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February 17, 2016

Her Excellency, Governor Margaret Wood Hassan
 and the Honorable Executive Council
 State House
 Concord, NH 03301

REQUESTED ACTION

Pursuant to RSA 21-I:14, I; RSA 541-A:1, XV and RSA 4:15, the Department of Administrative Services (DAS) requests **approval of a new chapter of the Department of Administrative Services Manual of Procedures ("DAS MOP"), DAS MOP 161- Memoranda of Understanding (" DAS MOP 161")**, effective upon Governor and Council approval. The text of this proposed chapter is found in Attachment A to this request.

EXPLANATION

RSA 21-I:14, I provides that the Commissioner of Administrative Services is to adopt a comprehensive uniform system of state financial management described in RSA 21-I:13, XV and XVI in the form of a manual, to be updated and revised as the Commissioner deems necessary, to explain procedures applicable to all executive branch state agencies, officers and employees. Topics addressed in the Manual of Procedures ("DAS MOP"), include, but are not limited to, those items listed in RSA 21-I:14, I (b)(1) through (12), as well as topic areas relating to agency annual or biennial reports as described in RSA 21-I:14, IX. Pursuant to RSA 21-I: 14, I (a) and RSA 541-A: 1, XV, the Manual's provisions are not administrative "rules" that must be adopted by way of the formal rulemaking procedures of RSA 541-A, but executive branch agencies must nonetheless abide by requirements of the DAS MOP.

RSA 21-I: 114, I (b) (4) specifically provides that the manual may set forth standards, practices, procedures, policies, protocols, guidelines, specifications, instructions, directives, requirements or descriptions of requirements related to the financial management of the state, including "governor and council actions." In DAS MOP 150, the Governor and Council established monetary thresholds for direct approval of certain agency contracts. That chapter did not make specific reference to when, whether or if Governor and Council approval was required for memoranda of understanding (agreements which may be similar, but not necessarily identical to, contracts, and the use of which is not universally understood). Several months ago this gave rise to questions as to how memoranda of understanding (also known as "memoranda of agreement," "MOUs" or "MOAs") should be handled as part of the Governor and Executive Council approval process. The Department of Administrative Services was asked to document and formalize the process for agency handling of MOUs. For the past several months, members of the Department have been working with attorneys of the Department of Justice to craft Chapter 161 of the DAS MOP which clearly explains to agencies what Memoranda of

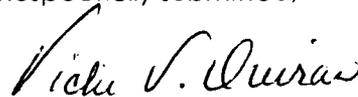
Understanding are, when they should be used and when such documents should be presented to the Governor and Executive Council for approval. The result is the chapter included here as Attachment A. A "quick reference chart" setting forth highlights of the chapter is found at Attachment B.

The chapter of the DAS MOP proposed here explains that there are two different types of MOUs (interagency and "external") and highlights the circumstances in which each might appropriately be used, distinguishing such agreements from Grants and Contracts. In regard to memoranda of understanding between state agencies (interagency MOUs), it is explained that such items must be submitted to the Governor and Executive Council for approval if they involve an expenditure equal to or greater than the threshold established by the Governor and Council for approval of service contracts under DAS MOP 150 (whatever those thresholds may be). Interagency MOUs below the threshold would not be submitted to Governor and Council for approval. In regard to "external MOUs" (agreements between the state and an entity other than the state), it is explained that such items are generally more appropriately viewed as contracts or grants and treated according to the Governor and Council approval processes established for those items. In the very limited circumstances where an external MOU does not involve an expenditure of state funds, the receipt of funds or an enforceable obligation, Governor and Council approval would not be required.

The Department of Administrative Services and the Department of Justice have created forms, checklists and instructions for agencies to use when crafting MOUs of various types, thereby standardizing the MOU development, review and approval process. Pursuant to DAS MOP 2, I., the most recent versions of these forms, checklists and instructions, as well as a "quick reference chart" similar to Attachment B, would be incorporated into Chapter 161 by reference, for use by agencies. Pursuant to DAS MOP 2, I., the Department of Administrative Services would be able to update these incorporated documents in the future as needed, without submitting the forms, checklists, instructions and charts to the Governor and Council for specific review and approval. The text and requirements of MOP 161, attached here as Attachment A, could not, however, be altered without the specific approval of Governor and Council. By approving Chapter 161, Governor and Council will in part be authorizing the Department of Administrative Services to incorporate MOU forms, checklists and instructions that it developed with the Department of Justice into the Manual. Like other Manual provisions and incorporated documents, these materials will be posted on the Sunspot state intranet site for regular use by agencies.

