

# Contracting Requirements and Why They Matter

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# Getting It Right

- Clarity and avoidance of doubt
  - Know who is supposed to do what, when, and how
- Avoidance of liability
  - Protect yourself and the University
- Enforceability
  - Make sure it's legally binding

# Getting It Wrong

- *Case:* Your unit contracts with Fun Corp (FC) to provide Student Fun Fair on campus. Contract requires that University **indemnify** FC for injuries/damage/liability arising out of Fun Fair. Student is seriously injured at Fun Fair and sues FC for \$2 million. FC goes after University for the \$2 million liability, since you agreed to indemnify FC. Tort Claims Act covers only \$1 million.
- *Result:* **Your unit owes** the remaining \$1 million to the injured student, PLUS FC' s attorney's fees and costs.

# Getting It Wrong Again

- *Case:* Your unit contracts with Most Popular Speaker (MPS) and sells 2,000 tickets to the event at \$25/ticket. Your unit head signs the contract. MPS cancels at the last minute. You claim damages, but MPS asserts that the contract was void because the unit head had **no signature authority**.
- *Result:* Your unit can't collect damages because the **contract was void** for lack of authorized signature. Your unit must refund the tickets and absorb the \$40,000 loss.

# Another Mistake

- *Case:* Your unit contracts with Vendor to purchase a Do-It-All Machine for \$50,000. Contract **limits Vendor's liability** to the cost of the Machine. Machine indeed “does it all,” but also causes \$100,000 in damages to the Machine Room.
- *Result:* Vendor invokes limitation of liability clause and pays only \$50,000; **your unit is responsible** for the remaining \$50,000 to repair the damage.

# How Do I Prevent This, and Where Do I Start?

- Contract Resources on OLA website
  - <http://legal.uncc.edu/legal-topics/contracts>
- Contract Checklist
  - <http://legal.uncc.edu/legal-topics/contracts/contract-checklist>
- Negotiating
  - Deal Breakers
  - Troublesome Terms
  - Alternate clauses
- Contract Checklist Training (ppt on website and live)
- Ask Questions!
  - Office of Legal Affairs is here to help you

# Contract Checklist is Your Friend

- Purpose & Procedures
- Guides you through the review process
- Highlights Deal Breakers and Troublesome Terms
- Links to language for negotiating terms
- Links to alternate language for Troublesome Terms
- Links to valuable information (e.g. purchasing manual, University Policies, contract authority)

# Where Do They Come From?

- External Contracts
  - Other party often insists on using its own form contract
  - Need to check carefully for Deal Breakers or Troublesome Terms
- University Contracts
  - University has its own contracts and templates for many situations
  - Use University-generated contracts **if at all possible**
  - Be careful of changes other party wants to make

# Typical Contracts

- **Purchase of goods/services or Independent Contractor:** Materials Management
- **MOU (Memorandum of Understanding):** Memorialization of general understanding of the parties' obligations; often contemplating a more specific agreement in the future
- **Affiliation:** Arrangement between two organizations to share resources or services
- **Employment:** SPA handled through HR; EPA handled through AA
- **Events:** Conferences, Reservations, and Event Services
- **Loans:** Arrangement for borrowing or lending of art/objects/materials
- **Grants and Research Contracts:** Office of Research Services
- **Volunteer:** Volunteer Agreement template on website

# What to Look Out For

- **Deal Breakers**

- Prohibited terms. Must either negotiate to remove them, or alter them so that they are acceptable.

- **Troublesome Terms**

- Terms that impose unusual or generally unacceptable risks of liability on the University.
- Agreement to these terms involves assumption of risk that should be approved at a supervisory level through the [Contract Advisory](#) process.

# Deal Breakers...

- Prohibited Clauses  
<http://legal.uncc.edu/legal-topics/negotiating-prohibited-contract-clauses>
- Liability beyond Tort Claims Act limitations (\$1,000,000)
  - State entity can't assume liability beyond TCA limits or for actions not covered by the TCA. \* **Note that recoveries are mostly paid from OPERATING BUDGETS; there is NO self-insurance pool!**
  - Indemnity
  - Waiver of Sovereign Immunity
  - Assumption of risk/liability
  - Payment of attorney fees, court costs or other litigation expenses
- Governing law/jurisdiction (must be NC law)
  - Cannot agree to a clause subjecting the University to either the substantive law or the jurisdiction of another state

# ...More Deal Breakers

- Arbitration
  - State cannot agree to mandatory dispute resolution other than legal action in NC courts
- Assignment of payment
  - Constitutes a waiver of defenses and recourse and implicates the NC Constitutional prohibition on exclusive emoluments (other party receives State funds without providing public service)
- Personal liability for signer or other employees
- Non-compete
  - Promise not to hire other party's employee; violates public policy
- Liquidated damages or cancellation fees
  - May implicate AG's obligation to exercise civil litigation duties

# Troublesome Terms

- Limitations on other party's liability
  - Implicate State's obligation to exercise duties regarding civil litigation; implicate the NC Constitutional prohibition on exclusive emoluments (other party receives State funds without providing public service)
- Acceleration clauses (all payments due on breach or default)
  - Implicate the State's obligation to operate within budget; forces University to make payments not appropriated
- Late payment penalties or finance charges
- Alters legal protections
  - Shortens statute of limitations (usually three years)
  - Provides that breach will cause irreparable harm/injunctive relief
- Grants ownership rights in property purchased by University

# Contract Advisory Process

- Use if contract reviewer wants to accept Troublesome Terms
- Ensures that the decision is made at the appropriate level
- Requires contract reviewer to obtain approval
- Notification that legal counsel advises against such clauses
- Notification that any resulting damages or costs will be paid from the signatory's budget
- Retain copy in file with contract and contract checklist
- <http://legal.uncc.edu/legal-topics/contracts/contract-checklist#advisory>

# Resource Reminders

- Contracting Info on OLA Website
  - <http://legal.uncc.edu/legal-topics/contracts>
- Contract Authority
  - Policy 603.1, Authority to Sign Contracts  
<http://legal.uncc.edu/policies/up-603.1>
- Office of Legal Affairs: [legal@uncc.edu](mailto:legal@uncc.edu)
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