

Let's Make a Deal: Dos and Don'ts of Negotiating University Contracts

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First things first: what is a contract?



Question 1: Which of these is not a contract?

1. A purchase order for 10 new desks for your unit.
2. A memorandum of understanding between the University of North Carolina at Charlotte (“University”) and another school describing the parties’ expectations for a new training program for students of both schools without the exchange of money.
3. A list of terms and conditions that must be clicked through before completing the purchase of software.
4. All of the above are contracts.



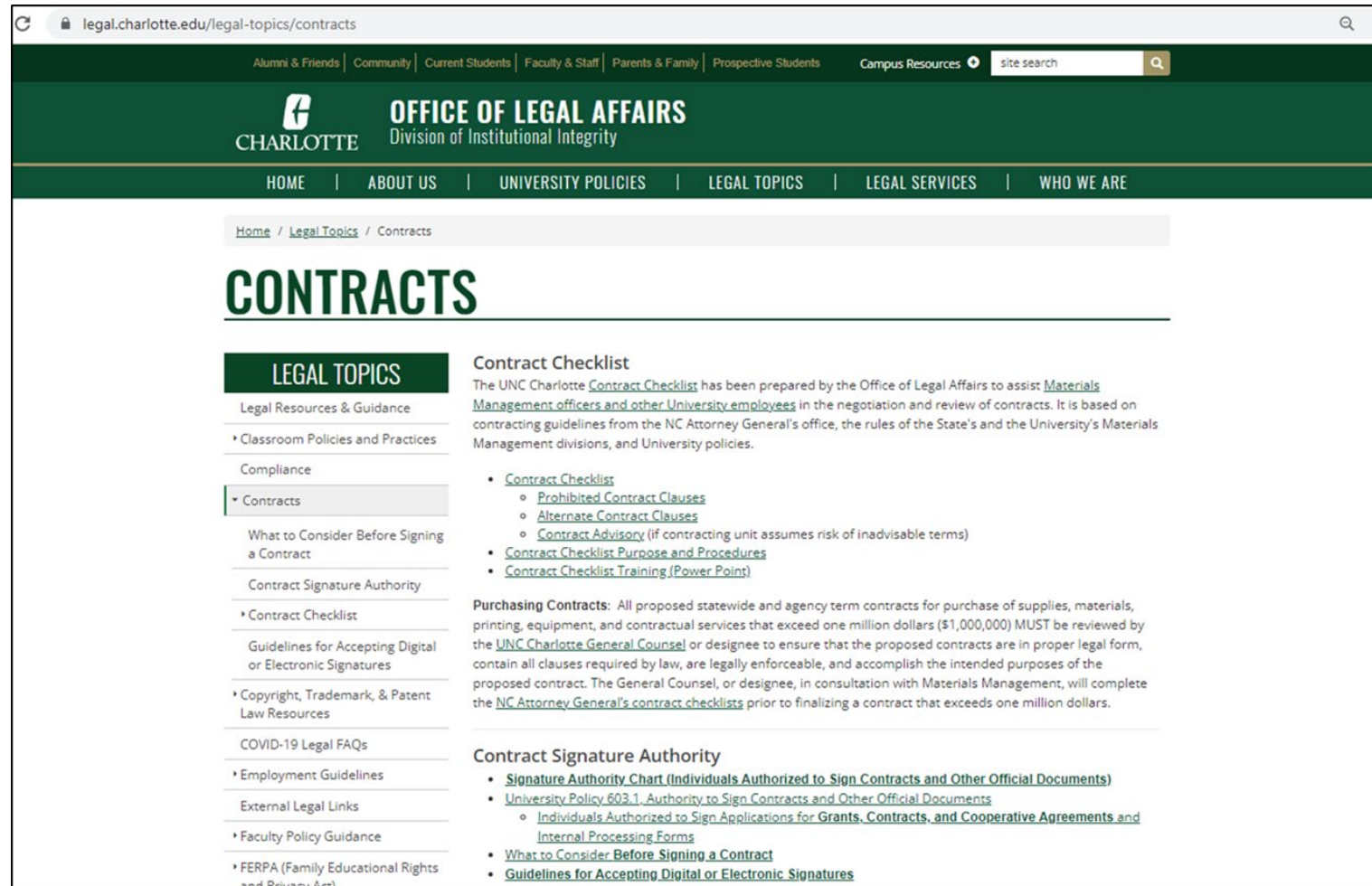
University Policy 603.1

- ❑ A contract is any document that legally binds the University to another party, including any agreement in which either party promises to take specific actions or to refrain from taking certain actions.
- ❑ A contract could be called an affiliation agreement, memorandum of understanding (“MOU”), terms and conditions, letter of agreement, purchase order, or any number of other labels.
- ❑ A contract might or might not involve the payment of money.
- ❑ Online terms and conditions that must be accepted prior to using a product or service are also considered contracts under this Policy.

Your Best Friends

- ❑ **Your Department's Assigned Purchasing Agent:**
<https://finance.charlotte.edu/resources/purchasing/purchasing-agent-departmental-listing>
- ❑ **The Contract Checklist:** <https://legal.charlotte.edu/legal-topics/contract-checklist>
- ❑ **Guidelines for Accepting Digital or Electronic Signatures:** <https://legal.charlotte.edu/legal-topics/contracts/guidelines-accepting-digital-or-electronic-signatures>
- ❑ **What to Consider Before Signing a Contract:** <https://legal.charlotte.edu/legal-topics/contracts/what-consider-signing-contract>
- ❑ **Signature Authority Chart:**
<https://legal.charlotte.edu/sites/legal.charlotte.edu/files/media/SignatureAuthorityChart.pdf>
- ❑ **Grants and Contract Administration** (if the contract relates to research or sponsored programs): <https://research.charlotte.edu/departments/grants-contracts-administration-gca>
- ❑ **Your Friendly Neighborhood Attorney:** Isabel Alele (ialele@uncc.edu)

<https://legal.charlotte.edu/legal-topics/contracts>