By approving this requested action, the Governor and Executive Council will authorize the inclusion of DAS MOP 161 (Attachment A) in the DAS Manual of Procedures. Approval of DAS MOP 161 would in turn make it clear that agencies are also required to use standardized forms, checklists and instructions when crafting memoranda of understanding, as those items may from time to time be amended.

Respectfully submitted,



Vicki V. Quiram
Commissioner

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EXECUTIVE AND LEGISLATIVE BRANCHES

MOP 161 Memoranda of Understanding

I. Purpose, Scope and Definitions

A. Purpose

The purpose of this chapter of the Manual of Procedures is to set forth uniform procedures and standardized documents that are to be used when one or more executive branch agencies enter into a Memorandum of Understanding, also known as a “Memorandum of Agreement,” an “MOA” or an “MOU.”

B. Scope and Definitions

Memoranda of Understanding are used to memorialize agreements that are not binding in the sense that they are not intended by the parties to result in litigation in the case of a breach. An “**Interagency MOU**” is used to establish the terms of an agreement or understanding between an agency of State government and another agency of State government. In those very limited circumstances where the parties to an MOU agree that no enforceable rights or obligations exist between them, a Memoranda of Understanding might also be used to document an agency’s understanding with an entity that is not a part of State government. This second category of agreement is known as an “**External MOU.**”

This chapter of the Manual of Procedures addresses both types of Memoranda of Understanding.

II. Distinguishing Contracts, Memoranda of Understanding and Grants

A. Contracts

State agencies wishing to enter into agreements with entities that are not part of State government generally do so by entering into contracts. Contracts are broadly defined as agreements between two or more parties which create legally enforceable obligations to do or not do particular things. As addressed in DAS MOP Chapter 150, certain contracts entered into by State agencies require the specific approval of the Governor and Executive Council. In addition, RSA 5:18-a specifies that, subject to certain exceptions, no contract for personal services between the State and a nonresident corporation, partnership or association (or between the State and a resident doing business under a name other than his own) which involves payments in a particular amount shall be valid unless certain documents are attached to it. This important provision applies *regardless of*

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whether a personal service contract is submitted to the Governor and Council for approval and regardless of whether an agency sends the contract to the Department of Justice for review.

A breach of a contract may in some cases result in an action in court. Whether or not a particular document constitutes a contract is not dependent upon whether the document is *titled* as a contract. Sometimes, entities such as the federal government will have standard form agreements entitled “Memorandum of Understanding” or “Memorandum of Agreement.” Although use of such terms may be common, the agreement itself should be reviewed in order to assess whether or not the document is actually a contract and what processes must be followed for its acceptance and approval by the State. In other words, when assessing what a particular document is – a contract, a Memorandum of Understanding or a Grant – it is the *content* of the document and not its *title* that is of primary significance. If an agency has any question about whether a particular set of agreements or understandings should be treated as a contract as opposed to a Memoranda of Understanding or a Grant, it should consult with its counsel in the Department of Justice.

B. “Interagency MOUs”: Memoranda of Understanding Between State Agencies

An “Interagency MOU” is used when one or more agencies of the State’s executive branch wish to establish an agreement or set of expectations with another entity that is part of State government, upon which the parties expect to rely but which would not be enforceable in a court of law. In other words, it is a set of promises between agencies that will never be litigated in the case of a dispute. Interagency MOUs are different from contracts in part because the State of New Hampshire is on both sides of the equation. If a dispute arises between the agencies, the terms of the document will not be legally enforceable and will not be resolved in a court. Instead, the matter will be resolved between the agencies, if necessary with the involvement of the Department of Justice.

An Interagency MOU, sometimes called a “Memorandum of Agreement,” is simply a set of unenforceable promises between executive branch agencies, or between one or more executive branch agencies and another branch of State government (the legislature or the judiciary). There is no difference between a “Memorandum of Understanding” and a “Memorandum of Agreement.”

