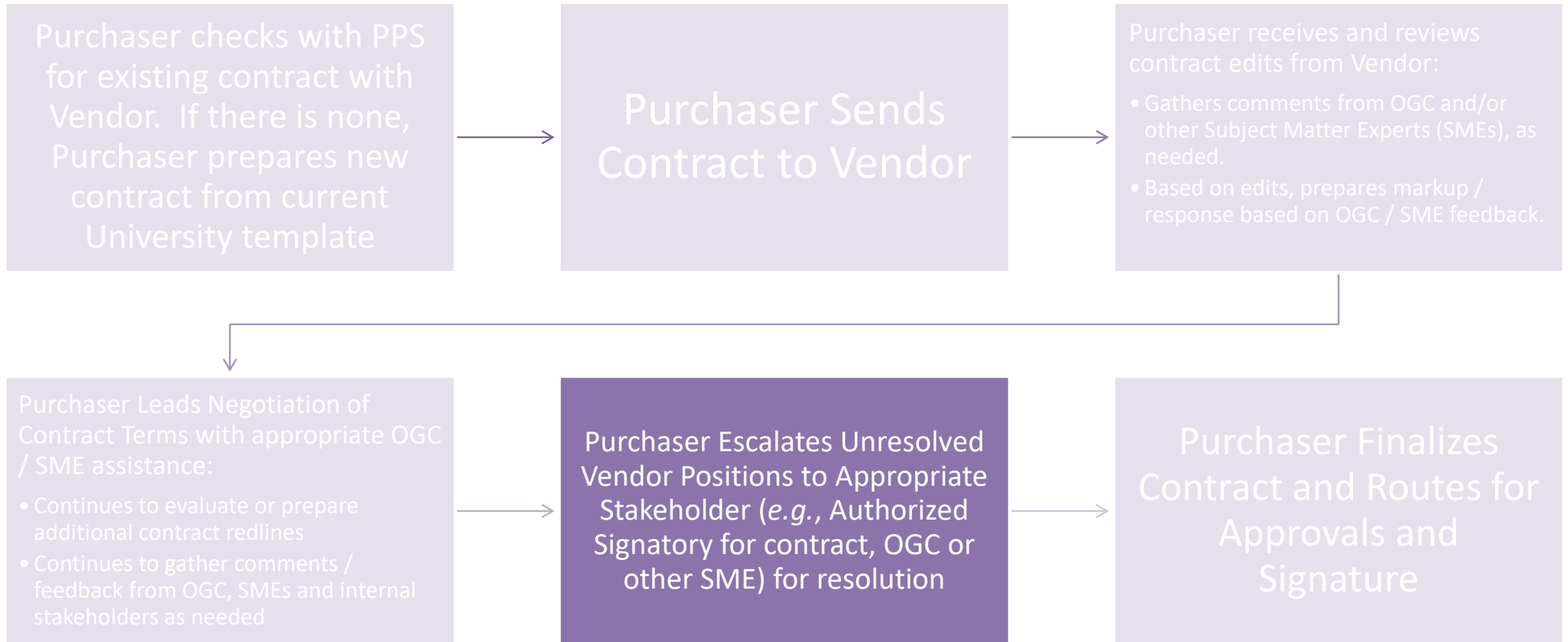
Subject Matter Expert / Department	Contact	Contract Review Responsibility
Neighborhood and Community Relations	<a href="mailto:ncr@northwestern.edu">ncr@northwestern.edu</a>	Purchase contracts related to special events, carnivals, races, etc.
Office of Global Marketing and Communications	Jon Yates ( <a href="mailto:jon.yates@northwestern.edu">jon.yates@northwestern.edu</a> )	Contract terms allowing a third party to use the University's name, logo, or other trademarks in its publicity, marketing or advertising materials



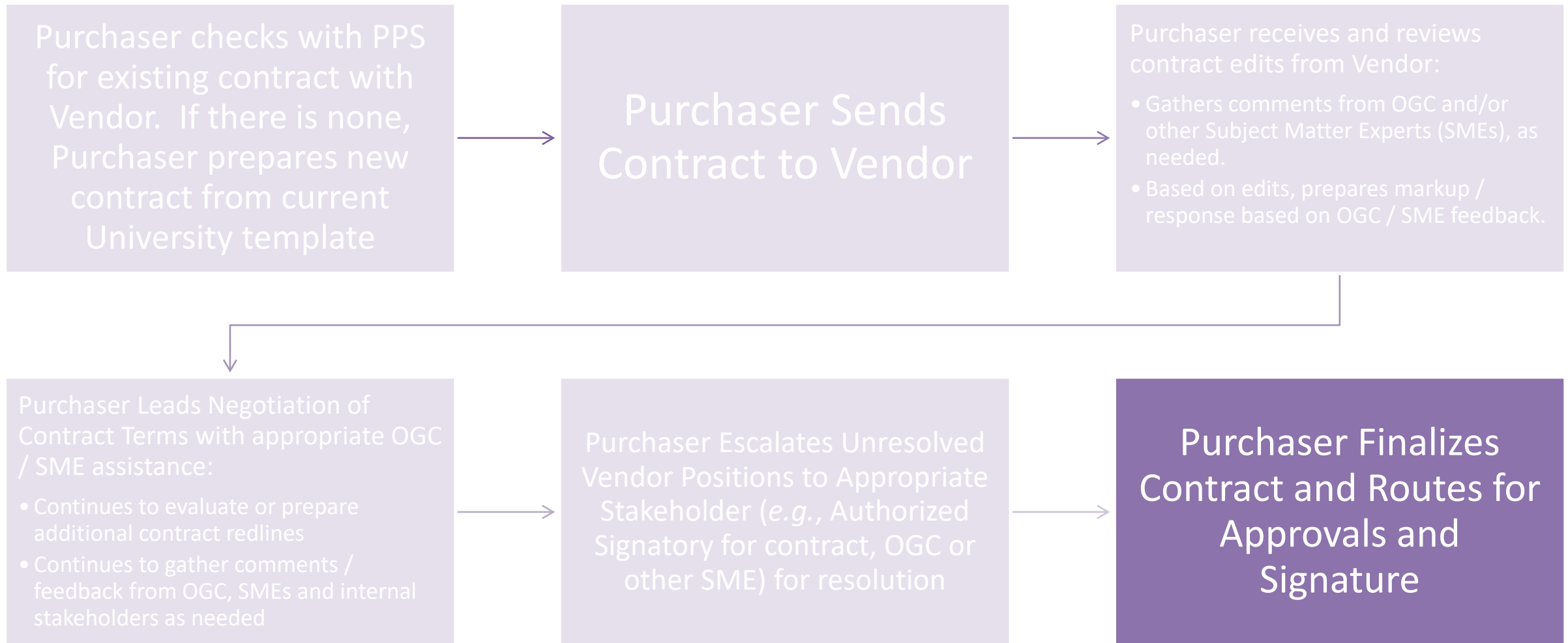
# Contract Management Process Workflow: Contract Negotiation



# Contract Management Process Workflow: Issue Escalation and Resolution



# Contract Management Process Workflow: Approval and Signature



# Contract Management Process Workflow: Preparing a Contract for Approval and Signature

Make sure all blanks (*e.g.*, date, party names, contact information, etc.) are filled in, and all missing exhibits / attachments are in the final version.

