

116B MLC



State of New Hampshire

DEPARTMENT OF ADMINISTRATIVE SERVICES

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April 11, 2022

His Excellency, Governor Christopher T. Sununu
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”)**, 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 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 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.” At present, the Manual of Procedures does not specify the precise processes to be followed or forms to be used by executive branch agencies when submitting “memoranda of understanding” to the Governor and Executive Council for approval, although the monetary thresholds for approval of such items have been previously established in DAS MOP 150. Those thresholds are not the subject of this submission. Rather, some time ago the Department of Administrative Services was asked to document and formalize the process for agency handling of MOUs, a matter which is not commonly understood. The Department, working with the Department of Justice, crafted a chapter of the Manual of Procedures which explained 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. That item was not initially adopted. Accordingly, since that time, the Department of Administrative Services and the Department of Justice have worked on the creation of other chapters of the Manual while updating DAS MOP 161 regarding Memoranda of Understanding. 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.

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The chapter of the Manual of Procedures 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 contracts and grants. 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 such memoranda 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. 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.

In addition to MOP 161 itself, 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. The most recent versions of those forms, checklists and instructions, as well as a “quick reference chart” similar to that attached here as Attachment B, would be incorporated into Chapter 161 by reference. 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 newer MOU forms, checklists and instructions into the Manual.

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,



Charles M. Arlinghaus
Commissioner

Enclosures

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. An “**External MOU**” is used to document an agency’s understanding with an entity that is not part of state government in those very limited circumstances where the parties agree that no enforceable rights or obligations are intended to be created between them.

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 Executive 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, External MOUs should be used only in those limited circumstances where the parties wish to establish non-binding expectations or agreements between the State and a third party. For example, 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.

However, many (if not most) documents titled “Memorandum of Understanding” or “Memorandum of Agreement” **do** establish legally enforceable rights and obligations between an executive branch agency and entities that are **not** part of State government. These documents are actually **contracts** (or in some cases “Grants”), but are not on approved State contracting forms (such as the P-37 or G-1 forms).

Pursuant to subparagraph V.A.5 of Chapter 150 of the DAS Manual of Procedures, all External MOUs that include one or more of the following criteria must be must be reviewed by DOJ and approved by the Governor and Council:

1. Any anticipated expenditure of State funds or receipt of funds on behalf of the State;

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

External MOUs that do **not** include the criteria described in 1. through 3. above do not bind the State and do not require Governor and Council approval.

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 and/or 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 163 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 and forms 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 III. 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 III. 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

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vote, 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 the applicable monetary threshold established by the Governor and Executive Council 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 paragraph 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 applicable threshold established by the Governor and Council for approval of memoranda of understanding 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 applicable threshold established by the Governor and Council for approval of memoranda of understanding 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. Agencies shall, however, follow the processes described in paragraph V. E. below. External MOUs which **do** involve State expenditures, the receipt of funds or the creation of binding obligations **must** go through the Governor and Council approval process.

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 Executive 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 applicable threshold established by the Governor and Executive Council for approval of memoranda of understanding 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 Executive 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 applicable threshold established by the Governor and Council for approval of interagency memoranda of understanding 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 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

Interagency MOUs involving a State expenditure equal to or greater than the applicable threshold established by the Governor and Council for approval of interagency memoranda of understanding 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.

External MOUs involving the receipt or expenditure of funds, or creating legally binding obligations are reviewed and approved by the Governor and Executive Council regardless of the amount of any expenditure. Agencies should include an explanation of why an External MOU, instead of a formal contract or grant, has been utilized.

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 Executive Council approval request

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to the Department of Administrative Services by the submission deadline established for that meeting.

2. Process for Obtaining Approval

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 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 paragraph 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

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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:

- 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 applicable threshold established by the Governor and Council for approval of interagency or external memoranda of understanding 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 applicable threshold established by the Governor and Council for approval of memoranda of understanding under DAS MOP 150, as set forth in paragraph V. F. above.

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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 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. The DOJ 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 MOU 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. Retention of MOUs

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

DAS MANUAL OF PROCEDURES

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>

State of New Hampshire

Interagency Memorandum of Understanding

(For use between an executive branch agency and another agency or branch of government of the State of New Hampshire)

Whereas, the _____ [**AGENCY 1**] is a duly constituted agency or branch of government of the State of New Hampshire;

Whereas, the _____ [**AGENCY 2**] is a duly constituted agency or branch of government of the State of New Hampshire;

Whereas, pursuant to _____ [*insert, for example, RSA or Chapter Law number*] **AGENCY 1** is responsible for:

Whereas, **AGENCY 1** desires to:

Whereas, pursuant to _____ [*insert, for example, RSA or Chapter Law number*] **AGENCY 2** is responsible for:

Whereas, **AGENCY 2** desires to:

NOW, THEREFORE, the parties enter into this Memorandum of Understanding to their mutual benefit, the benefit of the State and in furtherance of constitutional or statutory authority and objectives.

1. The _____ [**AGENCY 1**] agrees to [*check all that apply*]:

- A. Pay **AGENCY 2** the amount of \$ _____ for the services described in the attached MOU Exhibit A, which is hereby incorporated by reference.