A **lease** or other form of agreement for the use of space in which an executive branch State agency agrees to rent or use space offered by another State executive branch agency, or by another branch of State government, should be treated as an Interagency MOU, using the procedures set forth in this chapter of the Manual.

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C. “External MOUs”: Memoranda of Understanding Between the State and Third Parties

As a general matter, documents which establish agreements between an executive branch agency and entities that are not part of State government should be treated as contracts (or, in some cases, as “Grants”) rather than as “Memoranda of Understanding.” In those limited circumstances where a Memorandum of Understanding is used to establish non-binding expectations or agreements between the State and a third party the arrangement might in some cases be documented by an “External MOU.”

An External MOU might be used to document expectations or agreements between an executive branch State agency and:

- One or more other governmental units (for example, a town, city, county, school district, or a different State);
- A nonprofit organization
- A university or college system (except where the subject matter is covered by a “Master Agreement” as set forth in Section II. D. below); or
- A business, corporation or partnership registered to do business in the State of New Hampshire or other entities that are not part of the government of the State of New Hampshire;
- A combination of the foregoing entities

but **only** when the parties agree that the arrangement **will not** give rise to any legally enforceable rights or obligations and will not result in the expenditure or receipt of funds. Unlike a breach of a contract, violation of an External MOU is not generally expected to be addressed by way of a lawsuit. A “cooperative agreement” between the State and another governmental entity, in which the entities are engaged in a form of partnership, might in some cases be considered an External MOU.

An agreement between the State and another governmental unit, an institution or an outside organization should **not be considered** an External MOU if it involves:

1. Any anticipated expenditure of State funds or receipt of funds on behalf of the State;
2. Any obligation which the State is legally bound to perform; or

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3. Payments that must be made to the State or obligations which the outside entity is legally bound to perform.

Generally, the agreements described in 1. through 3. above are contracts and should be treated according to the applicable contract approval processes, including but not limited to those set forth in Chapter 150 of the DAS Manual of Procedures.

D. Master Agreements for Cooperative Projects Between the State and the University System or Community College System

Traditionally, the State has entered into a “Master Agreement for Cooperative Projects Between the State of New Hampshire and the University System of New Hampshire.” Similar agreements might also be entered into with the Community College System of New Hampshire. Unique processes apply in those situations where the State is involved in such cooperative agreements. This chapter of the Manual of Procedures (Chapter MOP 161) is not intended to establish the processes for the establishment or use of any Master Agreement for Cooperative Projects with the University System or Community College System. The use of such agreements is more fully discussed in the agreements themselves and it is anticipated that these matters will be addressed in another chapter of the Manual of Procedures. Questions regarding the applicability and use of cooperative agreements with the University or Community College Systems should be directed to the agency’s business supervisor in the DAS Budget Office.

E. Grants

The State sometimes receives grants of funds from sources such as the federal government. At times, it also gives grants to organizations, institutions or individuals. For the purposes of this chapter of the Manual, a “Grant” is a transaction in which one or more executive branch State agencies **issue** funds that are to be used for a particular purpose by another entity, including but not limited to an individual, a not-for-profit organization, a college or university, a municipality, another agency or branch of New Hampshire state government, or the government of another state. Grants issued by State agencies bear similarities to both contracts and MOUs but also involve unique issues and processes. If an agency has any question about whether a particular item should be treated as a contract or MOU, rather than as a Grant, it should consult with its counsel in the Department of Justice. Grants will be addressed in Chapter 160 of the Manual of Procedures, independent of the chapters relating to contracts and Memoranda of Understanding.

III. Considerations in Formulating Memoranda of Understanding

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Just as agencies contemplating the establishment of a contract must consider a number of factors relating to their specific business needs, agencies contemplating the establishment of a Memorandum of Understanding must consider whether entering such an agreement makes sense under the circumstances. This Section of the Manual of Procedures addresses considerations which an agency should take into account when formulating Interagency or External MOUs. The considerations apply regardless of whether the MOU will be submitted to the Governor and Executive Council for approval and regardless of whether the MOU will be reviewed by the Department of Justice.