All Northwestern contract templates include space for the vendor and Northwestern to sign the contract, with the exception of our PO Terms and Conditions.

Many (though not all) vendor forms will include space for the vendor and its customer to sign the contract.

It is customary for the party whose contract template was used in the negotiation to prepare the final contract for signatures. This includes:

- accepting all agreed-upon tracked changes, removing all margin comments, etc.
- ensuring all blanks in the contract are filled (*e.g.*, effective date of the contract, notice information for each party, etc.)

If the contract takes the form of our PO Terms and Conditions or another set of negotiated terms and conditions of sale that do not include spaces for signatures, you can either:

- add spaces for signatures into the final terms so both the vendor and NU can sign them; or
- attach the final terms to the vendor's quote for the goods / services and have that signed by the vendor and NU.

In either case, please make sure the vendor's final quote does not attach, link to, or otherwise reference another set of conflicting terms, such as the vendor's standard terms and conditions of sale.

# Contract Management Process Workflow: Approval and Signature

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Collect Internal Approvals

Approvals required by your school, department, or unit (i.e., department chair, Dean's Office, VP, etc.)

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PPS approval process applicable to your purchase outlined in [Purchasing and Payment Policy](#)

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Have Contract Signed

It is the purchaser's responsibility to arrange to have the purchase contract signed by the appropriate authorized signatory for their school, department, or unit.

Vast majority of employees, faculty, and other members of the Northwestern community **DO NOT** have the authority to sign contracts on behalf of Northwestern or one of its departments/schools.

A list of the most common authorized signatories of purchase contracts for most departments and schools is included in this presentation and can be found on OGC website.

Check with Procurement or OGC if you are unsure who has authority to sign your contract on behalf of Northwestern

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Keep the signed Contract for University Records

Keep the signed contract in your department's / school's / unit's records according to the University's Record Retention Policy

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Email the signed contract to [richard.cummo@northwestern.edu](mailto:richard.cummo@northwestern.edu) so it can be kept in OGC's records.

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# Contract Management Process Workflow: Common Authorized Signatories for Purchase Contracts\*

School / Unit / Department	Name of Signatory	Title of Signatory
Facilities Management	Darragh, Alex	Vice President for Facilities
Facilities Management	Carrie West	Senior Director of Facilities Capital Planning
Facilities Management	Lizabeth Schaps	Senior Director Finance and Administration
Facilities Management	McKinney, James	Director of Facilities Management Operations
Facilities Management	Peter Buhl	Senior Director of Real Estate Asset Management
Facilities Management	Williams, Angela S.	Assistant Vice President
Feinberg School of Medicine	Campbell, Heather	Vice Dean for Finance and Administration
Feinberg School of Medicine	Chisholm, Rex	Vice Dean for Scientific Affairs
Graduate School	Mayo, Kelly	Dean of the Graduate School
Information Technology (signatory for all IT-related contracts)	Reynolds, Sean	Vice President of Information Technology and Chief Information Officer
Kellogg School of Management	Cornelli, Francesca	Dean, Kellogg School of Management
Kellogg School of Management	Fisher, Daniel	Chief Operating Officer
Kellogg School of Management	Starr, Alexa	Managing Director of Financial Administration
McCormick School of Engineering and Applied Sciences	Ottino, Julio	Dean
McCormick School of Engineering and Applied Sciences	White, Julie	Associate Dean of Administration, Finance and Planning
Medill School of Journalism	Whitaker, Charles	Dean, Medill
Medill School of Journalism	Nelson, Sara	Associate Dean of Administration
Office of the Executive Vice President	Craig Johnson	Executive Vice President
Office of the Executive Vice President	Luke Figora	Vice President for Operations
Pritzker School of Law	Osofsky, Hari	Dean
Procurement and Payment Services	Konrad, Jim	Executive Director of Procurement and Payment Services
Qatar	Kraidy, Marwan	Dean and Chief Executive Officer
School of Communication	E. Patrick Johnson	Dean of the School of Communication
School of Education and Social Policy	Coleman, Coleen	Associate Dean of the SESP
School of Education and Social Policy	Hughes, Jeanne	Assistant Dean for Research of the SESP
School of Professional Studies	Gibbons, Thomas F.	Dean of the School of Professional Studies
School of Professional Studies	Grohman, Therese	Director of Marketing & Recruitment
School of Professional Studies	Russo, Jeannine	Associate Dean of Finance & Administration
Weinberg College of Arts and Sciences	Randolph, Adrian	Dean
Weinberg College of Arts and Sciences	Post, Amy	Associate Dean for Finance and Business Operations
Weinberg College of Arts and Sciences	Schueneman, Holly	Director of Financial Analysis

\*Current as of October 26, 2022

# Contract Management Process Workflow: Electronic Signatures

- Electronic signatures (*i.e.*, PDF signatures, DocuSign, AdobeSign, etc.) are acceptable and legally enforceable
- Northwestern has partnered with DocuSign to provide the University community with a standard digital signature solution.
- More information about DocuSign, typical use cases, features, and how to use it can be found on the Procurement's [DocuSign Information Page](#).