The screenshot shows a web browser displaying the page legal.charlotte.edu/legal-topics/contracts. The page features a dark green header with the University of North Carolina Charlotte logo and the text "OFFICE OF LEGAL AFFAIRS Division of Institutional Integrity". A navigation menu includes links for HOME, ABOUT US, UNIVERSITY POLICIES, LEGAL TOPICS, LEGAL SERVICES, and WHO WE ARE. A search bar is located in the top right corner.

The main content area has a breadcrumb trail: [Home](#) / [Legal Topics](#) / [Contracts](#). The title "CONTRACTS" is prominently displayed in large, bold, dark green letters.

On the left side, there is a "LEGAL TOPICS" sidebar with a list of links: Legal Resources & Guidance, Classroom Policies and Practices, Compliance, **Contracts** (highlighted), What to Consider Before Signing a Contract, Contract Signature Authority, Contract Checklist, Guidelines for Accepting Digital or Electronic Signatures, Copyright, Trademark, & Patent Law Resources, COVID-19 Legal FAQs, Employment Guidelines, External Legal Links, Faculty Policy Guidance, and FERPA (Family Educational Rights and Privacy Act).

The main content area is divided into two columns. The left column contains the "LEGAL TOPICS" sidebar. The right column features the "Contract Checklist" section, which includes a paragraph explaining the checklist's purpose and a bulleted list of links: [Contract Checklist](#), [Prohibited Contract Clauses](#), [Alternate Contract Clauses](#), [Contract Advisory](#) (if contracting unit assumes risk of inadvisable terms), [Contract Checklist Purpose and Procedures](#), and [Contract Checklist Training \(Power Point\)](#).

Below the "Contract Checklist" section is the "Purchasing Contracts" section, which states that all proposed statewide and agency term contracts for purchase of supplies, materials, printing, equipment, and contractual services that exceed one million dollars (\$1,000,000) MUST be reviewed by the [UNC Charlotte General Counsel](#) or designee to ensure that the proposed contracts are in proper legal form, contain all clauses required by law, are legally enforceable, and accomplish the intended purposes of the proposed contract. The General Counsel, or designee, in consultation with Materials Management, will complete the [NC Attorney General's contract checklists](#) prior to finalizing a contract that exceeds one million dollars.