A. Considerations in Formulating Interagency Memoranda of Understanding

When contemplating an Interagency MOU, the agencies involved should consider factors including, but not limited to, the following:

1. ***Whether a Memorandum of Understanding is the proper document to use in the particular context.*** Agencies should consider whether the obligations they seek to impose or perform would more properly be handled by way of a different or more formal agreement. If in doubt, contact the Department of Justice.
2. ***The particular legal obligations of the agencies involved.*** State statutes, case law, legal opinions of the Department of Justice and other sources might establish that particular functions have to be performed by the agency itself, not delegated to others. Before entering into a Memorandum of Understanding, agency personnel should make sure that they are fully familiar with the obligations imposed upon the agency by law. The New Hampshire Legislature establishes agencies' specific authority in the Revised Statutes Annotated ("RSAs") and/or in yearly volumes of the "New Hampshire Laws" (the annual books of bills that have been adopted into law, commonly referred to as "Chapter Laws" or "Session Laws"). If in doubt as to whether certain agency obligations may be delegated, the agency should contact its counsel in the Department of Justice.
3. ***The necessity of a Memorandum of Understanding.*** At times, the Legislature specifies that an executive branch agency must interact with other agencies of State government in a particular way. If that interaction is clearly spelled out in law, a Memorandum of Understanding might not be necessary. Provisions of the RSAs, Chapter Laws or, in some cases, footnotes contained in the State's budget might, for example, describe how certain inter-agency relationships must be handled. Whether further clarifications must be

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worked out and documented in order for the agencies to implement such provisions will depend upon the circumstances. If in doubt, the agency should contact its counsel in the Department of Justice. A Memorandum of Understanding between agencies would, of course, be required if the Legislature specifically states that this is the case.

4. **Clarity and contingencies.** So that the agencies involved, as well as others, have a firm understanding of what is expected, drafting should be clear and specific. In addition, consideration must be given to what occurs if one of the parties is unable to perform its specified obligations. Unlike a contract, where one party may sue the other in court if the party fails to perform, disputes arising under Memoranda of Agreement should not necessitate litigation. Unless otherwise specified, disputes arising under Interagency Memoranda of Understanding shall be referred to the Department of Justice for resolution. See Section VI below.
5. **Authority of the signer.** If an agency has the authority to enter into an MOU, the head of an agency will generally have the authority to sign on the agency's behalf. In those cases where the MOU will be signed by an individual at a lower level in the agency, however, the signer should make certain that he or she has the authority to sign for the agency. Such authority is generally conveyed by a power of attorney ("POA") form signed by the agency head. See RSA 21-G: 9, II (d).
6. **Duration.** Memoranda of Understanding should clearly specify when they begin and when they end and should contain provisions on how a party may terminate the agreement.
7. **Funding and appropriations.** Memoranda of Understanding must be consistent with the agencies' funding and appropriation limits. They may not impose costs and expenditures on an agency which are not authorized by law. Questions regarding funding and related matters may be directed to the agency's business supervisor in the Department of Administrative Services Budget Office or, if necessary under the circumstances, the agency's counsel in the Department of Justice.

B. Considerations in Formulating External Memoranda of Understanding

When contemplating an External MOU, the agencies involved should consider factors including, but not limited to, the following:

1. **Whether a Memorandum of Understanding is the proper document to use in the particular context.** In the case of an External MOU, it is important to fully consider whether a more formal agreement should

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be used. If the MOU involves a State expenditure in any amount, or if it involves the receipt of funds from a third party, it should generally be treated as a Grant or a contract (depending on the circumstances), using the approval processes for those types of documents. The informal External MOU process should not be used if the obligations assumed by the agency are such that the State is truly bound to perform them for the benefit of an entity other than the State of New Hampshire. Finally, if the proposed agreement with the outside entity includes rights or obligations that the agency may, if necessary, be compelled to enforce in court, a contract should be used. If in doubt about whether an External MOU should be used in a particular context, contact the Department of Justice.

