

# Signed, Sealed, and Delivered: Navigating UNC Charlotte's Contracting Process

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# Agenda

- Part I: What is a Contract?
- Part II: Overview of the Contract Checklist
- Part III: Discussion of Issues Relating to Contracts
- Part IV: Final Thoughts

# Which of These Is Not a Contract?

- a) A text message sent by a faculty member confirming the final details of a school-sponsored trip with a travel agency.
- b) A purchase order for ten new computers for your unit.
- c) A list of online conditions that are referenced in a contract as being incorporated into the agreement.
- d) Terms of service that must be clicked through before completing the purchase of software.
- e) All of the above could be considered contracts.

# So... what is a contract?

- ❑ At its core, a contract is any document that legally binds the university to another party, including any agreement where a party promises to act or not act in a certain way.
- ❑ The negotiating process is the chance to define what's important in the relationship:
  - Who are the parties?
  - What is expected of the institution?
  - What can the university expect from the other party?
  - What happens if things go wrong?
- ❑ We want to set clear expectations so the relationship can be successful!
- ❑ See University Policy 603.1

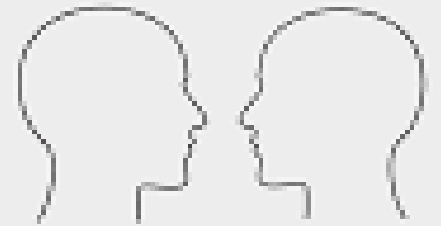


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# Initial Considerations

- What benefits will the university receive under the agreement?
- Is money involved?
- Will data be transferred?
- Have all documents that are referenced been reviewed?
- How will performance be measured?
- Are the stakeholders aware of the transaction?
- From a practical perspective, what could go wrong?
- Most importantly, is this a fair deal for UNC Charlotte?



MEETING  
OF THE  
MINDS

# Overview of the Contract Checklist



## Question 2

Norm is working on a contract between UNC Charlotte and the University of Michigan. The other party has added the following language to the agreement:

- UNC Charlotte will hold the University of Michigan harmless for any financial harm arising from the agreement.
- UNC Charlotte will assume liability for the actions of students relating to the agreement.
- All claims arising from the agreement will be governed by the laws of Michigan.





# How Do You Advise Norm?

- a) The first provision is (stating that UNC Charlotte will hold the University of Michigan harmless for financial harm arising) is okay because we are both state agencies.
- b) The second provision (stating that UNC Charlotte will assume liability for the actions of students is okay) because we are an institution of higher education.
- c) The third provision (stating that all claims will be governed by Michigan law) is okay, if Norm signs a contract advisory.
- a) None of the provisions are okay.



# Contract Checklist



# Dealbreaker # 1: Agreeing to Clauses that Undermine the University's Sovereign Immunity

- ❑ Mandatory mediation or arbitration (unless subject to the written consent of the North Carolina Attorney General at the time the dispute arises)
- ❑ Governing law (other than North Carolina)
- ❑ Attorney's fees and court costs



# Deal breaker # 2: Indemnification Clauses

- ❑ **Indemnification** is a contractual promise by one party to protect the other party against losses, damages, or costs that may arise from their actions or failures.
  
- ❑ Under the North Carolina Tort Claims Act, the University may only cover:
  - personal injury and property damage
  - based on negligence (**NOT** willful misconduct)
  - of our employees (**NOT** students unless they are as employees)
  - Up to \$1,000,000
  - ***“Only in the manner and to the extent permitted by the North Carolina Tort Claims Act”***
  
- ❑ Best Practice: Ask for the other party to indemnify UNC Charlotte, particularly when they are engaging in activities that are risky.