The bottom section is "Contract Signature Authority", which includes a bulleted list of links: [Signature Authority Chart \(Individuals Authorized to Sign Contracts and Other Official Documents\)](#), [University Policy 603.1. Authority to Sign Contracts and Other Official Documents](#) (with sub-link [Individuals Authorized to Sign Applications for Grants, Contracts, and Cooperative Agreements and Internal Processing Forms](#)), [What to Consider Before Signing a Contract](#), and [Guidelines for Accepting Digital or Electronic Signatures](#).



The Contract Checklist: Getting Started





Finding Your Bearings



- What product or service is being provided?
- Does the University need to provide information to the other party to make it happen?
- Will the other party have access to university facilities or IT networks?
- What could go wrong?
- Are any documents mentioned (attachments, appendices, linked terms and conditions, etc.) that aren't included?
- And most importantly, is this a good deal for UNC Charlotte?



Question 2:

Norm is working on a contract between the University and Samford (which is in Alabama). Samford has added the following provisions to the agreement

- ❑ The University will hold Samford harmless for any financial harm arising from the agreement.
- ❑ The University agrees that all claims arising out of or related to the agreement will be governed and enforced by the laws of Alabama.





How do you advise Norm?

1. Only the first provision (stating the University will hold Samford harmless against claims arising from the contract) is okay.
2. Only the second provision (stating that any claims arising from the contract will be governed by Alabama law) is okay.
3. Both provisions are okay as long as Norm acknowledges the risks of agreeing to them in writing.
4. Neither provision is okay.



Contract Checklist: Deal Breakers

NO DEAL



Indemnification Clauses

- ❑ Key language to look for:

“indemnify”

“release”

“defend”

“hold harmless”

“waive”

- ❑ Under the North Carolina Tort Claims Act the University can cover;
 - personal injury and property damage
 - based on the negligence of our employees (NOT students)
 - Up to \$1,000,000
- ❑ Get the Tort Claims Act language in there!
 - Only in the manner and to the extent permitted by the North Carolina Tort Claims Act, N.C.G.S. 143-291, et seq. and without waiver of its sovereign immunity



Accepting Liability for Students

- Generally speaking, the University cannot accept liability for students.
- Don't "ensure" that students will do or not do anything.
- Don't agree to indemnify the other party based on the actions of students.
- Don't agree to provide insurance for students
- Exception: student employees



Other Deal Breakers

- Substantive Law
- Non-competition clauses
- Attorney's fees, court costs, etc.
- Personal liability
- Contract with employee or family member
(See University Policy 603.2)
- No-hire clauses



Question 3

The University enters into an agreement with Queens College to borrow computer equipment for the students of Niner University to use next school year. Under the agreement, the University promises to use best efforts to maintain the equipment and agrees that any claims arising from a breach of the agreement may be brought within 3 years, which is the default under North Carolina law. Are there any problems with these provisions?



Response to Question 3

1. Yes, the University should not agree to use best efforts to maintain the equipment.
2. Yes, the University should not agree that claims brought for breach of the agreement must be brought within the default 3 year period.
3. Both provisions are problematic.
4. Neither provision is problematic.



Contract Checklist: Risky Terms



Risky Terms

- ❑ Terms that alter legal protections
 - Shorten the statute of limitations
 - Agree that breach would cause irreparable harm and justify injunctive relief
 - Liquidated damages/cancellation fee
 - Waiver of trial by jury (GS 22B-10)
- ❑ Limit the other party's liability
- ❑ Forfeits control over lawsuits
- ❑ Best efforts/warranty



More Risky Terms

- Use of University name, logo, or trademarks in advertising
- Acceleration clauses
- Late payment penalties
- Liens on state property (G.S. 44A-34)
- Confidentiality (G.S. 132-1 et seq)
- Governing Terms Provision



Quick Fix for Confidentiality

- ❑ If the contract defines “Confidential Information,” simply add the following sentence:
 - ❑ “Confidential Information” does not include any information that is required to be disclosed by law, including but not limited to, the North Carolina public records Act, N.C.G.S. 132-1, et seq.
- ❑ We can also agree to notify the other party prior to disclosing its information in response to a public records request or subpoena.