2. ***The particular legal obligations of the agencies involved.*** See considerations at subparagraph A. 2. above. Executive branch agencies generally have the authority and duties assigned to them by law. Not all State functions can be delegated to others and not all obligations can be assumed. External MOUs must be within the scope of agency authority and consistent with the agency's mission.
3. ***Clarity and contingencies.*** See considerations at subparagraph III. A. 4. above. As in the case of a contract or an Interagency MOU, External MOUs should be drafted in clear and specific language. One distinction between a contract and an External MOU is the understanding that obligations contained in the document are not generally enforceable in court. If an agency anticipates that it will be entering into an External MOU it is important that the informal nature of the agreement be made clear to the other party. That being the case, all External MOUs must clearly specify that the agreement does not create legally enforceable rights and obligations. Each External MOU should also state what occurs if one of the parties is unable to perform its specified obligations. Whereas in the case of an Interagency MOU all disputes must be referred to the Department of Justice for resolution, other options might be available in the case of an External MOU.
5. ***Authority of the signers and attachments.*** See considerations at subparagraph A. 5. above as to the authority of the agency. In the case of certain contracts between the State and a resident or nonresident corporation, partnership or association, RSA 5:18-a requires that evidence of the signing parties' authority to execute and be bound by the contract be attached to the document. Assuming that an External MOU is properly drafted and is truly not a contract, this and other requirements of RSA 5:18-a would not apply. In other words, the documents normally attached to a contract (certificate of vote,

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evidence of registration and so forth) do not need to be attached to an External MOU. It is nonetheless good practice for the agency to confirm that the person signing on behalf of the outside entity has that power.

6. **Duration.** See considerations at subparagraph III, A. 6. above.
7. **Funding and appropriations.** An External MOU is generally not the appropriate document to use if the agreement involves an expenditure of State funds in any amount or the agency's receipt of funds from a third party. If a transaction involves an expenditure, the operative document would generally be either a contract or a Grant, depending on the circumstances. Likewise, an External MOU would not normally be used when the agreement includes payments that must be made to the State or obligations that the outside entity is bound to perform. These types of matters should generally be treated as contracts.

IV. Forms, Checklists and Instructions for Memoranda of Understanding

A. Use of Forms, Checklists and Instructions

In order to assist agencies in formulating Memoranda of Understanding, the Department of Justice and the Department of Administrative Services have produced MOU forms or templates for executive branch agency use. Different forms are used for Interagency and External MOUs. Agencies shall use the most recent version of these forms unless modified or adjusted with the approval of the Department of Justice.

The Interagency MOU and External MOU forms shall be used regardless of whether the particular Memorandum of Understanding requires Governor and Council approval or Department of Justice review. In other words, the forms shall be used regardless of whether the particular MOU is of a type that generally requires Governor and Council review, shall be used regardless of whether the MOU is above or below any monetary threshold established by the Governor and Executive Council under Section V. below, and shall be used regardless of whether the particular MOU is reviewed by the Office of the Attorney General.

The Department of Justice and the Department of Administrative Services have also produced checklists, instructions and a "Quick Reference Chart" for use with MOU forms. These items shall be used by agencies when formulating either Interagency or External Memoranda of Understanding.

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B. Incorporation by Reference

The most recent version of the forms, checklists, instructions and chart referred to in IV. A. above are incorporated herein by reference. These items may be periodically updated and modified by the Department of Administrative Services, in consultation with the Department of Justice, as circumstances may warrant. Pursuant to DAS MOP 2, I. I., the Department of Administrative Services is authorized to incorporate future updated and modified versions into this Manual by reference without additional action on the part of the Governor and Executive Council.

The most recent version of the following documents, incorporated herein by reference, may be found in the directory located at

<http://sunspot.nh.gov/DASManualProcedures/Incorporated.aspx> :

1. Memoranda of Understanding Quick Reference Chart;
2. Interagency Memorandum of Understanding Form ("MOU-1" Form);
3. Interagency Memorandum of Understanding (MOU-1) Form Instructions;
4. Interagency Memorandum of Understanding (MOU-1) Checklist;
5. External Memorandum of Understanding Form ("MOU 2" Form);
6. External Memorandum of Understanding (MOU-2) Form Instructions;
and
7. External Memorandum of Understanding (MOU-2) Checklist

V. Memorandum of Understanding Approval Processes

All Memoranda of Understanding go through some type of approval process, be it solely at the agency level or through a process which involves review by the Department of Justice and the Governor and Executive Council. This section of Chapter MOP 161 describes the process used in each of these instances.