# Dealbreaker # 3: Accepting Liability for Students

- The University cannot accept liability for students.
- Instead of “**ensuring**” that students will do X → agree that the university will “**instruct**” that students do X.
- Don’t agree to provide insurance for students
- Exception: student employees

## Dealbreaker # 4:

# Executing An Agreement Without Signature Authority

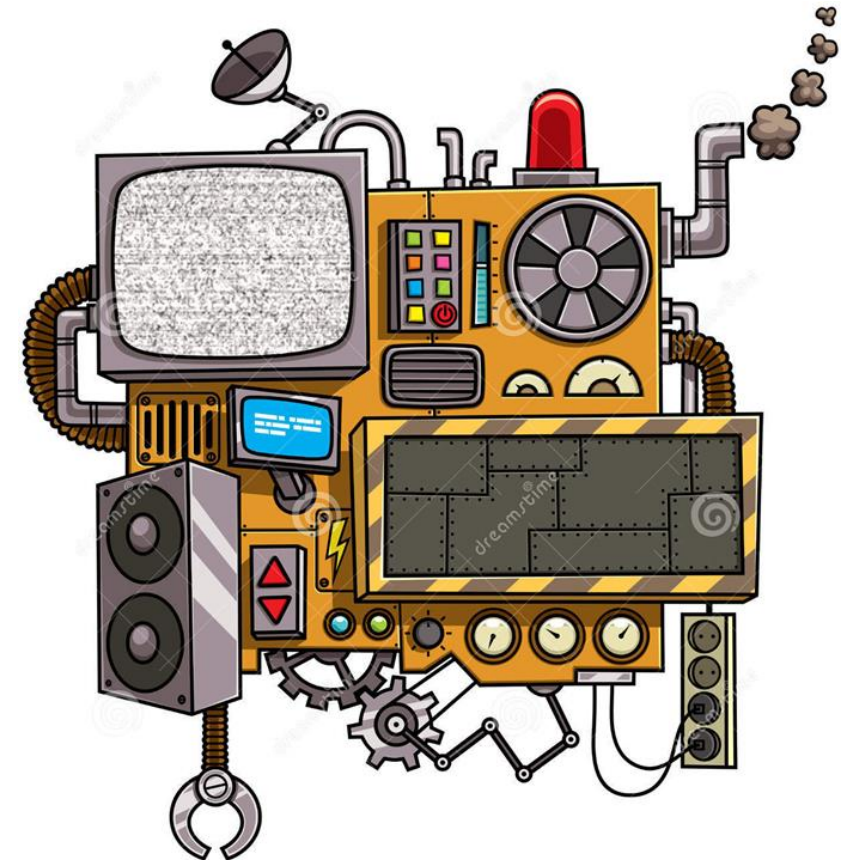
- Don't represent that you have authority to represent the institution for a matter if you don't have that discretion.
- Don't sign university-related agreements in your personal capacity.
- Don't sign ANY agreement relating to your UNC Charlotte duties unless you have signature authority.
- Don't ask students or employees to sign agreements in their personal capacity for UNC Charlotte work.

## **Dealbreaker # 5: Unlawful Restrictions on the University's Ability to Contract**

- Don't agree to non-competes which provide that the university can't enter into agreements for a particular type of good or service.
- Don't agree to provisions that prevent the university from hiring the contractor's employees.

## Question 3

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 \$50,000 in damages to the Machine Room. You reach out to the Vendor for help, and ask for reasonable compensation or a new Do-It-All Machine.





# 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.

# Risky Provisions



# Risky Terms

- Terms that alter legal protections
- Terms that limit the other party's liability
- Provisions requiring that UNC Charlotte use best efforts
- Provisions that forfeit control over lawsuits
- Provisions that allow another party to use UNC Charlotte's name, logo, or trademarks
- Acceleration clauses
- Liens on state property
- Late payment penalties
- Governing Terms Provision

# The Public Records Act

- ❑ As an agency of the State of North Carolina, the university must adhere to the requirements of the North Carolina Public Records Act.
- ❑ Public records include, all documents of any type “regardless of physical form or characteristics... made or received... in connection with the transaction of public business by any agency of North Carolina” → (**content matters – not location!**)
- ❑ Exceptions: trade secrets and research data, records, or information of a proprietary nature



# Contract Advisory

- UNC Charlotte's internal process for documenting that a contract contains 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
- Must be acknowledged by the person with signature authority prior to the execution of the agreement
- Contract advisory is kept on file with the contract (is not shared with the other party)

# Other Important 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)
- Appropriations language
- Digital Accessibility
- No Click Wrap Agreements

