
GENERAL COUNSEL NOTE

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Vanderbilt spends over \$2.5 billion each year in conducting its education and health care operations. Many of these expenditures are made in performing the obligations created by contracts or agreements with other parties. Selecting and negotiating with contracting partners is a significant enterprise for the University. The process for properly entering into contracts is controlled by several legal doctrines that define the ability and responsibility of employees who are part of the contracting process. Completing a contract involves multiple steps and requires the coordination of different offices to bring the greatest institutional expertise to bear on the transaction.

Authority to Sign Contracts

The first step in the contracting process is determining the proper authorization for the particular type of contract in question. Originally, by law, the authority to bind any corporation such as the University lies exclusively with its Board of Directors. At Vanderbilt, the Board has delegated executive authority to the Chancellor who has further delegated some of it to other university officials. The details of this delegated authority to bind Vanderbilt to a contract are published in a document approved by the Board of Trust and available online at: http://www.vanderbilt.edu/compliance/authority_signing.pdf. The Contract Signing Authority should be consulted whenever one is in doubt about one's ability to execute a contract for Vanderbilt.

When an authorized employee commits the University to an agreement, by signing his or her name and title to a contract for instance, the University is bound to perform the obligations owed to the other party, which are contained in the contract. Responsibility for performing the contract, e.g. paying for a good or service, lies ultimately with the University as long as the contract has been properly executed. But the consequences of entering into contracts without official authorization can be severe because, under law, employees can be held personally responsible for contracts they sign without appropriately delegated authority. Unless the University later takes affirmative steps to ratify a contract already signed by someone without authority, the individual executing the contract may be personally responsible for the financial or other obligations owed to the contracting party. It is therefore important to learn the scope of one's authority to contract on behalf of Vanderbilt and to not exceed that authority.

Selecting and Negotiating With Business Partners

Several specific steps must be followed to initiate and develop a contract according to Vanderbilt's requirements. Depending on the nature of the good or service at issue in a contract Vanderbilt may have promulgated specific policies, or established certain practices, about how particular transactions can appropriately be initiated, negotiated, and executed. The best way to learn about the University's business requirements in different areas is to consult with the officials who have contracting responsibility in the specific area of interest, whether in real

estate, capital equipment, or institutional affiliations, to name only a few examples. Commonly known examples of such requirements would include the Division of Administration's requirement that, when goods or services costing more than \$25,000 are to be purchased it must be done through a competitive bid process. Other areas may require written analyses early in the contracting process related to the proposed expenditure of funds.

An important milestone in the course of each contract is the assessment of compliance with Vanderbilt's Supplier Diversity Program. As an institution Vanderbilt has a commitment to increasing diversity among its business partners and has adopted the goal of building more and stronger relationships with owners of small and diverse business owners. Compliance with the university's supplier diversity policy requires that contracting divisions of the university actively identify and where possible bargain with minority-owned businesses in the course of conducting operations.

Typically, the preliminary work on a contract will include learning about the potential business partner's credentials, history, and business health in addition to evaluating the suitability of the vendor's offerings to meet the University's needs. This business due diligence assures the University that it is obtaining the best possible deal available to it on the market. Part of this due diligence also involves scrutiny of contractual terms and conditions applicable to the exchange. Many divisions of the University have defined standard contract terms for the types of agreements into which they routinely enter. These standard terms, when made to fit the deal at hand, serve the University's interest in reducing risk related to a transaction and in making the contract process go more quickly. Through the disclosure of these terms vendors also learn about Vanderbilt's expectations and can more readily respond as to whether or not the business relationship will be a good fit. The discussion of contract terms and conditions is ideally begun even before contracting partners are selected. Once other contracting options have been eliminated the University's negotiating leverage is diminished. Too often vendor selection is made on the basis of price and product alone with the result that Vanderbilt is left to resolve important risk-shifting provisions of the contract relationship without significant bargaining power.

Perhaps the most important goal in developing a contract is to insure that the final contract document accurately describes Vanderbilt's expectations and requirements from the transaction. Essential to this goal is a clear, specific statement of each party's obligations to the other. Commonly a vendor's standard pre-printed contract terms will not capture Vanderbilt's intent with a deal. Revising, refining, and making explicit the mutually agreed understanding of the parties is essential to successful contracting and can involve not only operational divisions with the University, but also the University legal office, risk management professionals, and other administrative support offices.

Duty to Promote Vanderbilt's Interest

In the contracting process, as in all official business, employees are obligated by law to put the interest of their employer first when acting on behalf of the employer. This means that when selecting business partners and negotiating terms for Vanderbilt each employee must seek only

Vanderbilt's advantage. The goal of every transaction must be to advance Vanderbilt's interest, not that of the vendor or employees personally.

Sometimes this concern arises in a situation where Vanderbilt personnel are reluctant to ask for contract terms advantageous to the University because they believe such a request might injure their personal relationship or friendship with the vendor's representatives. This would be a case of placing one's personal interest above the University's and should be avoided.

One way the University checks the inappropriate influence of outside interests is through the Conflict of Interest process. The University's Conflict of Interest policy prohibits employees from participating in transactions where the employee has an outside interest that may possibly conflict with that person's duties to the University. Outside interests that may create possible conflicts include not only a financial stake in the success of an outside party, but also personal friendships, loyalties, or sympathies that would inhibit one from advancing Vanderbilt's interest.

Although the process of completing a contract can involve more effort than may be evident on the face of a simple, finished document, the University, like any business organization, expects to obtain the best deals available to it. All those involved in the contracting process have a duty to devote their best efforts to serving the University's interest.

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