Execute the following if Box 1., A is checked: Payment shall be provided from [**IDENTIFY FUND**]:

B. Perform the services described in the attached MOU Exhibit A, which is hereby incorporated by reference.

2. The _____ *[AGENCY 2]* agrees to *[check all that apply]*:

A. Pay *AGENCY 1* the amount of \$ _____ for the services described in the attached MOU Exhibit A, which is hereby incorporated by reference.

Execute the following if Box 2. A is checked: Payment shall be provided from *[IDENTIFY FUND]*:

B. Perform the services described in the attached MOU Exhibit A, which is hereby incorporated by reference.

3. The method of payment and payment amount for the above-referenced services, if any is required, is described in the attached MOU Exhibit B, such exhibit being hereby incorporated by reference.

4. All obligations hereunder are contingent upon the availability and continued appropriation of funds. The agencies shall not be required to transfer funds from any other account in the event that funds are reduced or unavailable.

5. The Memorandum of Understanding is effective until _____ *[DATE]*.

6. This Memorandum of Understanding may be amended by an instrument in writing signed by both parties. Either party may terminate this agreement by providing written notice to the other party at least _____ *[NUMBER]* days prior to termination.

7. The Parties agree that the obligations, agreements and promises made under this Memorandum of Understanding are not intended to be legally binding on the Parties and are not legally enforceable.

8. Disputes arising under this Memorandum of Understanding which cannot be resolved between the agencies shall be referred to the New Hampshire Department of Justice for review and resolution.

9. This Agreement shall be construed in accordance with the laws of the State of New Hampshire.

- 10. The parties hereto do not intend to benefit any third parties and this Memorandum of Understanding shall not be construed to confer any such benefit.
- 11. In the event any of the provisions of this Memorandum of Understanding are held to be contrary to any state or federal law, the remaining provisions of this Memorandum of Understanding will remain in full force and effect.
- 12. This Memorandum of Understanding, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire Memorandum of Understanding and understandings between the parties, and supersedes all prior Memoranda of Understanding and understandings relating hereto.
- 13. Nothing herein shall be construed as a waiver of sovereign immunity, such immunity being hereby specifically preserved.
- 14. **FOR AGENCY 1** *[Name of Agency]*: _____

[Agency Head or Commissioner signature]

Date

[Agency Head or Commissioner name in print]

- 15. **FOR AGENCY 2** *[Name of Agency]*: _____

[Agency Head or Commissioner signature]

Date

[Agency Head or Commissioner name in print]

PLEASE NOTE

- 1. **MOU Exhibit A** (*MOU Terms*) and, if applicable, **MOU Exhibit B** (*Payment Terms*) must be attached to this form.
- 2. *This form is intended only for use with Interagency Memoranda of Understanding (“MOUs”). Please refer to the MOU 1 checklist and instructions when executing this document. For Interagency MOUs, Department of Justice review and execution is only required if the MOU involves an expenditure of funds in an amount which is equal to or greater than the approval threshold established by the Governor and Executive Council*

in Chapter MOP 161 of the Department of Administrative Services Manual of Procedures.

3. *If more than two agencies or branches are involved in the agreement, please include all information listed above for each agency or branch, identifying them as, for example, "Agency 3," "Agency 4," and so forth.*
4. *No changes may be made to the preprinted terms of this form without the approval of the Department of Justice.*
5. **The Department of Justice and Governor and Council approvals appearing below are only required if this MOU is submitted to the Governor and Council for approval.**

Approved by the New Hampshire Department of Justice for form, substance, and execution:

By: _____ . On: _____
[Name of Assistant Attorney General] Date

Approved by the Governor and Executive Council

By: _____ . On: _____
Date

STATE OF N.H. MOU1 (INTERAGENCY MOU) CHECKLIST
(See DAS MOP 161)

1. Name of Responsible Agency entering into MOU: (Designated as Agency 1 on MOU-1 Form)	2. Responsible Agency Contact Phone Number :
3. Responsible Agency Contact Name and Title:	4. Responsible Agency Contact Email:
5. Name of Secondary Agency: (Designated as Agency 2 on MOU-1 Form)	6. Secondary Agency Contact Name, Title, Phone Number and Email:
7. If more than two State agencies or branches are a party to this MOU, name(s) of additional agencies or branches:	8. Name and Contact Information for all other agency/branch contacts :
9. Have the agencies engaged in an assessment of the factors listed in DAS Manual of Procedures MOP 161, III. A? <input type="checkbox"/> Yes <input type="checkbox"/> No (Note: Do not submit or finalize MOU unless answer is "yes")	10. What is the targeted G & C Closing Date?
11. What is the targeted G & C Meeting Date?	

12. RUSH? Yes No; If "yes": REQUESTED RUSH RETURN DATE FROM DOJ _____
(If requested return date is less than two weeks from targeted G & C Closing Date noted in Box 10, please explain.)