A. Agency Approval Generally

As outlined in the most recent version of the "Memorandum of Understanding Quick Reference Chart," some MOUs may be entered into with the sole

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approval of the agency itself. Other MOUs require Governor and Council approval. As in the case of contracts, agencies shall follow internally-established processes for the approval of all Memoranda of Understanding which are consistent with statutory requirements, administrative rules and regulations, the provisions of the Manual of Procedures and the guidance offered to them by the Department of Justice and the Department of Administrative Services. Agencies may contact their business supervisor in the Department of Administrative Services should they have questions about the establishment of workable internal processes.

Regardless of whether a Memoranda of Understanding requires Governor and Council approval, MOUs must only be entered into with the approval of the agency head or his or her duly authorized designee. In the case of an MOU entered into by the designee of an agency head, the agency shall, upon request of the Department of Administrative Services or the Department of Justice, provide a copy of the designee's authorization to enter into the Memorandum of Understanding.

B. Approvals Required for Interagency MOUs

1. Governor and Council Approval Not Required

Interagency MOUs which, over their anticipated duration, are expected to involve expenditures by any executive branch agency in an amount less than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150 (or which do not involve an expenditure in any amount) may be entered into by agencies without specific approval of the Governor and Executive Council. Agencies shall, however, follow the processes described in paragraph V. E. below.

2. Governor and Council Approval Required

Interagency MOUs which, over their anticipated duration, are expected to involve expenditures by any executive branch agency in the amount equal to or greater than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150 require the specific approval of the Governor and Executive Council, following the processes described in paragraph V. F. below.

C. Approvals Required for External MOUs

1. Governor and Council Approval Not Generally Required

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External MOUs which do **not** involve a State expenditure in any amount, or the receipt of funds on behalf of the State, may be entered into by agencies without the specific approval of the Governor and Executive Council, but **only if they also** do not involve the establishment of binding, enforceable obligations. External MOUs which **do** involve State expenditures, the receipt of funds or the creation of binding obligations are generally contracts or Grants and should be approved according to the applicable contract or Grant approval process. That being the case, External MOUs do not generally go through the Governor and Council approval process. Agencies shall, however, follow the processes described in paragraph V. E. below.

D. Interagency and External MOUs Where Governor and Council Approval Is Requested But Is Not Generally Required

In those instances where an agency is not required to submit an Interagency or External MOU to the Governor and Executive Council for approval, it may nonetheless do so if it wishes to have the Governor and Executive Council review and approve the MOU. If an agency is not required to submit an MOU to the Governor and Executive Council for approval, it might also be instructed by either the Department of Justice or the Department of Administrative Services that submission of the item is advisable. If such instruction is given, or if an agency wishes to seek Governor and Council approval in a situation where such approval is not generally required, the agency shall follow the procedures for obtaining approval of MOUs involving expenditures in an amount equal to or greater than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150 as set forth in paragraph V. F. below. In addition to the requirements found there, the agency shall include in the first paragraph of the explanatory portion of its letter to Governor and Council (the "Explanation" section) a clear indication of the reason or reasons that the matter is presented for review and approval.

E. Approval Processes for MOUs Not Reviewed by Governor and Council

Before entering into an Interagency MOU involving an expenditure of less than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150, or before entering into an External MOU not requiring Governor and Executive Council approval, the agency or agencies involved shall:

1. If the Memorandum of Understanding is an Interagency MOU, carefully assess the considerations set forth in paragraph III. A. above;

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2. If the Memorandum of Understanding is an External MOU, carefully assess the considerations set forth in paragraph III. B, above;
3. Draft the Memorandum of Understanding, using the applicable MOU form, checklist and instructions described in paragraph IV. B. above;
4. Contact its counsel in the Department of Justice if it wishes to make any change is proposed to the standard, preprinted language of the MOU form and follow the instructions of the Department of Justice as to whether or not those changes should be made. No changes may be made to the preprinted terms of a Memorandum of Understanding form without the approval of the Department of Justice;
5. Contact its counsel in the Department of Justice with any additional questions that it may have regarding the MOU; and
6. Finalize and execute the MOU Form, with applicable attachments.