# 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)



# **Other Considerations Relating to the University Contracts**



# When Should I Reach Out to Purchasing?

- ❑ For contracts involving the exchange of money for goods or services, including consulting agreements, technology contracts (e.g., software licenses), purchase of supplies, etc.
- ❑ [Purchasing Agent Listing](#) or [purchasing@charlotte.edu](mailto:purchasing@charlotte.edu)
- ❑ Purchasing will navigate:
  - Any competitive solicitation processes or exemptions;
  - Review of the contractual terms to determine if they comply with law and University policy;
  - Collaborating with the Office of OneIT if the agreement involves technological goods or services;
  - Incorporating a Data Protection Agreement if the vendor will have access to university data;
  - Collaborating with eCommerce for PCI compliance if the vendor would potentially have access to card information;
  - The finalization of the agreement and routing of the document to the appropriate department or vendor upon its execution .

# What If The Contract Involves the Transfer of Data?

- ❑ If UNC Charlotte is receiving data from another party that is subject to contractual access restrictions, be sure to follow the requirements provided in the [Regulation Regarding Third Party Data Subject to Contractual Access Restrictions](#).
- ❑ If UNC Charlotte is providing another party access to data, be sure to connect with OneIT (unless you're working with Purchasing). OneIT will conduct a security risk assessment and ensure the university's data protection agreement is incorporated.
- ❑ For more information regarding expectations when handling university data, see [Guideline for Data Handling](#) or the [Guideline for Research Data Security](#)
- ❑ If the University is providing the vendor access to PHI, execute a BAA. If the university is asked to execute a BAA, contact Legal Affairs.

# Contractual Considerations Relating to AI

- ❑ Data Processing– Make sure the agreement contains language that limits the purpose and means the vendor may use to process university data.
- ❑ Indemnification – The vendor should protect the university against damages resulting from its processing of university data under an agreement.
- ❑ Ownership – Ensure there’s clear understanding regarding ownership of input and output.
- ❑ Data Protection – The agreement should require that the vendor take reasonable steps to protect data that it processes under the agreement.
- ❑ Data Breaches – Make sure the vendor is responsible for protecting against and mitigating data breaches, and for notifying the university of breaches.
- ❑ Best Practices
  - Make sure OneIT, Purchasing, or Legal Affairs is aware of the transaction so the appropriate subject matter experts are looped in (**even if no money is involved**)
  - Incorporate UNC Charlotte’s Data Protection Agreement

# What Other Resources Are Available to Me?

- ❑ Sponsored research → Grants and Contracts Administration
- ❑ Intellectual property and tech transfer agreements → Office of Research Commercialization and Development
- ❑ Gift Agreements → University Advancement
- ❑ Disposal of university property → Inventory Control/Purchasing
- ❑ Data Use Agreements → OneIT or Legal Affairs
- ❑ Use of University Name or Image → Licensing
- ❑ Donations to the University → University Foundation
- ❑ Donations to University Athletics → Athletic Foundation
- ❑ Nondisclosure Agreements → Legal Affairs or the Office of Research Commercialization and Development

# What Other Resources Are Available To Me?

- ❑ **The Contract Checklist:** <https://legal.charlotte.edu/legal-topics/contract-checklist>
- ❑ **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>
- ❑ [UNC Charlotte's Guideline for Data Handling](#)
- ❑ [UNC Charlotte's Guideline for Research Data Security](#)
- ❑ **Isabel Alele**, [ialele@charlotte.edu](mailto:ialele@charlotte.edu)



# Final Thoughts

- Are the party names correct? “The University of North Carolina at Charlotte for its ...”
- Have you thought through the worst-case scenarios?
  - If there is a breach, who can terminate?
  - What actions would constitute a breach?
  - If the university breaches, will we receive notice and opportunity to cure?
- Who is paying? How much? By when? What is being received in return?
- Are we receiving or disclosing confidential information?
- Are there any documents mentioned in the agreement (e.g., attachments and linked terms) that aren't included?
- Insurance – Minimum insurance requirements from risk management.

# 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)



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CHARLOTTE

# 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?

