

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>
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