F. Approval Processes for MOUs Reviewed by Governor and Council

1. Overview

As a general matter, only Interagency MOUs involving a State expenditure equal to or greater than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150 are reviewed and approved by the Governor and Executive Council. The process for obtaining approval is similar to the process used to request approval of contracts. Agencies shall not split transactions which logically relate to the same subject matter into more than one MOU so as to avoid the requirement of Governor and Executive Council approval. Should an agency have any question as to whether one or more transactions should be included in a request for Governor and Executive Council approval, it shall contact its business supervisor in the DAS Budget Office.

For an MOU to be considered at a particular meeting of the Governor and Executive Council, agencies must generally submit a fully and properly completed Governor and Council approval request to the Department of Administrative Services by the submission deadline established for that meeting.

2. Process for Obtaining Approval

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Prior to submitting an MOU for Governor and Council approval, the agency or agencies involved shall:

- a) Carefully assess the considerations set forth in paragraph III. A. (or, if applicable, paragraph III. B.) above;
- b) Use the applicable MOU form, checklist and instructions described in paragraph IV. B. above to draft the Memorandum of Understanding and execute the same;
- c) Contact its counsel in the Department of Justice if it wishes to make any change is proposed to the standard, preprinted language of the MOU form and follow the instructions of the Department of Justice as to whether or not those changes should be made. No changes may be made to the preprinted terms of a Memorandum of Understanding form without the approval of the Department of Justice;
- d) Contact its counsel in the Department of Justice with any additional questions that it may have regarding the MOU;
- e) Execute the agency portions of the applicable MOU checklist described in IV. B. above;
- f) Submit the MOU, the MOU checklist, any attachments thereto, and a letter requesting Governor and Executive Council approval to the agency's counsel in the Department of Justice for review;
- g) After making such adjustments to the documents as may be required by the Department of Justice, submit the materials to the agency's business supervisor in the DAS Budget Office for review; and
- h) If requested by DAS, correct, adjust or modify the material which is to be submitted to the Governor and Executive Council in order to conform with the Council's most recent preferred filing practices.

3. Emergency Action and Retroactive Approval

In some circumstances, an agency might believe that it is imperative to enter into a Memorandum of Understanding, and that approval of the MOU must occur prior to the time of a meeting of the Governor and Executive Council. In those circumstances, the agency or agencies involved shall:

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- a) Carefully assess the considerations set forth in paragraph III. A. (or, if applicable, paragraph III. B.) above;
- b) Draft the Memorandum of Understanding, using the applicable MOU form, checklist and instructions described in paragraph IV. B. above;
- c) Contact counsel in the Department of Justice with any questions that it may have regarding the MOU; and
- d) Prepare a retroactive request for approval of the MOU for submission at the following meeting of the Governor and Executive Council. Such requests shall generally follow the procedures for retroactive approval of contracts set forth in DAS MOP 150. This shall include, but shall not be limited to, including in the first paragraph of the explanatory portion of the agency's letter to Governor and Council (the "Explanation" section) a clear indication of the reason or reasons that the matter is presented as a retroactive item.

G. Approvals of Amendments to MOUs

1. MOUs Which Have Not Been Approved By the Governor and Executive Council.

Amendments to MOUs which did not originally go to the Governor and Executive Council for approval generally do not themselves require such approval. In some cases, however, amendments to *Interagency* MOUs (the only type of MOU which might potentially involve an expenditure) could, in combination with the underlying MOU, bring the total expenditure involved to an amount equal to or greater than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150 . In those cases, agencies shall follow the procedures for obtaining approval of MOUs involving expenditures equal to or greater than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150, as set forth in paragraph V. F. above.

2. MOUs Which Have Been Approved By the Governor and Executive Council.

All amendments to MOUs which have been approved by the Governor and Executive Council shall themselves require the approval of the

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Governor and Executive Council, regardless of whether or not those amendments impose an additional cost.

VI. Resolution of Disputes Under Interagency MOUs

- A. Unlike disputes arising under External MOUs, disputes concerning Interagency MOUs are by definition disputes between two agencies or branches of State government. If disputes arising under Interagency MOUs could only be resolved by way of a lawsuit, the State would essentially be required to sue itself in order to resolve differences. That being the case, agencies are encouraged to resolve any disputes amicably, if necessary making amendments to their MOU in order to address areas of potential difficulty.
- B. To the extent that it is not possible for executive branch agencies which are parties to an interagency Memorandum of Understanding to resolve their dispute, the agencies shall contact their counsel in the Department of Justice. That Department will provide a definitive legal interpretation as to the agencies' respective obligations or instruct the agencies how the dispute should be resolved.
- C. To the extent that it is not possible for an executive branch agency that is a party to an interagency Memorandum of Understanding with another branch of government to resolve a dispute, the executive branch agency shall contact its counsel in the Department of Justice, who shall work with counsel for the other branch to resolve the dispute.

