

## Checklist for Departmental Review of Contracts

This three-page guide highlights common contract questions to promote consistent reviews by non-attorney staff. While not a comprehensive listing of all contract considerations, it highlights many of the common issues that should be considered when reviewing standard contracts. Addressing these issues with the other party up front (instead of following a review by the Office of General Counsel), will save both you and the Office of General Counsel valuable time.

***Does the contract accurately and completely identify the parties?***

The "parties" are the persons or entities who enter into a legal arrangement. Because individual departments or schools are not legal entities capable of entering into a contract, the university, as a party, should always be referred to as "Abilene Christian University." The contract should contain the date in the body of the contract, usually in the first paragraph. If the date is not in the body of the contract, then a date line should be added to the Signature Block as shown on page three. *Example: This contract is made on October 8, 2015, between Abilene Christian University, a Texas non-profit corporation, ACU Box [Dept. Box #], Abilene, TX 79699 and XYZ Computer Company, P. O. Box 1234, Dallas, TX 75201*

***Does the contract accurately reflect the parties' intent?***

Because ACU will be required to comply strictly with the terms of the contract, it is important to read the document closely to make sure that it clearly and accurately reflects the parties' intent. This includes all other documents, websites, or statutes referenced in or incorporated into the contract. Only those who negotiated the contract and those who will be responsible for its performance can know this with certainty.

***Is the subject matter of the contract fully and accurately described?***

The subject matter of a contract is what "consideration" the parties are providing each other (e.g. goods or services in exchange for payment). The goods or services should be described in sufficient detail so that a reasonably prudent person could identify the goods or could understand the types of services that are to be performed. Also, the contract should clearly state the specific purchase price and method of payment that is being made in exchange for specific goods or services. This amount cannot be open-ended. *Ex: University will pay the Contractor by university check the Contract Sum of \$95,468 on January 1, 2016.*

***Is the duration – that is, the beginning and end of the contract – correct? Are there early termination and renewal provisions? If so, are they clearly set out and understood?***

If the contract is to last more than one year, considering negotiating for the addition of a provision allowing ACU to terminate the contract for any reason by giving 30 days prior written notice. Any provision that allows a party to terminate the contract due to "acts of God" or other extraordinary circumstances outside the parties' control (i.e., a *force majeure* provision) should apply to both parties.

***If the contract contains an anti-discriminatory provision, does it allow ACU to make hiring decisions on the basis of religion?***

As a religiously affiliated institution of higher education, ACU is legally entitled to make hiring decision on the basis of religion under the First Amendment of the United States Constitution in general, and specifically under §703(e)(2) of Title VII of the Civil Rights Act of 1964. Therefore, the contract should not broadly prohibit such discrimination. As an easy fix, it is recommended

that the word “unlawfully” be inserted to any such provision so that the university does not “unlawfully” discriminate . . . .

□ ***What happens if one party breaches – that is, fails to perform under - the agreement?***

Sometimes, certain vendor contracts attempt to include “Limitation of Liability” provisions into agreements that limit the amount and/or type of damages (exemplary, punitive, or consequential damages) that the University can seek against the vendor if it breaches the agreement. In regard to limitations on the *amount* of damages, which typically limit damages to an amount paid for a product or service, the contract originator must consider the worst case scenario and what amount of money would be necessary to make the University whole if that scenario occurred. If the limited amount in the contract is insufficient for that purpose, then the originator may want to consider requesting that the limitation be removed or based on a larger sum, e.g., ten times the amount paid or up to the maximum of the insurance that the vendor provides under the agreement. As a matter of policy, the University does not agree to limitation on the *types* of damages in that it is too difficult to determine what our potential exemplary, punitive, or consequential damages may be in the future.

□ ***Do any Indemnification, Release or Waiver Clauses fairly allocate potential liability?***

These clauses attempt to place or transfer liability for certain acts or omissions to one of the parties. Indemnification clauses require one party to pay for any losses or cost associated with claims by third parties arising from the contract. A release or waiver clause relieves one party from responsibility for injuries caused to the other party.

If the contract contains such a clause where ACU is indemnifying the other party or waiving the potential liability or limiting liability to acts of "gross negligence" or "willful misconduct," the Office of General Counsel will likely request that these provisions be removed or modified. As a matter of policy, the University does not agree to indemnification clauses. If you believe that ACU should not object to such clauses under the particular circumstances of the contract you have negotiated, please specify your reasons for this belief in your note forwarding the proposed contract to the Office of General Counsel.

□ ***Is either party required to provide insurance under the agreement?***

The subject matter of the contract may create a risk for ACU, the other party to the contract, or to third parties. The nature of the activities must be evaluated to ensure that the parties to the contract adequately address the risk, obtain appropriate insurance, and provide the other party certificates of such insurance.

- If there is any doubt as to the need for insurance by either ACU or the other party to the contract, contact the Office of Risk Management. If it is determined that the other party should provide insurance, Risk Management can provide standard recommended coverages to be included in the contract. A certificate of insurance from the other party must be submitted along with the contract and cover sheet.
- If the contract requires ACU to obtain insurance or provide proof of insurance, Risk Management will review those provisions before execution and obtain any necessary certificates of insurance.

□ ***If a dispute develops, is alternative dispute resolution (arbitration or mediation) required under the contract? Does the contract limit our timeframe to file a suit?***

As a matter of policy, the University will not agree to waive its legal rights to a trial by agreeing to mandatory mediation or arbitration or a modification of the standard statute of limitations for

bringing a breach of contract claim, which is generally four years. Instead, in regard to dispute resolution, it is recommended that contracts permit the parties to use voluntary, non-binding mediation to resolve disagreements or claims arising out of contracts.

- Will Texas law be used to govern or interpret the contract? Will any suits related to the contract be filed in Taylor County?**

As a matter of policy, Texas law should be used and the jurisdiction should be in Taylor County, Texas. Therefore, when possible, the following should be added to all contracts: *This contract will be governed by and construed and enforced in keeping with the laws of the State of Texas. Venue for any action to enforce the terms and conditions of this contract will be Taylor County, Texas.*

- Does the contract contain a “merger” or “entire contract” clause? Does it allow the contract to be modified or severed in the future?**

The contract should contain a "merger" or an "entire contract" clause. This clause incorporates all prior written and oral contracts into the current contract and states that the current contract is the only contract which legally binds the parties. *(Example: The Contractor and Abilene Christian University acknowledge that no representations, inducements, promises, or contracts, orally or otherwise, have been made by either party, or by anyone acting on behalf of either party, other than those included in this contract, and that no other contract, statement, or promise not included in this contract is valid or binding.)*

Any modification provisions should only allow the parties to modify the agreement through mutual consent evidenced through a writing signed by the parties.

Finally, if possible, the contract should also contain a "severability" clause. This clause allows the contract to remain enforceable if one or more of its provisions are found to be invalid. *(Example: If any provision of this contract is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this contract, such provision is fully severable, and this contract must be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part of this contract; and the remaining provisions of this contract remain in full force and effect and may not be affected by the illegal, invalid, or unenforceable provision or its severance from this contract.)*

- Does the contract include a proper signature block?**

The signature block should be set up as follows. Please do not fill in the blanks or sign the agreement. The Office of General Counsel will have the contract executed by an authorized university representative.

**Abilene Christian University**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_ (Unless set out in opening paragraph)