13. Did the agencies noted above review the MOU, its attachments, cover letter (if any), and all other materials included with the submission, and redact information that is private, confidential, proprietary, or otherwise exempt from public disclosure under RSA 91-A or other law? Yes No

14. Is this an amendment to a prior MOU Yes No
If yes, identify date of earlier MOU below and attach a copy.

STATE OF N.H. MOU1 (INTERAGENCY MOU) CHECKLIST
(See DAS MOP 161)

Item	Verify	✓	Comments
15. Execution	Has the MOU executed by all agencies or branches involved, with all portions of the MOU-1 Form fully completed.	<input type="checkbox"/> Yes <input type="checkbox"/> No	
16. MOU Exhibit A (MOU Terms)	Is the Memorandum of Understanding described in detail in MOU Exhibit A?	<input type="checkbox"/> N/A <input type="checkbox"/> Yes <input type="checkbox"/> No	
17. MOU Exhibit B – Payment Terms	Is the description of all payments to be made and/or received clearly set out and attached as Exhibit B?	<input type="checkbox"/> N/A <input type="checkbox"/> Yes <input type="checkbox"/> No	
18. MOU-1 Form Modifications	If modifications, additions and/or deletions have been made to Form MOU -1, have they been described in detail?	<input type="checkbox"/> N/A <input type="checkbox"/> Yes <input type="checkbox"/> No	Note: DOJ approval is required for modifications to MOU Form 1.

FOR DOJ USE ONLY

DATE RECEIVED BY DOJ :	DATE APPROVED:
DATE CONDITIONALLY APPROVED:	DATE REJECTED:
REVIEWING ATTORNEY:	PHONE AND EMAIL:

NOTES

STATE OF N.H. MOU1 (INTERAGENCY MOU) CHECKLIST
(See DAS MOP 161)

Part 2 – CHECKLIST FOR DEPARTMENT OF ADMINISTRATIVE SERVICES

Item	Verify	✓	Comments
19. G & C Request Letter – Requested Action	Requesting Parties; purpose (to enter into an Interagency MOU); timing	<input type="checkbox"/>	
20. Request Letter – Explanation	Description of Interagency MOU; If retroactive, the reason.	<input type="checkbox"/>	
21. Expenditure or receipt of funds, no enforceable obligations	Identify any expenditure or receipt of funds anticipated under the MOU. It should be noted that Interagency MOU does not establish enforceable obligations.	<input type="checkbox"/>	Note: For the purposes of an Interagency MOU, even if an item involves an expenditure or receipt of funds, it does not create a legally enforceable obligation.
22. Agencies	One request by all agencies or branches involved, with all required information/approvals.	<input type="checkbox"/>	Note: At least one responsible agency must be an <u>executive branch</u> agency
23. Authorized Signer	State signatories must have legal authority (via statute or power of attorney) to enter into MOU	<input type="checkbox"/>	
24. Format	Pages double-sided; ¾ inch margins; font is 10 Pica or larger; all pages sequentially numbered and labeled (Page 1 of __; Exhibit A, B, etc).	<input type="checkbox"/>	
25. Number of Copies	One original plus 8 copies (8 G&C and 1 DAS)	<input type="checkbox"/>	
26. Order of Documents in Request Package	G&C Letter; executed MOU-1 Form; Exhibit A; Exhibit B (if any); Exhibit C (if any);	<input type="checkbox"/>	
27. Review for Nonpublic Information	Confirm that the agency has checked “yes” to Box 13 above.	<input type="checkbox"/>	Note: Items submitted to G & C for approval will generally be publicly posted on the internet. Items should not be submitted to G & C unless the review noted in Box 13 has first been accomplished by the responsible agency.

FOR DAS USE ONLY

DATE RECEIVED BY DAS:	REVIEWING BUSINESS SUPERVISOR:
PHONE:	EMAIL:

STATE OF N.H. MOU1 (INTERAGENCY MOU) CHECKLIST
(See DAS MOP 161)

NOTES

STATE OF N.H. MOU-1 (INTERAGENCY MOU) CHECKLIST INSTRUCTIONS

The following instructions are designed to provide State agencies with guidance on completion of the State of N.H. MOU-1 (Interagency MOU) Checklist (Version 4/6 /2022) (“MOU-1 Checklist”).¹ An Interagency Memorandum of Understanding (“MOU”) is an agreement between two or more agencies, branches or units of the government of the State of New Hampshire. These MOUs require Governor & Executive Council (“G & C”) approval if the agreement involves an expenditure equal to or greater than the threshold established by the G & C for approval of such items under DAS MOP 150. If the MOU does not involve an expenditure or involves an expenditure less than the relevant threshold, the MOU may still be submitted for G & C approval if the agencies wish to do so. Agencies considering entering into an MOU are strongly encouraged to consult Chapter 161 of the Department of Administrative Services (“DAS”) Manual of Procedures (“DAS MOP”), which may be found on the State’s “Sunspot” intranet site.

By definition Interagency MOUs are entered into between two or more agencies, branches or units of the government of the State of New Hampshire. For the purpose of ensuring the proper execution, review and submission of the MOU, the parties to the agreement shall designate one entity to be the “Responsible Agency” which will ensure the submission of the MOU to DOJ and/or DAS for review and potential submission to G & C.

The MOU-1 Checklist is divided into two parts: Part 1, Checklist for Department of Justice Review; and Part 2, Checklist for the Department of Administrative Services Review.

