

Let's Make a Deal
The Dos and Don'ts of
Managing University Contracts

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First Things First

What is a contract?

- ▶ Letter of agreement
- ▶ Memorandum of understanding (MOU)
- ▶ Affiliation agreement
- ▶ Internship/field experience agreement
- ▶ Purchase order
- ▶ Equipment/artwork loan
- ▶ Facility license
- ▶ Non-disclosure agreement (NDA)
- ▶ Terms & conditions you click through on a website

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 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 . . .

- (1) The Contract Checklist:
legal.uncc.edu/legal-topics/contracts/contract-checklist
- (2) Guidelines for Accepting Digital or Electronic Signatures:
legal.uncc.edu/legal-topics/contracts/guidelines-accepting-digital-or-electronic-signatures
- (3) What to Consider Before Signing a Contract:
legal.uncc.edu/legal-topics/contracts/what-consider-signing-contract
- (4) Signature Authority Chart:
legal.uncc.edu/sites/legal.uncc.edu/files/media/SignatureAuthorityChart.pdf
- (5) Your friendly neighborhood attorney:
sarah.edwards@uncc.edu

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

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CONTRACTS

Legal Resources & Guidance

- Classroom Policies and Practices
- Compliance
- Copyrights
- Contracts**
- Employment Guidelines
- External Legal Links
- Faculty Policy Guidance
- Records Privacy (Educational Rights and Privacy Act)
- Trademark

CONTRACT CHECKLIST

The UNC Charlotte **Contract Checklist** has been prepared by the Office of Legal Affairs to assist **MEMBER MANAGERIAL OFFICES AND OTHER UNIVERSITY OFFICES** in the negotiation and review of contracts. It is based on longstanding guidelines from the NC Attorney General's office, the rules of the State and the University's Materials Management divisions, and on University policies.

- Contract Checklist
- Standard Contract Clauses
- Signature Contract Clauses
- Contract Addendum (if contracting unit assumes risk of modifiable terms)
- Contract Checklist, Purchase and Procurement
- Contract Checklist, Taxation (Power Point)

Purchasing Contracts: 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 Council** or delegates 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 Council, or delegates, in consultation with Materials Management, will complete the NC Attorney General's contract checklist (a3a.pdf) and a3a2.pdf prior to finalizing a contract that exceeds one million dollars.

CONTRACT SIGNATURE AUTHORITY


- University Policy 603.1 - Authority to Sign Contracts and Other Official Documents
- What is Possible Before Signing a Contract
- Individuals Authorized to Sign Contracts and Other Official Documents

Contract Checklist

Pass the Buck!

- ▶ For a lot of you, your protocol when you receive a contract should be to send it to someone else:
 - ▶ Purchasing - Scott Brechtel (sjbrecht@uncc.edu, 7-7329)
 - ▶ Grants & Contracts - Nikki Simmons (nsimmo17@uncc.edu, 7-1885)
 - ▶ Tech Transfer - Carl Mahler (7-8012, techtransfer@uncc.edu)
 - ▶ Legal Affairs - Sarah Edwards, Amy Kelso, or others (7-5372, legal-affairs@uncc.edu)

Finding Your Bearings



- ▶ What product or service is being provided here?
- ▶ Does the university need to provide information (student, personnel, financial, etc.) to the other party to make it happen?
- ▶ Will the other party have access to university facilities or IT networks?
- ▶ What could go wrong with this arrangement (if the product or service doesn't work as intended, if the other party discloses our information, if the other party damages our property, etc.)?
- ▶ Are any documents mentioned (attachments, appendices, linked terms and conditions, etc.) that aren't included?



**Contract Checklist:
Deal breakers**

Deal breaker #1: Waiving immunity

- ▶ Sovereign Immunity = the state cannot be sued
- ▶ NC has given up its sovereign immunity only for certain limited claims (G.S. 143-291, et seq.)
 - ▶ only for harm resulting from negligence
 - ▶ only up to \$1,000,000
- ▶ Issues affected by this principle:
 - ▶ indemnification
 - ▶ substantive law/jurisdiction (G.S. 22B-3)
 - ▶ binding arbitration

True/False:

UNC Charlotte students are not covered by the NC Tort Claims Act.

- A. True
- B. Mostly true
- C. Mostly false
- D. False

Indemnification

- ▶ Key words –
 - “indemnify”
 - “release”
 - “defend”
 - “hold harmless”
 - “waive”
- ▶ The University can agree to 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, . . .”)

Negotiating Substantive Law

- (1) Strong preference = North Carolina law
 - ▶ “This Agreement shall be construed, governed, and enforced by and in accordance with the internal laws of the State of North Carolina without regard to its conflict of laws provisions.”
- (2) Second option is to delete any reference to which law governs (i.e. remain silent)
 - ▶ good if services performed in NC
- (3) Last option (and only if the contract is very important and the other party will not budge after multiple attempts):
 - ▶ “Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may be brought against a party to this Agreement only in the state or federal courts in the state of the defending party, and the law of the situs of the litigation will govern such action or proceeding.”

Other deal breakers

- ▶ No-hire clauses (G.S. 126-14.2(a))
- ▶ Non-competition clauses (G.S. 143, Article 3 (bidding))
- ▶ Attorneys’ fees, court costs, etc. (G.S. 143-291 et seq.)
- ▶ Personal liability (Defense of State Employees Act (G.S. 143-300.3 et seq.))