VII. Review and Retention of MOUs

A. Agency Review of Existing Memoranda of Understanding

Within ninety (90) days of the Governor and Executive Council's approval of this chapter of the Manual of Procedures (DAS MOP 161), each executive branch agency shall inform its counsel in the Department of Justice of all existing Memoranda of Understanding and Memoranda of Agreement to which it is a party, whether external or interagency. The agency and its counsel shall consult as to what, if any, action may be required to bring existing MOUs and MOAs into substantial compliance with the provisions of this chapter.

B. Retention of Memoranda of Understanding

DAS MANUAL OF PROCEDURES

Each executive branch agency shall retain in its possession a complete, fully executed copy of all Memoranda of Understanding or Memoranda of Agreement to which it is a party, together with all related checklists (regardless of whether such MOU or MOA is submitted to the Governor and Executive Council for approval) for the duration of the agreement plus whatever period is applicable to the agency for the retention of copies of contracts.

VIII. Other Sources and Information

A. Statutes

RSA 5:18-a (Items required to be attached to State contracts)

B. Contact Information

1. The Department of Justice (Attorney General's Office), may be contacted at:

New Hampshire Department of Justice – Civil Bureau
33 Capitol St.
Concord, NH 03301

Telephone: (603) 271- 3658

2. The business supervisors of the Department of Administrative Services Budget Office may be contacted at:

Department of Administrative Services
Budget Office – Room 120
State House Annex
25 Capitol St.
Concord, NH 03301

Telephone: (603) 271-3204

C. Other

Website of the Executive Council (including links to minutes, meeting schedules and related items):

<http://www.nh.gov/council/meeting.html>

MEMORANDA OF UNDERSTANDING "QUICK REFERENCE CHART"

Category	Method of Processing
<p>INTERAGENCY MOUS (MOU 1 Forms)</p> <p>Entered into by one or more executive branch agencies. The State (whether two executive branch agencies or an executive branch agency and another branch) is on both sides of the transaction. Not technically a contract.</p>	<p>If the MOU involves an expenditure equal to or greater than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150:</p> <p>Governor and Executive Council (G & C) approval is required. After consideration of the relevant factors listed in MOP 161, III. A., the agency uses the MOU-1 form, checklist and instructions to submit the item to the Department of Justice (DOJ) and the Department of Administrative Services (DAS) prior to filing with G & C under MOP 161, V. F.</p> <p>If the MOU involves an expenditure of less than the general threshold established by the Governor and Council for approval of service contracts under DAS MOP 150:</p> <p>No G & C approval or DOJ/DAS review is required. The agency considers the relevant factors listed in MOP 161, III. A. and executes using the MOU-1 form, checklist and instructions, handling under the process described at MOP 161, V. E. The Department of Justice and Department of Administrative Services are contacted only if the agency has questions.</p>
<p>EXTERNAL MOUS (MOU 2 Forms)</p> <p>The transaction is between an executive branch State agency and an outside organization, institution, individual or unit of government (such as a municipality, another state, a county, a school administrative unit, or the federal government). Generally considered a Contract (or a Grant) <u>except</u> _____</p>	<p>If the MOU Involves a State expenditure (in any amount), the receipt of funds, or an enforceable obligation:</p> <p>Should generally be treated as either a <u>Contract</u> or a <u>Grant</u>, depending on the circumstances, using the approval processes for those types of documents.</p> <p>If the MOU does NOT involve a State expenditure, the receipt of funds, or an enforceable obligation:</p> <p>No G & C approval or DOJ/DAS review is required. The agency considers the relevant factors listed in MOP 161, III. B. and executes the agreement using the MOU-2 form, checklist and instructions, handling under the process described at MOP 161, V. E. The Department of Justice and Department of Administrative Services are contacted only if the agency has questions.</p>

Adopted: 12/3/2015
 Approved: _____
 Most recently Revised: _____