The agencies entering into an agreement are responsible for assuring that the requirements of DAS MOP 161 are met and the checklist is a tool to assist the agencies in conducting their internal review of the operative document. If the parties are required or wish to submit the Interagency MOU to G & C for approval by that body, the Checklist is a tool for use by both DOJ and DAS. Like contracts submitted for G & C approval, Interagency MOUs provided for G & C review are initially delivered by the agency to its counsel in the Department of Justice. DOJ in turn forwards the item to DAS for ultimate delivery to the Governor and Executive Council. Both DOJ and DAS work with the agencies to address any matters of concern prior to G & C submission, using the MOU-1 checklist to assist in their assessments.

The following instructions address the numbered and lettered boxes appearing on the MOU-1 Checklist.

1. **Responsible Agency:** The Parties should designate one of the entities entering the MOU to be the Responsible Agency with respect to ensuring the proper execution review and submission of the MOU. Enter the Responsible Agency’s name as it appears on the MOU 1 Form.

¹ The paragraph numbers in the Instructions correspond with the related items in the Contract Checklist.

2. **Responsible Agency Contact Phone:** Enter the telephone number for the Responsible Agency Contact.
3. **Responsible Agency Contact:** Enter the name and title of the agency employee who is the Responsible contact for any substantive contract questions or discussion.
4. **Responsible Agency Contact Email:** Enter the Responsible Agency Contact's email address.
5. **Secondary Agency:** The name of the second State of New Hampshire governmental entity as it appears on the MOU 1 Form.
6. **Secondary Contact, Phone Number and Email:** Enter the name and title of the employee who is the contact for the second State of New Hampshire governmental entity entering into the agreement and that person's telephone number and e-mail address.
7. **Other State Entities that are a party to this MOU:** Enter the name of all other State of New Hampshire Governmental entities that are entering into this MOU. Please note that none of these parties can be non-State of New Hampshire governmental entities.
8. **Name and Contact Information for all other agency/branch contacts:** Enter the names, telephone numbers and e-mail addresses for the contact persons for all of the entities listed in Box 7.
9. **Assessment of the factors listed in DAS Manual of Procedures MOP 161, III. A:** The Parties to the agreement must review the factors set forth the DAS Manual of Procedures MOP 161, III. A. Specifically, the entities should consider whether an Interagency MOU is the proper document to effectuate the purpose of the agreement in light of the obligations sought to be imposed upon the parties. An MOU does not create enforceable legal obligations. Please note that the parties have assessed these factors. The MOU cannot be submitted to DAS or DOJ if the parties have not performed this assessment and answered in the affirmative.
10. **What is the targeted G & C Closing Date:**
The DAS establishes a "closing date" for the submission of contracts for upcoming G & C meetings. The applicable dates can be found on the DAS website at <http://www.admin.state.nh.us/comm/index2.asp>, and on the G & C website at <http://sos.nh.gov/GC2.aspx>. Enter the G & C closing date your agency is targeting.
11. **What is the targeted G & C Meeting Date:** Enter the G&C meeting date your agency is targeting.
12. **Requested Rush Return Date for DOJ Review:** Please allow at least two (2) weeks prior to the Targeted G & C Closing Date for DOJ legal review ("DOJ Review

Period”).² If you seek return of the MOU from DOJ prior to the conclusion of the DOJ Review Period, please explain reasons in detail, including, but not limited to, specifying the Requested Rush Return Date, whether the contract is a “late item,” the Targeted G & C Closing Date, and the Targeted G & C Meeting Date.

13. **Review for Nonpublic Information:** Effective July 1, 2012, RSA 9-F: 1 requires that all contracts “entered into as the result of a request for proposals” be publicly posted on the TransparentNH website. The G&C cover letter and all supplemental documents included in the submission packet are also posted. Other G & C items are likewise posted on the TransparentNH website including, but not limited to, grants and MOUs.

As a general matter, agencies should assume that *all items* submitted to the G & C will be publicly posted on the internet. Agencies must therefore take steps to ensure that contracts, leases and other submissions to G & C do not contain confidential information or other information that is exempt from disclosure under RSA 91-A (the State’s “Right-to-Know” Law) or other law.

Examples of information that might need to be redacted include floor plans or other diagrams in leases that could affect the security of public buildings; grants or qualifications-based contracts that include resumes with private information, such as home addresses, phone numbers and email addresses; and technical contracts that incorporate proprietary or confidential company information. Consideration should be given to such matters before submitting items to G&C for approval. To the extent that such information is not a necessary component of the contract, lease or other agreement, do not include those pages or sections as part of the “contract” document. Where such information is a necessary component, redact any information that is exempt from disclosure.

Pursuant to RSA 9-F, the agency is obligated to identify any such information. Refer to the Attorney General’s memorandum on the Right-To-Law at <http://doj.nh.gov/civil/documents/right-to-know.pdf>, specifically Exhibit E. In addition, for questions about how to handle certain information, contact DOJ for assistance. Item 13 on the checklist provides for an initial certification that the agency has reviewed and redacted exempt information. All redactions should be made before sending a contract, grant, lease or other item to DOJ for review. DOJ will not be reviewing the information that was redacted. DAS will not generally accept a submission unless an agency is able to check “yes” in Item 13.

