

# Clause and Effect: 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

# First things first... 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



# 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?



# Overview of the Contract Checklist



**DEAL**   
**BREAKERS**

# 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 People Who Are Not Employees or Agents of UNC Charlotte

- The University cannot accept liability for individuals who are not under the university's direction and control.
- Instead of “**ensuring**” that these individuals will do X → agree that the university will “**instruct**” that they do X.
- Don't agree to provide insurance for these individuals
- 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.

# 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
- Liquidated Damages and Cancellation Fees
- Provisions that expressly permit injunction relief
- 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 (as required by federal law)
- Appropriations language
- Digital Accessibility
- Criminal Background Check – required under University Policy 101.23 if the contractor has “sensitive duties”
- FERPA Provision (if UNC Charlotte is disclosing student information)



# Other Considerations Relating to the University Contracts

# IT Agreements

- ❑ Practical Considerations
  - Make sure the appropriate campus partners are looped in to ensure the terms of the agreement comply with UNC Charlotte's policies and North Carolina law.
  - Expect that vendors will incorporate terms involving the use of AI
- ❑ Issues Relating to Data Protection
  - Ensure the parties have executed a data protection agreement
  - Make sure it's clear how the vendor can use the data, for how long, and what happens after termination of the agreement.
  - Look for unnecessary uses of university data.
- ❑ Click-wraps
  - Be aware that if you are clicking, you are signing!
- ❑ Other considerations
  - Digital accessibility;
  - Indemnification and limitation of liability.

# Research Agreements

- ❑ What is a research agreement?
  - A contract executed for the purpose of engaging in activities that will create generalizable, new knowledge.
  - Practically speaking, this means that a research agreement is framed towards producing results that will matter to the academic community.
- ❑ Service Agreements
  - Executed when the university engages in work for external sponsors, but the work does not rise to the level of research (e.g., routine testing using well known protocols).
- ❑ Who Decides?
  - The Vice Chancellor for Research (or his designee) determines whether a particular agreement is for research or services
- ❑ Remember: The Division of Research should review and sign *\*all\** research agreements

# 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 vendor 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.

# Have You Considered Worst Case Scenarios?

- Are the requirements for satisfactory performance clear?
- What actions would constitute a breach?
- If there is a breach, who can terminate?
- Will UNC Charlotte receive notice and opportunity to cure?
- If circumstances change, does UNC Charlotte have an exit?



But you **promised!** :(

# Final Thoughts

- Are the party names correct? “The University of North Carolina at Charlotte for its ...”
- 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.
- Multi-year terms – generally disfavored

# 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)

# What Other Resources Are Available To Me?

- ❑ Sponsored research → Office of Research Services
- ❑ Intellectual property → Office of Research Commercialization and Partnerships
- ❑ Gifts → Alumni Engagement
- ❑ Employment Matters → Human Resources
- ❑ 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
- ❑ Legal Affairs



# What Other Resources Are Available To Me?

- UNC Charlotte Contract Checklist
- What to Consider Before Signing a Contract
- Signatory Authority Chart
- Guidelines for Accepting Digital or Electronic Signatures
- UNC Charlotte's Guideline for Data Handling
- UNC Charlotte's Guideline for Research Data Security
- Your friendly, neighborhood attorney: [ialele@charlotte.edu](mailto:ialele@charlotte.edu)



# Questions?