# Key Contracting Do's and Don'ts

Don't	Instead, Do
Don't send a clean or marked contract to OGC before reading it to understand the open issues / questions in the draft	Instead, (1) read the contract first, (2) insert your questions and comments, noting items for business / SME / OGC review, and then (3) send to OGC if required.
Don't expect OGC to take ownership of the contract or process	Instead, conduct a preliminary review of the contract before sending to OGC or SMEs for review. Check the parties, terms, formatting (no .pdf), schedules or exhibits that need to be attached to the contract; finalize business terms with the appropriate authorized person.  <b>Remember: This is <u>your</u> contract</b>
Don't expect OGC to make business/commercial/risk edits to the contract	Instead, make edits yourself. Purchasing teams must make non-legal edits, such as changes to reflect business decisions, feedback from stakeholders or SMEs, or clean-up items. Additionally, purchasing teams frequently can do so more quickly than OGC given our limited resources and the high volume of contract review requests we receive.
Don't tell your vendor that Northwestern would be happy to use the vendor's standard agreement / T&Cs.	Instead, first tell your vendor to use our form of agreement as it's NU policy and the vast majority of other vendors do so. You should try to use Northwestern's templates as much as possible for speed, efficiency and consistency.
If you don't know the right process / procedure, don't act first and ask for forgiveness later if something goes wrong.	Instead, know the rules, follow the rules, and ask questions if you aren't sure.



# Key Contracting Do's and Don'ts

Don't	Instead, Do
Don't assume OGC is conservative in its approach.	Instead, please understand that OGC is here to protect Northwestern's interests now and in the future, including from "what if" hypotheticals. We work hard to strike a balance between enabling opportunity and minimizing unnecessary risk to you and the University community.
If you need a contract done quickly, don't submit for OGC review prior to negotiation of material business terms or applicable SOW.	Instead, submit your contract for OGC review (if needed) once key business terms (or SOWs) are negotiated or have been vetted. Prior to submitting to OGC, you should review the vendor's comments to key business terms with the applicable campus stakeholder and insert your own comments.
Don't expect your contract is more important than others that came in before it.	Instead, please understand that OGC is constantly receiving numerous contract review requests, and some are very complicated, lengthy, risky, expensive, etc. OGC has limited resources and we order and prioritize requests to address the University's contracting needs as quickly and efficiently as possible. With this in mind, plan ahead to give OGC as much time as possible to review your contract.
Don't assume OGC will be able to review your contract / issue immediately.	Instead, OGC typically has to review the entire contract / circumstances to understand the "why" behind the vendor's changes or issues, which takes time. Any contract change or issue, no matter how seemingly insignificant, can have a big consequence.
Don't wait to contact OGC with vendor issues only after you have <b><u>NO</u></b> other options.	Instead, please call OGC early so that we can help structure practical solutions to business problems / contracts. <b>Let us help you before it becomes a crisis!</b>
Don't view the contract only through the lens of the present day.	Instead, look into the future and try to envision the impact of the contract down the road, including under various scenarios. And a contract could set the tone with a vendor for years to come!

# Refresher on Contracts: The Basics

# What is a Contract?

- An agreement or understanding between two or more parties to do (or not do) something
- **NOT** only or just a piece of paper
- Rather, a contract is a relationship between separate parties defined by mutual agreement and obligations

# Essential Elements of a Contract

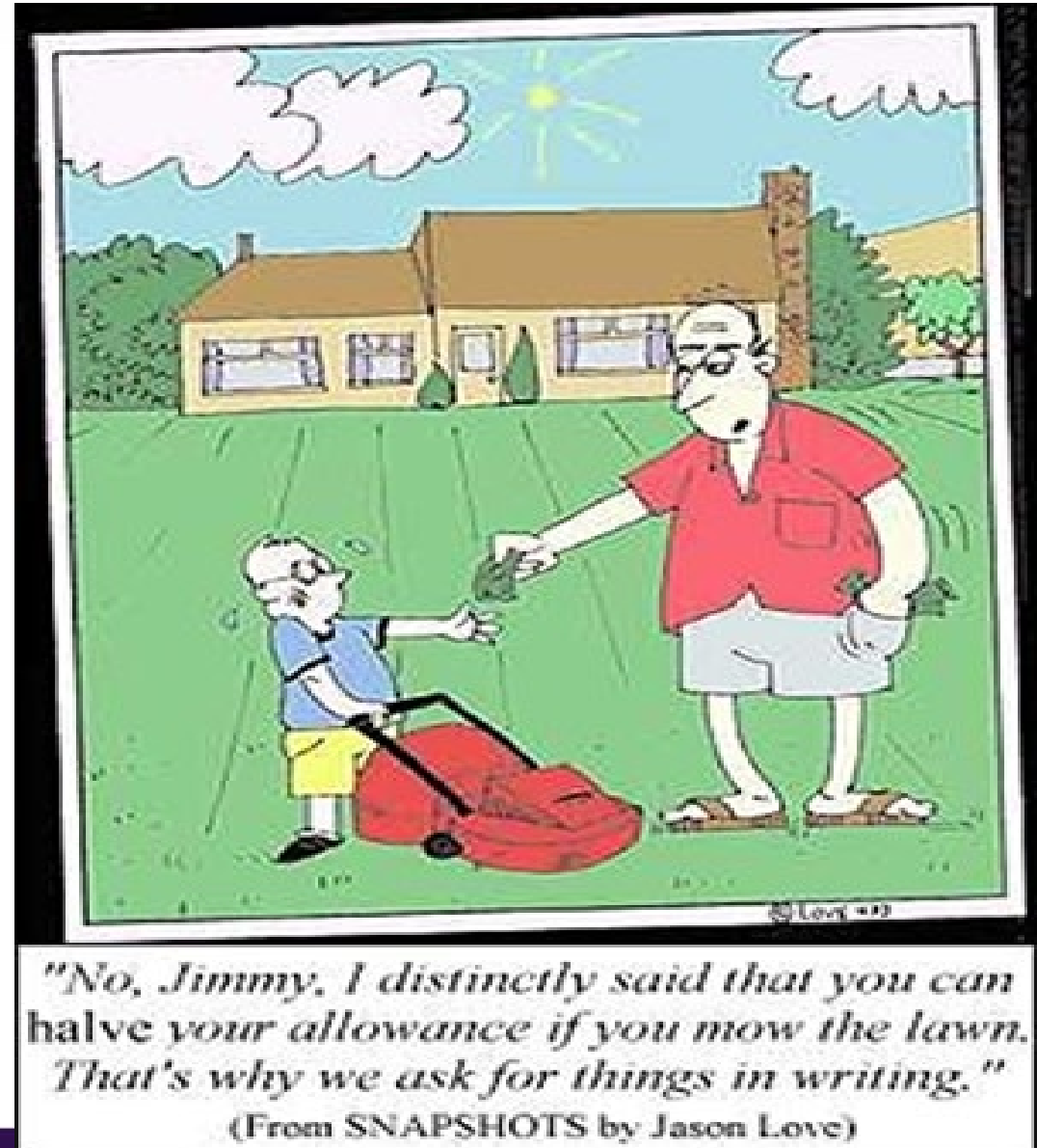
Every contract must have three essential elements:

- Offer – proposal
- Acceptance – acknowledgment / agreement of offer
- Consideration – anything of significant value for which the parties have bargained; it must be mutual

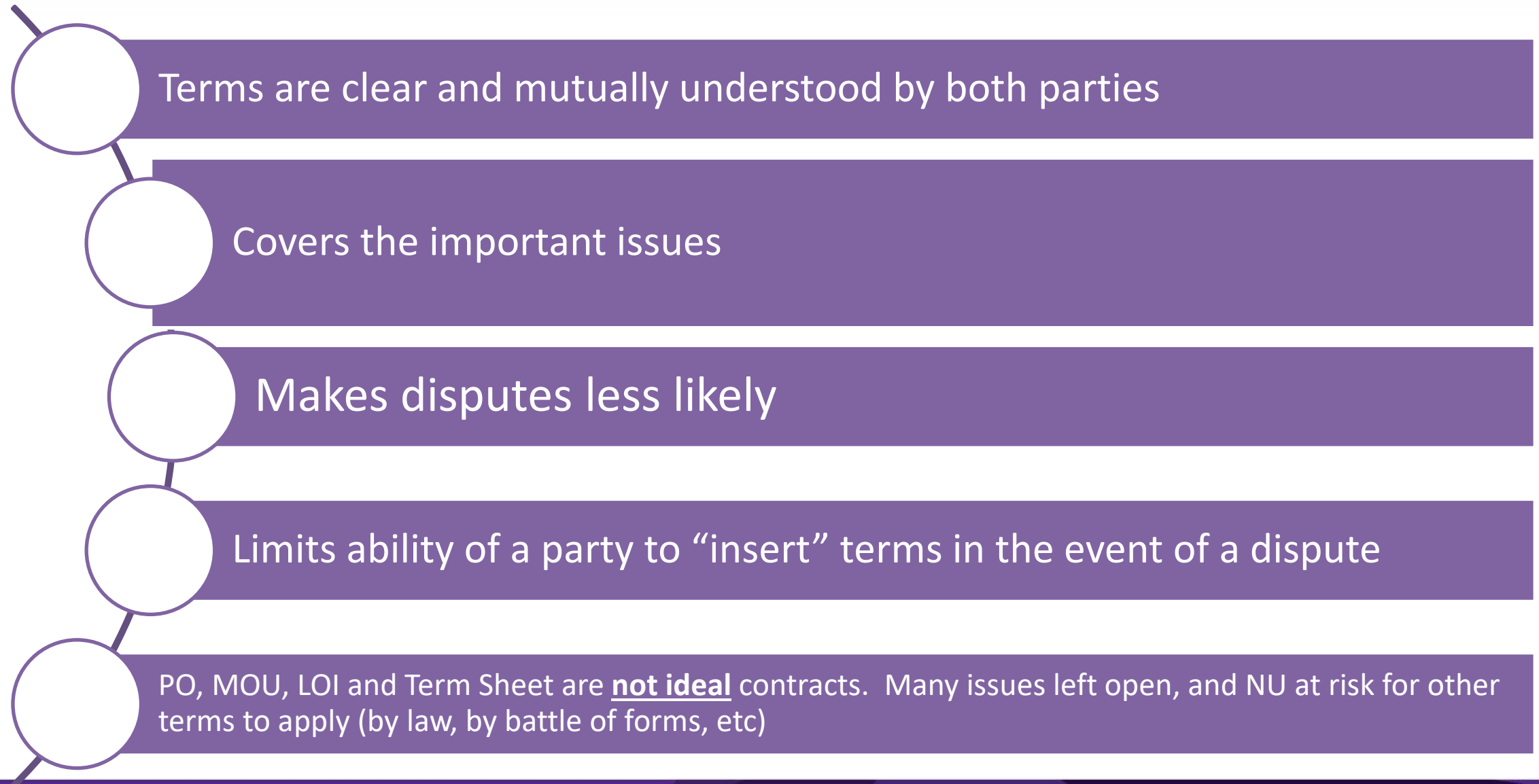
# Contracts: Written vs. Oral

## Contracts **MAY** be oral / unwritten

- Except under certain circumstances, contracts do not have to be written. Telephone or other oral conversations might suffice.
- Only three kinds of contracts are required to be in writing by law: (1) not fully performable within one year, (2) purchase of goods for more than \$500, and (3) purchase of real estate.
- As Jimmy learned the hard way, oral contracts are rife with risk, so get it in writing!



# Advantages of Signed Written Contracts



# “Battle of the Forms”

- A contract must have mutual agreement (“meeting of the minds”) on the most important business terms (e.g., price, quantity, delivery, etc.)
  - And ideally on other important legal terms too (e.g., warranties, indemnity, etc.), but this doesn’t always happen
- NU sends its PO and vendor sends confirmation of the few basic business terms, but makes its acceptance conditioned upon the vendor’s legal T&Cs and attaches its PO.
- Even if the forms are hopelessly conflicted, so long as the parties act like there is an agreement (*i.e.*, vendor shipped the goods and NU has accepted them), there is a contract made up of the terms on which the forms agree, with conflicting terms excluded and replaced with default terms provided by the UCC. This is sometimes called the “Knockout” Rule.
- **Bottom Line:** As a practical matter, costly and time-consuming litigation or arbitration is the only way to resolve a “Battle of the Forms” situation.

**So, when it matters, get a signed contract in place.**

# “Battle of the Forms”: Key Take Aways

Follow the [Purchasing and Payment Policy and Procedures](#):

- Get a signed contract.
- Use Northwestern templates.
- Avoid significant purchases only on POs without signed terms. **PAY ATTENTION** to other T&Cs/POs being included.