14. **Amendment:** If this is an amendment to an earlier MOU, the original MOU and all prior amendments must be attached to the amendment. The amendment must identify any renewal/extension options in the original MOU being exercised.
15. **Execution:** The MOU must be executed by all parties.

² DOJ strives to complete the review and approval process within the DOJ Review Period. Expedited review is available in exceptional circumstances upon request.

The MOU-1 is not a stand-alone contract document, and must be used in conjunction with Exhibits A and B (See paragraphs 16 and 17 below):

16. **Exhibit A, Terms of the Agreement and Services to be Performed:** Exhibit A sets forth the specific terms of the agreement, including a detailed description of the work and services to be made pursuant to this agreement. Exhibit A must also contain specific reference to all exhibits, appendices, and other attachments, incorporating them by reference into the contract (e.g. “This Agreement consists of the following documents: Exhibits A, B, C, D, and E, which are all incorporated herein by reference as if fully set forth herein”).
17. **Exhibit B, Payment Terms:** Exhibit B must set out any and all payments to be made and/or received pursuant to the MOU.
18. **MOU-1 Form Modifications IMPORTANT:** MUST INCLUDE ALL MODIFICATIONS, DELETIONS, AND ADDITIONS TO THE GENERAL PROVISIONS IN THE MOU-1 FORM, and must reference the corresponding paragraph number of the MOU-1 Form.

Memorandum of Understanding (External MOU)

(This Agreement Does Not Create Any Legally Enforceable Rights or Obligations)

(For use by executive branch State agencies with entities that are not part of the Government of the State of New Hampshire. See DAS MOP 161, II. C.)

I. Whereas, the _____ [**“External ENTITY”**] is a:

- Duly constituted agency of the United States Federal Government;
- Duly constituted agency of the State of _____;
- Duly constituted Town/City of the State of New Hampshire;
- Corporation/partnership/business registered to do business in the State of New Hampshire;
- Charitable/non-profit organization registered with the State of New Hampshire;
- Another entity which is not part of the government of the State of New Hampshire (describe): _____

Whereas, the _____ [**“STATE AGENCY”**] is a duly constituted executive branch agency of the State of New Hampshire;

III. Whereas, THE EXTERNAL ENTITY desires to:

IV. Whereas, pursuant to _____ [**insert, for example, RSA or Chapter Law number**] **STATE AGENCY** is responsible for:

V. Whereas, The STATE AGENCY desires to:

VI. NOW, THEREFORE, _____ [*External Entity*] and _____ [*State Agency*], (hereinafter referred to as “The Parties”) enter into this Memorandum of Understanding for their mutual benefit and agree to act as follows:

- 1. The _____ [**EXTERNAL ENTITY**] agrees to perform all actions and services described in the attached MOU Exhibit A, which is hereby incorporated by reference.
- 2. The _____ [**STATE AGENCY**] agrees to perform all actions and services described in the attached MOU Exhibit A, which is hereby incorporated by reference.
- 3. The Parties agree that no exchange of payment will be made as part of this Memorandum of Understanding. To the extent the Parties determine that an exchange of funds between the Parties is necessary to realize the goals of this Memorandum, the Parties will execute a separate contract or grant to address any such payments, in accordance with standard contract or grant procedures.
- 4. The Parties agree that the obligations, agreements and promises made under this Memorandum of Understanding are not intended to be legally binding upon the Parties and are not legally enforceable. Additionally, the obligations, agreements and promises made by the Parties in this Memorandum of Understanding shall not comprise a standard of care or conduct to third parties.
- 5. This Memorandum of Understanding is effective until _____ [**DATE**].
- 6. This Memorandum of Understanding may be amended by a written instrument signed by the Parties provided that the amendment does not involve a State expenditure, the receipt of funds or the creation of an enforceable obligation.
- 7. Either party may terminate this agreement by providing written notice to the other party at least _____ [**NUMBER**] days prior to termination.
- 8. Disputes arising under this Memorandum of Understanding should be resolved by agreement between the Parties to the extent possible. In the event that the Parties cannot resolve a dispute by agreement, the Parties anticipate that disputes will be resolved in the following manner:

Any manner of dispute resolution agreed to by the Parties, as set out above, is purely voluntary and non-binding in nature and is not intended to create a legally enforceable right, responsibility and/or obligation. In the event that these processes do not resolve the dispute to the satisfaction of the Parties, either Party may terminate this Memorandum of Understanding in the manner set forth in paragraph 7.

- 9. This Agreement shall be construed in accordance with the laws of the State of New Hampshire.
- 10. The Parties hereto do not intend to benefit any third parties and this Memorandum of Understanding shall not be construed to confer any such benefit.
- 11. In the event any of the provisions of this Memorandum of Understanding are held to be contrary to any state or federal law, the remaining provisions of this Memorandum of Understanding will remain in full force and effect.
- 12. This Memorandum of Understanding, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire Memorandum of Understanding and understandings between the parties, and supersedes all prior Memoranda of Understanding and understandings relating hereto.
- 13. Nothing herein shall be construed as a waiver of sovereign immunity, such immunity being hereby specifically preserved.