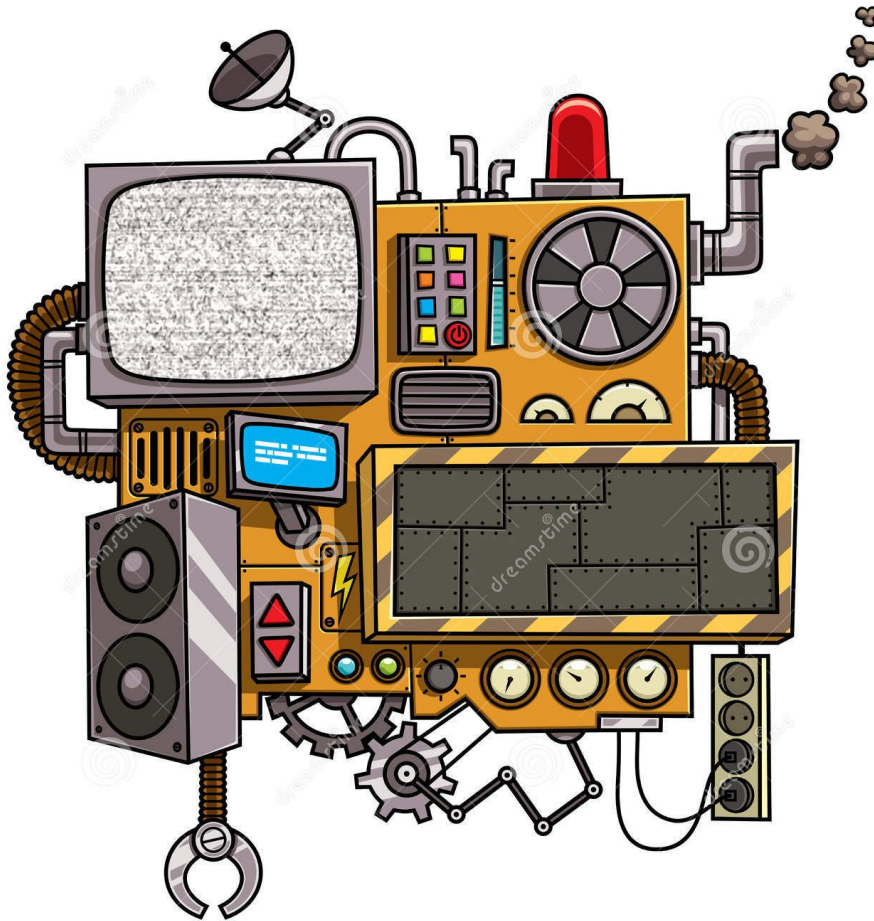
Contract Advisory

- This is used for risky terms
- Notifies the decision maker that
 - The Office of Legal Affairs advises against the clause
 - Losses will be paid from the signing unit's budget
- Contract advisory is kept on file with the contract internally (is not shared with the other party)





Question 4



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65278076
Martin Malchev | Dreamstime.com

Your unit contracts with Vendor to purchase a Do-It-All Machine for \$50,000. The contract limits Vendor's liability to the cost of the Machine. Although the Machine "does it all", it unexpectedly explodes and causes \$100,000 in damages to the Machine Room.



What is the Outcome?

1. The Vendor is liable for the full \$100,000 in damages.
2. The Vendor is not liable for any damages.
3. The Vendor is liable for \$50,000 in damages and the University will cover the remaining \$50,000 to repair the damage.
4. The Vendor is liable for \$50,000 in damages and your unit is responsible for the remaining \$50,000 in damages.