# Key Contract Terms

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Generally	<input type="checkbox"/> Always make sure the agreed-upon “deal” with the vendor is fully covered in writing in the contract. This includes the details of the services they will perform, how they will perform them, and/or the goods they will sell.	<p>If these details are not in the contract, then your other assumptions or the promises made by the other party (orally, email, etc.) likely will not be enforceable!</p>
<input type="checkbox"/> Scope of Work in Services Contracts	<input type="checkbox"/> NU should only enter into services contracts on a project-by-project basis, instead of a “master services agreements” where multiple and differing projects / scopes of work can be entered into.  <input type="checkbox"/> Please carefully review the scope of work to make sure all parts of the project and deliverables are described in the way you understand and discussed with the vendor	<p>Northwestern’s various schools, departments, and units represent a wide range of faculty, staff, students, and researchers with very different pursuits, projects, goals, and needs. For instance, a services contract for a project within Student Affairs often will not contain the appropriate terms, or have received the appropriate review, to be used for a scope of work to support a research project within Feinberg.</p>
<input type="checkbox"/> Pricing and Payment Terms	<input type="checkbox"/> Always double-check prices / fees in a vendor’s final quote or order form to make sure they are correct and there are no “surprises” ( <i>i.e.</i> , exorbitant handling fees, installation charges, etc.)	
	<input type="checkbox"/> Reject terms in services contracts that allow the vendor to increase fees at any time	<p>This approach is quite common with IT cloud service providers who offer subscriptions to internet-based platforms</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Pricing and Payment Terms	<input type="checkbox"/> Purchase price / service fees should be due only <b>after</b> delivery and acceptance of goods or work product or performance of services	<p>While upfront payments are sometimes necessary to cover costs of custom orders or to reserve our “spot in line” with a vendor, it is best to avoid these as we risk losing money without receiving goods or services if the vendor experiences business interruptions, bankruptcy, etc., or simply fails to perform, after payment.</p>
	<input type="checkbox"/> NU can NOT accept LESS than net 30 ( <i>i.e.</i> , payment within 30 days after Northwestern’s receipt of vendor’s invoice)	<p>Internally it takes a while to get funds disbursed</p>
	<input type="checkbox"/> Northwestern will pay <b>undisputed amounts</b> within 30 days after receipt of vendor’s invoice	<p>We always should have the right to dispute in good faith any inappropriate fees / charges in vendor bills.</p>
	<input type="checkbox"/> Reject any late payment charges / penalties	<p>Because (1) we accept net 30 day payment terms, which are the preferred terms for many vendors, and (2) vendors have other sufficient remedies to protect themselves in case we fail to pay on-time (<i>e.g.</i>, contract rescission or termination, suspension of services, etc.), we generally do not accept late charges as they are unnecessary and punitive.</p> <p>Interest should be avoided, but if unavoidable then the <u>lower</u> of the “max by law” or 1-5% can be okay.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Delivery Terms (Goods only)	<input type="checkbox"/> DDP (Incoterms 2020) Northwestern's facilities	<p>Incoterms are a set of internationally recognized terms governing the trade and delivery of goods. PPS maintains this helpful <a href="#">Shipping Guide</a> for Incoterms and other topics related to shipment and delivery of goods. DDP terms are the lowest risk, lowest cost delivery terms for buyers as the vendor is required to pay for shipping and all import customs fees, and bears risk of loss of the goods until they are safely delivered at our facilities.</p> <p>Other, less favorable delivery terms (<i>e.g.</i>, FOB or ExWorks vendor's facility) may be accepted <b>so long as</b> the purchaser (1) can arrange and pay for shipping and insurance on the goods while in transit, and (2) is willing to accept the risks if goods are lost in transit.</p> <p>For instance, if NU takes on the risk of loss in transit, then it can only seek reimbursement from the insurer if there is a loss of the goods. Pursuing an insurance claims is burdensome and time consuming, and there is no guarantee of the claim being honored (<i>e.g.</i>, risk of rejection or claim might not exceed applicable deductibles). This means the purchaser will often have to pay the vendor <i>again</i> for replacement goods while waiting for the insurance claim to be processed.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Delivery (goods) / Performance (services)	<input type="checkbox"/> “Time is of the essence” for orders	<p>Vendor is responsible for timely delivery according to the timing stipulated in the order and NU can cancel the order and seek other remedies if the vendor fails to deliver on-time.</p>
	<input type="checkbox"/> Use our customs clearance agent, Deltamax, for any customs clearance issues related to shipments of goods	<p>More information about how to contact Deltamax, their services, and their pricing can be found at Procurement’s <a href="#">Customs Vendor Webpage</a>. Fees for use of Deltamax are at the purchaser’s expense. Our customs clearance agent already has appropriate documents and powers of attorney from the University to manage customs clearance issues, which makes them more efficient than using an agent suggested by the vendor or the vendor’s carrier.</p>
<input type="checkbox"/> Inspection of Goods and Acceptance Services	<p>Always include terms that allow Northwestern sufficient time to inspect and either accept or reject goods or services after delivery. Northwestern’s standard inspection language is found in Sections 2 and 3 of our <a href="#">PO Terms and Conditions</a>.</p>	<p>Northwestern should have (1) a reasonable opportunity to inspect products and services to make sure they meet the agreed-upon specifications / requirements and are undamaged, and (2) the right to reject and at least receive a replacement for products / services that that don’t comply.</p> <p>Vendors will frequently limit the time Northwestern has to inspect to as little as 48 hours after delivery, but we typically want at least 30 days to allow our teams sufficient time to inspect and test products and deliverables received, especially if there is an installation or configuration component. Northwestern purchasers can agree to shorter inspection periods if they think they can realistically inspect and notify vendors of issues in less time.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Taxes	<p><b>Always</b> include language in the contract that recognizes Northwestern’s tax-exempt status:</p> <p>“Vendor acknowledges that Northwestern is a tax-exempt entity and will not be responsible for payment of taxes from which it is exempt at the time such taxes are levied or assessed. Upon vendor’s request, Northwestern will provide vendor with a certificate of tax exemption.”</p>	<p>Northwestern is a not-for-profit entity exempt from many U.S. state and federal sales, use, or excise taxes placed on goods and services.</p>
<input type="checkbox"/> Term and Termination	<input type="checkbox"/> Reject auto-renewal provisions in contracts for services, and instead propose that the term of the services contract only renew upon mutual written agreement of the parties.	<p>Auto-renewal terms often read as follows: “The term of this Agreement will automatically renew for additional 1 year periods at vendor’s then-current rates unless [Customer] provides vendor written notice of its intent not to renew at least 90 days prior to the end of the then-current term.”</p> <p>The University avoids auto-renewal provisions as they are hard for our teams to manage and can result in schools, departments, or units incurring unintended fees, particularly if the initial term of the contract is already long (e.g., 3 – 5 years).</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Term and Termination	<input type="checkbox"/> Include flexible termination language in <b>all</b> contracts for services to allow Northwestern to terminate services at any time and for any reason without additional liability to the vendor: “Northwestern may terminate this Agreement and/or any Statement of Work at any time, in whole or in part, with or without cause, upon thirty (30) days prior written notice to Contractor.”	<p>While this language is ideal, these clauses are often negotiated and compromises might need to be considered on a case-by-case basis. Alternatives could include:</p> <ul style="list-style-type: none"> <li>• Termination only upon extended prior notice (e.g., 60, 90, 120 days)</li> <li>• Termination right triggered by certain events, like “epidemic or pandemic (whether or not declared),” governmental order or other force majeure events</li> <li>• Termination / cancellation only with payment of a cancellation fee or tiered schedule of fees that increase the closer to an event or contract completion NU cancels</li> <li>• Any cancellation / termination fee is a business decision, but should be as low as possible to give NU as much flexibility as possible</li> </ul>
	<input type="checkbox"/> NU should receive a refund of prepaid fees in the event of early termination.	
	<input type="checkbox"/> Reject any flexible termination language that allows the vendor to terminate services at any time and for any reason.	<p>Northwestern and the vendor <b>should not</b> have equal termination for convenience rights. When we sign a contract with a service provider, we expect them to perform the promised services so long as we pay them the agreed upon fees. If the vendor can terminate the contract at any time, this severely undermines their commitments in, and the value of, the contract.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Reps and Warranties Generally	Make sure the materially important facts and assumptions that you have been told, assumed, or read/learned about the services or product ( <i>i.e.</i> , the ones that if they end up not being true could have a material adverse effect on your arrangement) are in writing in the contract!	If these details are not in the contract, then your other assumptions or the promises made by the other party (orally, email, etc.) likely will not be enforceable!



# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Warranties for Goods	<p>At a minimum, vendors should provide the following warranties related to goods sold to Northwestern:</p> <ol style="list-style-type: none"> <li>1. The vendor has good title to the goods and is selling them to Northwestern free of any encumbrances;</li> <li>2. The goods are fit for their ordinary purpose, free from defects or adulterations, and conform to agreed-upon specifications;</li> <li>3. The goods have been manufactured and delivered in accordance with applicable laws;</li> <li>4. The goods do not and will not violate any intellectual property right of any third party and there are no known intellectual property infringement claims by a third party relating to the goods.</li> </ol>	<p>Vendors will frequently try to limit warranties against defects and non-conformities to a set warranty period (<i>e.g.</i>, 90 days, 12 months, etc.) due to “wear and tear” and other factors outside of the vendor’s control (such as handling by carriers, unpredictable environmental factors, etc.) that can damage goods and lead to “unearned” warranty claims.</p> <p>Whether a warranty period offered by a vendor is sufficient is ultimately a business decision for the purchaser depending on the type of goods to be purchased (<i>e.g.</i>, complex or custom goods, simple, off-the-shelf goods, etc.), how expensive the goods are to replace, and whether a maintenance contract is also being purchased at the same time (which often acts as a sort of extended warranty).</p> <p>For instance, while a 90 day warranty might be fine for low cost lab supplies like gloves, tubing, or containers, it is reasonable to expect a much longer warranty from a manufacturer of very expensive and highly specialized scientific equipment (such as electron microscopes) that would be very expensive and difficult to fix or replace.</p> <p>The University typically expects all vendors to provide at least a 12 month warranty on all new goods.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Warranties for Services	<p>At a minimum, vendors should provide the following warranties related to services provided to Northwestern:</p> <ol style="list-style-type: none"> <li>1. The vendor will perform all services and deliver all work product in a timely and professional manner, using qualified personnel, in accordance with industry standards, all applicable laws, and the agreed-upon scope of work / specifications;</li> <li>2. The vendor will comply with all of Northwestern's rules, regulations and policies applicable to the vendor;</li> <li>3. The vendor will maintain all permits, licenses, etc. necessary to perform the services; and</li> <li>4. The services and work product provided by the vendor do not and will not violate any intellectual property right of any third party and there are no known intellectual property infringement claims by a third party relating to such services and work product.</li> </ol>	<p>Vendors will sometimes try to limit warranties against non-conformities in performance of services and work product to a set warranty period (<i>e.g.</i>, 90 days, 12 months, etc.). This is particularly true with IT services / SaaS providers.</p> <p>However, the University generally rejects these limitations because services and work product do not suffer from “wear and tear” or other factors outside of the vendor’s control that can lead to “unearned” warranty claims. Rather, the University expects all services vendors to stand behind their services for the entire period of performance under the contract (<i>i.e.</i>, the term of the contract or scope of work) <b>plus</b> any applicable inspection / acceptance period related to work product provided by the vendor.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Debarment and Conflicts of Interest Representation	<ul style="list-style-type: none"><li>• All vendors must make representations to Northwestern that neither the vendor nor any of its affiliates, subcontractors, or employees involved in providing goods or services to the University are debarred, a sanctioned entity, or otherwise excluded from participation on government programs.</li><li>• Additionally, Northwestern must have the right to immediately terminate the contract if any of those representations become false during the term of the contract.</li><li>• Northwestern’s standard debarment representation is found in Section 8 of our <a href="#">PO Terms and Conditions</a>.</li></ul>	<p>Due to the support Northwestern receives from various local, state, and federal governments / agencies in the form of grants and contracts, as well as other laws that apply to institutions of higher education, the University is not permitted to work with these sorts of debarred, sanctioned or excluded entities and can risk debarment and loss of all government support by doing so.</p> <p><b><i>As a result, this language must be included in all of our contracts.</i></b></p>

# Representations/Warranties

## What are they?

- A “representation” is a statement of fact, as of a moment in time, intended to induce reliance by the other contracting party
  - **For example:** “The Vendor has the requisite corporate power and authority to execute and deliver this Agreement and to perform all of its obligations hereunder.”
- A “warranty” is a promise by the maker that the statement relating to products/services is true

## Two types of warranties

- Express warranties
  - Written into the contract, and wouldn’t otherwise apply if not written in
- Implied warranties
  - Part of the contract automatically by “operation of law” -- not necessarily written in the doc (but waivable)

# Reps, Warranties and Remedies

**Express warranties are typically provided with respect to:**

- Product performance
- Equipment performance
- Quality of service (*e.g.*, skill and ability)
- Title or non-infringement of intellectual property\*

**Breach of a rep (e.g., untrue / not performed) gives rise to a potential claim and remedy**

## **Remedies**

- *Misrepresentation*: rescission, restitution, punitive damage (if fraudulent)
- *Breach of warranty*: “benefit of the bargain” damages (if provable)

***\*Important Note: if a vendor refuses to provide an non-infringement warranty, then it may be okay to accept in lieu: (i) replacement, modification, or continuation with appropriate license, or refund and (ii) indemnification.***

# Disclaimers of Warranties

- Statement aimed at limiting the vendor/seller's liability for defects in products/services
- Disclaiming already expressed warranties or a battle of the forms can create ambiguity (if expressed warranties are included, remove them from disclaimers/limits)
- Implied warranties (that are not expressly included) can be disclaimed if clearly excluded in writing

# Example of Disclaimers of Warranties

THE WARRANTIES PROVIDED IN THIS AGREEMENT ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES OF ANY KIND, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY OR NON-INFRINGEMENT.