14. **FOR EXTERNAL ENTITY** *[Name of Entity]:*

[Signature]

Date

[name in print]

[Title]

15. **FOR STATE AGENCY** *[Name of Agency]:*

[Agency Head or Commissioner signature]

Date

[Agency Head or Commissioner name in print]

VII. PLEASE NOTE

1. **MOU Exhibit A** (MOU Terms) must be attached to this form.
2. This form is intended only for use with External Memoranda of Understanding (“MOUs”). Please see the NH Department of Administrative Services Manual of Procedures (MOP) Chapter 161 for a discussion of the circumstances in which External MOUs may be used and refer to the MOU 2 form instructions when executing this document. This MOU cannot be used for agreements that result in an expenditure, a receipt of funds or creation of an enforceable obligation.
3. If more than two entities are involved in the agreement, please include all information listed above for each entity.
4. No changes may be made to the preprinted terms of this form without the approval of the Department of Justice.
5. External MOUs generally do not require Governor and Council approval. Agencies may nonetheless request such approval if they believe that to do so is appropriate in the circumstances. See MOP 161, V., D. The Department of Justice and Governor and Council approvals appearing in paragraphs VIII. and IX. below are **only** required if Governor and Council approval of this MOU is requested.

VIII. Approved by the New Hampshire Department of Justice for form, substance, and execution:

By: _____ . On: _____
[Name of Assistant Attorney General] Date

IX. Approved by the Governor and Executive Council

By: _____ . On: _____
Date

STATE OF N.H. MOU-2 (EXTERNAL MOU) CHECKLIST (See DAS MOP 161)

1. Name of State Agency primarily responsible for MOU:	2. Primary Agency Contact Phone Number:
3. Primary Agency Contact Name and Title:	4. Primary Agency Contact Email:
5. Secondary Agency Contact:	6. Secondary Agency Contact Phone Number and Email:
7. If more than one State agency or branch is a party to this MOU, name(s) of additional agencies or branches:	8. Name of External (Non-State) Entity:
9. If more than one External Entity is a party to this MOU, name(s) of additional External Entities:	10. Has the agency noted in Box 1 engaged in an assessment of the factors listed in DAS Manual of Procedures MOP 161, III. B? <input type="checkbox"/> Yes <input type="checkbox"/> No (<u>Note</u> : Do not submit or finalize MOU unless answer is "yes")
11. What is the targeted G & C Closing Date?	12. What is the targeted G & C Meeting Date?

13. RUSH? Yes No; If "yes": REQUESTED RUSH RETURN DATE FROM DOJ _____
(If requested return date is less than two weeks from targeted G & C Closing Date noted in Box 12, please explain.)

14. Did the agency noted in Box 1 above review the MOU, its attachments, cover letter (if any), and all other materials included with the submission, and redact information that is private, confidential, proprietary, or otherwise exempt from public disclosure under RSA 91-A or other law? Yes No

15. Is this an amendment to a prior MOU Yes No
If yes, identify date of earlier MOU below and attach a copy.

STATE OF N.H. MOU-2 (EXTERNAL MOU) CHECKLIST (See DAS MOP 161)

Item	Verify		Comments
16. Execution	Has the MOU been executed by all agencies or branches involved, with all portions of the MOU-2 Form fully completed.	<input type="checkbox"/> Yes <input type="checkbox"/> No	
17. MOU Exhibit A (MOU Terms)	Is the Memorandum of Understanding described in detail in MOU Exhibit A?	<input type="checkbox"/> N/A <input type="checkbox"/> Yes <input type="checkbox"/> No	
18. MOU Exhibit B – Amended MOU	If this is an amendment to an earlier MOU, has the earlier MOU been attached as Exhibit B?	<input type="checkbox"/> N/A <input type="checkbox"/> Yes <input type="checkbox"/> No	
19. MOU-2 Form Modifications	If modifications, additions and/or deletions have been made to MOU Form 2, have they been described in detail?	<input type="checkbox"/> N/A <input type="checkbox"/> Yes <input type="checkbox"/> No	Note: DOJ approval is required for modifications to MOU Form 2.

FOR DOJ USE ONLY

DATE RECEIVED BY DOJ :	DATE APPROVED:
DATE CONDITIONALLY APPROVED:	DATE REJECTED:
REVIEWING ATTORNEY:	PHONE AND EMAIL:

NOTES

STATE OF N.H. MOU-2 (EXTERNAL MOU) CHECKLIST (See DAS MOP 161)