Quick fix for no-hire clause

University agrees that during the term of this Agreement, and for a period of two (2) years following the last rendering of services by Company, University shall not directly ~~or indirectly solicit, or be solicited by or employ as a salaried employee or independent contractor,~~ any Company employee that was assigned to University's project or account.

University Policy 603.2

- ▶ Contract with university employee or family member used to be a deal breaker
- ▶ UP 603.2 was revised in March 2017
- ▶ Now it's permissible to contract with university employee or family member, BUT ONLY after a comprehensive review by Purchasing Office



Contract Checklist: Risky clauses

Risky terms

- ▶ Alters legal protections
 - ▶ statute of limitations
 - ▶ injunctive relief (agree to irreparable harm)
 - ▶ liquidated damages/cancellation fees
 - ▶ waiver of trial by jury (G.S. 22B-10)

- ▶ Limits liability

- ▶ Forfeits control over lawsuits

- ▶ Best efforts/warranty

- ▶ Business Associate Agreements

Liquidated damages

- ▶ Strong preference is to get rid of the provision all together, but for some parties (like hotels), that would be a deal-breaker
- ▶ Options:
 - ▶ Try to push back on dates/percentages
 - ▶ *E.g.* Instead of having to pay 50% of cost if you cancel 60 days out, make it 25% or only 30 days out
 - ▶ Always add a duty to mitigate
 - ▶ *The Holiday Inn has a responsibility to mitigate potential damages by filling or attempting to fill any reserved rooms not utilized by Client. If any reserved rooms are filled by non-Client guests, Client is not responsible for paying for those rooms.*

Quick fix for injunctive relief

University understands and acknowledges that the disclosure of Company's confidential information would may give rise to irreparable injury and, as such, that Company has the right to seek equitable and injunctive relief to prevent the unauthorized disclosure of its confidential information.

More risky terms

- ▶ Use of University name/logo/trademarks in advertising
- ▶ Acceleration clauses
- ▶ Late payment penalties
- ▶ Liens on state property
 - ▶ G.S. 44A-34
- ▶ Confidentiality
 - ▶ G.S. 132-1 et seq.

Quick fix for confidentiality

If the contract defines "Confidential Information," simply add a sentence that reads:

"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 Checklist: Essential terms

Essential terms

- ▶ Audit provision
 - ▶ required (G.S. 143-49(9))
- ▶ E-Verify provision
 - ▶ required (G.S. 143-48.5)
- ▶ Nondiscrimination language
 - ▶ required by federal law
- ▶ Americans with Disabilities Act
 - ▶ based on federal law
 - ▶ for electronic or information technology

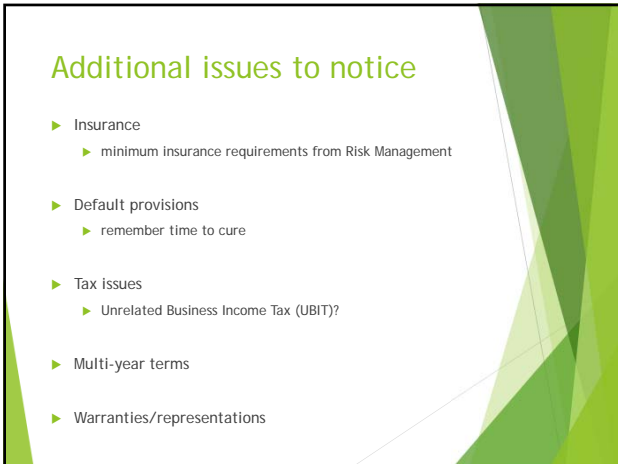
Criminal background check provision

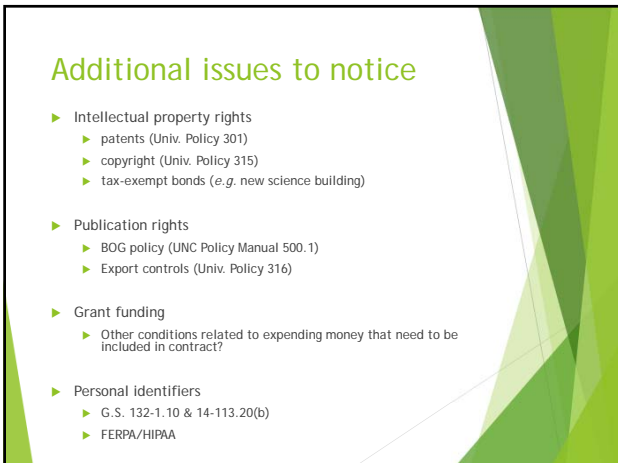
- ▶ Required by University Policy 101.23 if contractor has "sensitive duties":
 - ▶ Responsibility for care, safety, and security of vulnerable populations (e.g. non-student minors or animals)
 - ▶ Access to or responsibility for cash and cash equivalents, credit card information, etc.
 - ▶ Access to 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.*)
- ▶ Purchasing Office can check these for you







FERPA

Scenario: The College of Business purchases a new software program to manage all of its students' information, including 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 them to us)

- ▶ University Policy 311.9 (your DSO + Debbie Bolick in GCA)

Data sharing (from us to them)

- ▶ Does contract involve information that needs to be kept secure (e.g. student info, financial info, personnel info, SSNs, medical info, etc.)?
- ▶ Is the University able to retrieve the information from the company promptly in order to respond to public records requests?
- ▶ Will the company keep the information secure (physical and/or electronic)?
 - ▶ OLA has one-page Data Protection Agreement template

Fairness/Common Sense

- ▶ Who is paying? How much and by when? (And 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.