**Be Careful of Disclaimers!** Vendors will often try to slip other disclaimers into their forms or a markup of our standard language (see underlined language above) that could create ambiguity (if already expressed) or shift the risk of certain issues (if not addressed previously) to NU, such as IP infringement above. Non-infringement disclaimers are very common “add-on” by vendors, but something we typically reject.

**Note: Using the term “AS-IS” also disclaims all implied warranties.**

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Indemnification	<p>Northwestern’s standard indemnification terms are found in in the “Indemnification” sections in templates found on PPS’s <a href="#">Contracting Process website</a></p> <p>Deviations from Northwestern’s standard indemnities requested by a vendor must be reviewed by OGC.</p>	<p>Please see the slides below for additional information about indemnities and Northwestern’s standards with respect to its vendors.</p>



# Everyone's favorite... Indemnification! But what is it?

- An indemnity is a written contractual right to compensate the harm/loss/damage incurred by the other
- It can turn harder theoretical rights/damages that must be asserted and proven, into easier/clearer written contractual rights to enforce
- A party (the “indemnitor”) may agree to “hold harmless” (think “protect”) the other (the “indemnitee”) if the indemnitor does (or fails to do) something, and it may go even further and require the indemnitor to “defend” (think “pay for attorneys and settlement/litigation costs”) the indemnitee for the issue at hand

# Indemnification – Indemnities Given by Vendors

- NU expects its vendors to indemnify, defend, and hold the University and its officers, trustees, employees, and agents harmless against all claims and liabilities caused by the vendor or its affiliates, subcontractors, or their respective employees (“**Personnel**”) in connection with the contract or the goods or services provided under the contract. This typically includes:
  - acts or omissions by the vendor or its Personnel, including any personal injury, death, or property damage caused by the vendor’s goods or services
  - breaches of the contracts entered into as part of the purchase, including any related privacy agreements (*i.e.*, a BAA or data processing addendum required by other privacy laws)
  - any data breach caused by the vendor or its Personnel, to the extent the vendor has access to any of the University’s sensitive or personal data as part of services
  - any allegation that the goods, services or work product, or the use thereof by Northwestern, infringes, violates or misappropriates any third party IP rights

# Indemnification – Indemnities Given by Vendors

- Vendors typically try to limit their indemnities to:
  - Third party claims against NU (customer/indemnitee) resulting from bodily injury or property damage caused by a defect in products or non-conformity in services (*i.e.*, failure to perform in accordance with published or agreed-upon specifications)
  - Strict liability (responsibility they cannot avoid under applicable law, such as certain product liability claims)
  - Matters arising due to the vendor's clear bad fault (*i.e.*, gross negligence or willful misconduct)
- Indemnities are highly technical and negotiated terms that frequently end up as a compromise between each party's preferred terms.

# Indemnification – Indemnities Given by Northwestern

- Generally, Northwestern is not willing to indemnify vendors/providers against any claims because the vast majority of obligations and risks arise from the vendor/provider in most contracts.
- However, there are some exceptions. An indemnity that a vendor demands from Northwestern must be reviewed by OGC.

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Limitations of Liability	<p>Northwestern may accept a limitation on a vendor's liability for consequential and indirect damages, and sometimes a cap on a vendor's total liability under the contract (at least 2x), so long as:</p> <ul style="list-style-type: none"><li>• the vendor's indemnification, confidentiality and IP obligations and liabilities for gross negligence, willful misconduct, and fraud are carved-out from both limitations;</li><li>• the vendor's indemnification obligations meet Northwestern's standards; and</li><li>• both limitations are mutual and apply equally to Northwestern</li></ul> <p>Other changes to limitations of liability must be reviewed by OGC.</p>	<p>Please see the slides below for additional information about limitations of liability and Northwestern's standards with respect to its vendors.</p>

# Limitation of Liability – Examples

EXCEPT AS SET FORTH IN THIS SECTION, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES, OR DAMAGES FOR LOSS OF PROFITS OR REVENUE, WHETHER IN AN ACTION IN CONTRACT OR TORT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATIONS OF LIABILITY SHALL NOT APPLY TO: (a) CONTRACTOR'S INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT OR ANY BREACH THEREOF; OR (b) A PARTY'S GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR FRAUD, OR ANY OTHER LIABILITY THAT MAY NOT BE LIMITED OR EXCLUDED UNDER APPLICABLE LAW.

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Insurance	<ul style="list-style-type: none"><li>• The Office of Risk Management sets insurance requirements for our vendors/providers and reviews modification requests.</li><li>• Please review Risk Management’s Insurance Limit Matrix linked <a href="#">here</a> and adjust the insurance coverages and amounts in your contract based on the guidance provided in the Matrix and the type of vendor you are working with before sending the first draft of the contract to the vendor for review.</li><li>• Send any changes to those requirements submitted by vendors to Rashaan Evans (<a href="mailto:rashaan.evans@northwestern.edu">rashaan.evans@northwestern.edu</a>) in Risk Management for review.</li><li>• Do all of this prior to or at same time as submission to OGC</li></ul>	Please see the slides below for additional information about Northwestern’s insurance requirements for its vendors.

**Practice pointer:** An indemnity provision is separate from an insurance provision. The insurance policy will only pay for covered losses and associated costs regardless of what was agreed to in the indemnity language. Anything that is not picked up by insurance would have to be paid for by the indemnitor through other means.

# Insurance

**What is Insurance** – A means for recourse when a “bad thing” happens. Insurance is a contract where the one party (the insurer) agrees to reimburse another party (the insured) if certain events or other circumstances happen (e.g., a wrongful act; some other risk) in exchange for a consideration (charging a premium).