Part 2 – CHECKLIST FOR DEPARTMENT OF ADMINISTRATIVE SERVICES

Item	Verify	✓	Comments
20. G& C Request Letter – Requested Action	Requesting Party; purpose (to enter into an External MOU); External Entity name/address; timing	<input type="checkbox"/>	
21. Request Letter – Explanation	Description of External MOU; reason for retroactive request, if any	<input type="checkbox"/>	
22. No State expenditure or receipt of funds, no enforceable obligations	MOU does not involve expenditure or receipt of funds or purport to establish enforceable obligations	<input type="checkbox"/>	Note: If this item involves an expenditure, a receipt of funds or any obligation that is intended to be enforceable in a legal proceeding, it should normally be treated as a contract or grant, not as an External MOU. DAS to contact DOJ if any question.
23. Agencies	One request by all agencies or branches involved, with all required information/approvals.	<input type="checkbox"/>	Note: At least one responsible agency must be an <u>executive branch</u> agency.
24. Authorized Signer	State signatories must have legal authority (via statute or power of attorney) to enter into MOU on behalf of the State.	<input type="checkbox"/>	
25. Format	Pages double-sided; 3/4 inch margins; font is 10 Pica or larger; all pages sequentially numbered and labeled (Page 1 of __; Exhibit A, B, etc); pages initialed and dated by each External Entity.	<input type="checkbox"/>	
26. Number of Copies	One original plus 8 copies (8 G&C and 1 DAS)	<input type="checkbox"/>	
27. Order of Documents in Request Package	G&C Letter; executed MOU-2 Form; Exhibit A and Exhibit B (if any)	<input type="checkbox"/>	
28. Review for Nonpublic Information	Confirm that the agency has checked “yes” to Box 14 above.	<input type="checkbox"/>	Note: Items submitted to G & C for approval will generally be publicly posted on the internet. Items should not be submitted to G & C unless the review noted in Box 14 has first been accomplished by the responsible agency.

FOR DAS USE ONLY

DATE RECEIVED BY DAS:	REVIEWING BUSINESS SUPERVISOR:
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STATE OF N.H. MOU-2 (EXTERNAL MOU) CHECKLIST (See DAS MOP 161)

PHONE:	EMAIL:
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NOTES

STATE OF N.H. MOU-2 (EXTERNAL MOU) CHECKLIST INSTRUCTIONS

The following instructions are designed to provide State agencies with guidance on completion of the State of N.H. MOU-2 (External MOU) Checklist (Version 4/6/2022) (“MOU-2 Checklist”).¹ External MOUs are agreements between a State of New Hampshire executive branch agency and an organization, institution, individual or unit of government (such as a municipality or another state) which is not part of the government of the State of New Hampshire. An External MOU cannot involve a State expenditure, the receipt of funds by the State, or an enforceable legal obligation. **External MOUs are appropriately used only in exceptional and very limited circumstances.** Agencies considering entering into an External MOU are strongly encouraged to consult with their counsel at the New Hampshire Department of Justice (“DOJ”) and to review Chapter 161 of the Department of Administrative Services (“DAS”) Manual of Procedures (DAS MOP), which may be found on the State’s “Sunspot” intranet site. The vast majority of agreements between the State and an outside entity should be treated as contracts or grants in accordance with DAS MOP Chapter 150. If the External MOU involve either a State expenditure (in any amount), the receipt of funds, or the establishment of an enforceable obligation, such MOU must be submitted to G&C for approval in accordance with DAS MOP Chapter 150. Agencies are urged to take caution before entering into an External MOU.

The MOU-2 Checklist is divided into two parts: Part 1, Checklist for Department of Justice Review; and Part 2, Checklist for the Department of Administrative Services Review.

If the agency is required or wishes to submit the External MOU to G & C approval by that body, the Checklist is a tool for use by both DOJ and DAS. Like contracts submitted for G & C approval, External MOUs provided for G & C review are initially delivered by the agency to its counsel in the Department of Justice. DOJ in turn forwards the item to DAS for ultimate delivery to the Governor and Executive Council. Both DOJ and DAS work with the agency to address any matters of concern prior to G & C submission, using the MOU-2 checklist to assist in their assessments.

The following instructions address the numbered and lettered boxes appearing on the MOU-2 Checklist.

1. **Agency:** Enter the Agency’s name exactly as it appears on the MOU-2 Form.
2. **Primary Agency Contact Phone:** Enter the telephone number for the Primary Agency Contact.
3. **Primary Agency Contact:** Enter the name and title of the agency employee who is the primary contact for any substantive questions or discussion.
4. **Primary Agency Contact Email:** Enter the Primary Agency Contact’s email address.

¹ The paragraph numbers in the Instructions correspond with the related items in the Contract Checklist.

5. **Secondary Agency Contact:** Enter the name and title of the employee to whom the MOU should be returned if different from the Primary Agency Contact.
6. **Secondary Agency Contact Phone:** Enter the Secondary Agency Contact telephone number.
7. **Other State Agencies that are a party to this MOU:** Enter the name of all other State of New Hampshire Governmental agencies that are entering into this MOU.
8. **Name of External Entity:** Enter the name of the External Entity as it appears on the MOU-2 Form.
9. **Other External Entities entering into this MOU:** Enter the names of all other External Entities as they appear on the MOU-2 Form.
10. **Assessment of the factors listed in DAS Manual of Procedures MOP 161, III. B:**
The Agency(ies) must review the factors set forth the DAS MOP 161, III. B. Specifically, the agency(ies) should consider whether an External MOU is the proper document to effectuate the purpose of the agreement in light of the obligations sought to be imposed upon the parties. An MOU does not create enforceable legal obligations. If the parties are seeking to exchange or receive funds and/or create enforceable legal obligations, the agreement should be styled as a contract or a grant. Please note that the parties have assessed these factors. The MOU cannot be submitted to DAS or DOJ if the parties have not performed this assessment and answered in the affirmative.
11. **What is the Targeted G & C Closing Date:**
External MOUs that do not involve state expenditure, receipt of funds, or the establishment of an enforceable obligation do not require G & C approval; however, the MOU may still be submitted for G & C approval if the parties wish to do so. Please note whether the parties intend to submit the MOU for G & C approval.