Essential Terms

- Audit Provision (required by G.S. 143-49(9))
- E-Verify Provision (required by G.S. 143-48.5)
- Non-discrimination language (required by federal law)
- Americans with Disabilities Act
 - Based on federal law
 - For electronic or information technology



Criminal Background Check Provision

- ❑ Required by University Policy 101.23 if contractor has “sensitive duties”:
 - Responsibility for care, safety, and security of vulnerable populations (e.g. non-student minors or animals)
 - Access to or responsibility for cash and cash equivalents, credit card information, etc.
 - Access to or responsibility for controlled substances, select agents, or hazardous materials
 - Master key access to buildings, residence halls, etc.
 - Access to or responsibility for information or areas designated by University as safety or security sensitive (e.g. server rooms)



Iran Divestment/Israel Boycott

- ❑ No longer required to be part of the contract language
- ❑ But if the contract is for more than \$1,000, we must ensure that the other party is not listed on nctreasurer.com divestment lists for either:
 - Iran Divestment Act (G.S. 147-86.55, *et seq.*)
 - Companies Boycotting Israel (G.S. 147-86.80, *et seq.*)





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Contract Checklist: Other Stuff



Additional issues to notice

- ❑ Insurance – Minimum insurance requirements from risk management
- ❑ Default Provisions – remember to include time to cure along with provisions regarding breach
- ❑ Multi-Year Terms – Generally disfavored
- ❑ Consultant Agreement?
 - A contractor is a person or entity that possesses specialized knowledge, experience, expertise, and professional qualifications.
 - Contractor investigates assigned problems or projects and makes recommendations regarding how to proceed, but does **not** perform the actual work.
 - All consulting engagements require prior approval, regardless of dollar amount, so contact the Purchasing Office for further guidance.



Additional issues to notice

- Intellectual property rights
 - patents (Univ. Policy 301)
 - copyright (Univ. Policy 315)
 - tax-exempt bonds (e.g. new science building)

- Publication rights
 - BOG policy (UNC Policy Manual 500.1)
 - Export controls (Univ. Policy 316)

- Personal identifiers
 - G.S. 132-1.10 & 14-113.20(b)
 - FERPA/HIPAA



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FERPA Scenario

The College of Business purchases a new software program to manage all of its students' information, including students' names, grades, and class schedules.

Add:

Agency acknowledges that for the purposes of this Agreement it will be designated as a school official with legitimate educational interests in the students' education records, and Agency agrees to abide by the limitations and requirements imposed on school officials by the Family Educational Rights and Privacy Act and its implementing regulations (FERPA). Agency shall use the education records only for the purpose of fulfilling its duties under this Agreement and shall not share such data with or disclose it to any third party except as provided for in this Agreement, required by law, or authorized in writing by the University.



Data/Information

- Data Sharing (from us to them)
 - Does contract involve information that needs to be kept secure?
 - Will the company keep the information secure (physical and/or electronic) ? Legal Affairs has a one-page Data Protection Agreement

- Data Sharing (from them to us)
 - University Policy 311.9



Fairness/Common Sense

- Are the party names correct?
 - “The University of North Carolina at Charlotte, for its . . .”
(Department of Psychology, Niner Tech Store, etc.)
- Is there another agreement that provides exclusive rights for this good/service?
- Who is paying?
- How much and by when?
- What is being received in return?
- Who can terminate? For what reasons?
- Are terms bilateral where they need to be?
- How will it be renewed? Auto-renew?
 - If we’re paying and the commitment is longer than this budget year, we have to add clause re: state appropriations.



Signatures

- ❑ Who signs for the university?
 - Refer to our signature authority chart

- ❑ What electronic/digital signatures are acceptable from the other party?
 - Refer to our guidance document
 - In general, pdfs of entire contract are okay
 - Graphic images of signatures and/or typewritten signatures are not okay (unless secure software was used)

Interacting with the Office of Legal Affairs

- ❑ First, **we're happy to help**, so if you're not sure about a provision, feel free to ask!
- ❑ Second, **be very careful about forwarding emails** we send you to the other party. Some of the advice is meant only for you or the on-campus client, not the other party.
- ❑ Third, **do not encourage the other party to reach out directly to an attorney in the Office of Legal Affairs.** We have ethics rules that prevent us from directly communicating with another party who is represented (but lawyer-to-lawyer is okay).

Questions?

