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
• **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](http://legal.uncc.edu/legal-topics/contracts)

- Contract Checklist
  - [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

• 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](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

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