- Provides a financial means to pay outside of company’s assets (thus protecting those assets)
- Requires insight to evaluate risk/exposure



# Vendor's Insurance – Northwestern's Standards for Vendors

- Risk Management's Insurance Limit Matrix with insurance standards for different types of vendors can be found [here](#)
- Vendors can use excess/umbrella limits to meet requirements
- Northwestern's right of recovery against the vendor should not be limited to the insurance carried by the vendor
- 30 days advanced written notice of cancellation, non-renewal or material change in coverage
- Vendors must provide Northwestern with a certificate of insurance evidencing required coverages, and listing Northwestern as an additional insured

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Intellectual Property Rights	<input type="checkbox"/> <b>Commercial Goods:</b> Northwestern only expects to own the <u>physical good</u> delivered by the vendor, and <b>does not</b> expect to own any intellectual property rights in such goods. <input type="checkbox"/> <b>Licenses of off-the-shelf commercial software:</b> Northwestern only expects a non-exclusive license from the vendor to use the software for our intended business purposes. <input type="checkbox"/> <b>Professional Services Work Product:</b> Northwestern expects to own <u>both</u> the physical work product provided by the vendor as part of the services, <b>and</b> all intellectual property rights the vendor might have in that work product.	<p>Northwestern’s standard IP terms related to work product provided as part of services are included in the “Work Product” sections in our Services Agreement forms found on PPS’s <a href="#">Contracting Process website</a></p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<ul style="list-style-type: none"> <li><input type="checkbox"/> Choice of / Governing Law</li> <li><input type="checkbox"/> Dispute Resolution / Waiver of Jury Trial</li> <li><input type="checkbox"/> Choice of Venue/Forum</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Northwestern prefers to choose:               <ul style="list-style-type: none"> <li><input type="checkbox"/> Illinois law to govern its contracts and disputes arising from those contracts (“Choice of Law”)</li> <li><input type="checkbox"/> binding arbitration (and waiver of trial) to resolve disputes with vendors (note: arbitration vs mediation/negotiation); and</li> <li><input type="checkbox"/> to have all legal or arbitration proceedings related to disputes be conducted in Cook County, Illinois (“Choice of Forum”).</li> </ul> </li> <li><input type="checkbox"/> If the vendor refuses to accept any of these standard positions, Northwestern can also agree to remain silent on any of these points (<i>i.e.</i>, simply remove the choice of law, choice of venue, or choice of arbitration provision in the contract).</li> <li><input type="checkbox"/> If the vendor cannot remain silent on these provisions and insists on applying the law or forum of a jurisdiction outside of Illinois to the contract, the purchasing stakeholder may agree to this, but must be willing to (1) accept the risk of a less certain outcome in the event of a dispute with the vendor given the unknowns of litigating disputes outside of Illinois, and (2) pay for the additional costs that could arise in connection with such a dispute, including outside counsel fees and increased travel costs associated with litigating a dispute outside of Illinois.</li> <li><input type="checkbox"/> NY and DE can be more easily accepted; however, LA, CA and TX can NOT be accepted</li> <li><input type="checkbox"/> Any international law/venue requires OGC prior approval</li> </ul>	<p>Not all states have well-developed case law with respect to commercial transactions, or sophisticated courts or arbitrators to adjudicate or arbitrate disputes arising from those transactions. Illinois has the dual advantage of having robust and sophisticated law, courts, and legal services and infrastructure, and of being the University’s home state.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Other Terms / Issues to be Aware Of	<input type="checkbox"/> Reject any contract clause that prevents Northwestern from: <ul style="list-style-type: none"> <li>○ Hiring or soliciting the vendor's or another party's employees or contractors;</li> <li>○ interacting or doing business with certain individuals or entities, such as exclusivity clauses that require Northwestern to only purchase from or work with a single vendor; or</li> <li>○ undertaking otherwise lawful actions or operations (<i>i.e.</i>, non-compete clauses)</li> </ul>	<p>Due to the highly decentralized nature of the University's operations, Northwestern does not agree to non-solicitation, exclusivity, non-compete, or similar restrictive provisions like this as we have no way to manage these sorts of obligations.</p>
	<input type="checkbox"/> Reject any contract clause that allows the vendor to publicly refer to Northwestern as a customer, or to use the University's name, logo, or other trademarks in its publicity, marketing or advertising materials	<p>Northwestern generally does not endorse any third party products or services, including those of our vendors, and any use of the University's name or logos in the vendor's own publicity, marketing, or advertising is easily confused as an endorsement. Any proposed use of the University's name or logos by a vendor for such publicity or marketing purposes (including any reference to the University in a vendor's public list of customers) must be reviewed and approved by the Office of Global Marketing and Communications.</p>

# Checklist of Key Contract Terms

Term	Northwestern Position / Advice	Rationale / Notes
<input type="checkbox"/> Other Terms / Issues to be Aware Of	<input type="checkbox"/> <b>Digital Accessibility:</b> When purchasing any software or web-based IT product, be sure to review the <a href="#">NU Accessible Purchasing Process guidelines</a> to determine whether the product requires digital accessibility review and/or if you need to include <a href="#">Northwestern's Accessibility Provision</a> in the contract.	<p>Northwestern makes deliberate efforts to select software and web-based products that will be accessible to all users. Therefore, as per Northwestern's <a href="#">Digital Accessibility Policy</a>, the accessibility of a product must be considered during the purchasing process.</p> <p>Contact the <a href="#">Digital Accessibility Liaison</a> for your school / unit for help with the <a href="#">NU Accessible Purchasing Process guidelines</a> and the requirements of the <a href="#">Digital Accessibility Policy</a>, including how to evaluate software and web-based products for compliance with the policy and related accessibility standards.</p>
<input type="checkbox"/> Other Terms / Issues to be Aware Of	<input type="checkbox"/> <b>Export Controls and International Compliance.</b> When entering into any agreement there may be a range of export controls or international compliance terms.	<p>Northwestern is committed to an open and free academic research environment; however, we are still bound by <a href="#">export control regulations</a> unless the <a href="#">fundamental research exemption</a> is available. Export control regulations may limit access of items (equipment software, substances, and technical data, etc.) to non-U.S. persons. Therefore, we want to carefully evaluate any export control implications before entering into an agreement.</p> <p>Contact <a href="#">Export Controls &amp; International Compliance</a> if you need assistance evaluating an export control or international compliance-related clause.</p>

# QA and Wrap Up