The DAS establishes a “closing date” for the submission of contracts for upcoming G & C meetings. The applicable dates can be found on the DAS website at <http://www.admin.state.nh.us/comm/index2.asp>, and on the G & C website at <http://sos.nh.gov/GC2.aspx>. Enter the G & C closing date your agency is targeting.

12. **Targeted G & C Meeting Date:** Enter the G & C meeting date your agency is targeting.
13. **Requested Rush Return Date for DOJ Review:** Please allow at least two (2) weeks prior to the Targeted G & C Closing Date for DOJ legal review (“DOJ Review Period”).² If you seek return of the MOU from DOJ prior to the conclusion of the DOJ Review Period, please explain reasons in detail, including, but not limited to, specifying the Requested Rush

² DOJ strives to complete the review and approval process within the DOJ Review Period. Expedited review is available in exceptional circumstances upon request.

Return Date, whether the MOU is a “late item,” the Targeted G & C Closing Date, and the Targeted G & C Meeting Date.

14. Review for Nonpublic Information: Effective July 1, 2012, RSA 9-F: 1 requires that all contracts “entered into as the result of a request for proposals” be publicly posted on the TransparentNH website. The G & C cover letter and all supplemental documents included in the submission packet are also posted. Other G & C items are likewise posted on the TransparentNH website including, but not limited to, grants and MOUs.

As a general matter, agencies should assume that *all items* submitted to the G & C will be publicly posted on the internet. Agencies must therefore take steps to ensure that contracts, leases and other submissions to G & C do not contain confidential information or other information that is exempt from disclosure under RSA 91-A (the State’s “Right-to-Know” Law) or other law.

Examples of information that might need to be redacted include floor plans or other diagrams in leases that could affect the security of public buildings; grants or qualifications-based contracts that include resumes with private information, such as home addresses, phone numbers and email addresses; technical contracts that incorporate proprietary or confidential company information. Consideration should be given to such matters before submitting items to G & C for approval. To the extent that such information is not a necessary component of the contract, lease or other agreement, do not include those pages or sections as part of the “contract” document. Where such information is a necessary component, redact any information that is exempt from disclosure.

Pursuant to RSA 9-F, the agency is obligated to identify any such information. Refer to the Attorney General’s memorandum on the Right-To-Law at <http://doj.nh.gov/civil/documents/right-to-know.pdf>, specifically Exhibit E. In addition, for questions about how to handle certain information, contact DOJ for assistance. Item 14 on the checklist provides for an initial certification that the agency has reviewed and redacted exempt information. All redactions should be made before sending a contract, grant, lease or other item to DOJ for review. DOJ will not be reviewing the information that was redacted. DAS will not generally accept a submission unless an agency is able to check “yes” in Item 14.

15. Amendment: If applicable, the originally approved MOU and all prior amendments must be attached to the amendment. The amendment must identify any renewal/extension options in the original MOU being exercised.

16. Execution: The MOU-2 Form must be fully completed and executed by the all parties.

The MOU is not a stand-alone document, and must be used in conjunction with Exhibits A (See paragraphs 17 below):

17. Exhibit A, Terms of the Agreement: Exhibit A sets forth the specific terms of the agreement, including a detailed description of the work, services and payments to be made

pursuant to this agreement. Exhibit A must also contain specific reference to all exhibits, appendices, and other attachments, incorporating them by reference into the contract (e.g. “This Agreement consists of the following documents: Exhibits A, B and C, which are all incorporated herein by reference as if fully set forth herein”).

18. **If the item submitted to the G&C is an amendment**, it must attach the originally approved MOU and all prior amendments, if applicable.
19. **MOU-1 Form Modifications. IMPORTANT**: MUST INCLUDE ALL MODIFICATIONS, DELETIONS, AND ADDITIONS TO THE GENERAL PROVISIONS IN THE MOU-2 FORM, and must reference the corresponding paragraph number of the MOU-2 Form.

MEMORANDA OF UNDERSTANDING "QUICK REFERENCE CHART"

Category	Method of Processing
<p><u>INTERAGENCY MOUs (MOU 1 Forms)</u></p> <p><i>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.</i></p>	<p><i><u>If the MOU involves an expenditure equal to or greater than the applicable threshold established by the Governor and Council for approval of memoranda of understanding under DAS MOP 150:</u></i></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><i><u>If the MOU involves an expenditure of less than the threshold established by the Governor and Council for approval of memoranda of understanding under DAS MOP 150:</u></i></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><u>EXTERNAL MOUs (MOU 2 Forms)</u></p> <p><i>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></i></p>	<p><i><u>If the MOU involves a State expenditure (in any amount), the receipt of funds, or an enforceable obligation:</u></i></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. See MOP 160, 163.</p>
	<p><i><u>If the MOU does NOT involve a State expenditure, the receipt of funds, or an enforceable obligation:</u></i></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>