

UCCS GUIDE TO CONTRACT REVIEW

August, 2013

***“What’s in a name? That which we call a rose,
By any other name would smell as sweet.”***

University contracts are rarely as romantic as Shakespeare’s *Romeo and Juliet*, and hopefully this guide will help you prevent any contract for which you are responsible from being viewed as a tragedy! Although Juliet saw Romeo as something other than his name “Montague,” everyone else still saw him as a Montague and the consequences were, well, tragic.

Only slightly less romantic, the term, *University Contract* is defined by the University of Colorado Fiscal Procedures as follows: “Any formal, legally binding document between the University and another Party, the form, content and process for approval of which is described in Fiscal Procedure 3-1.” There are many synonyms for a “contract,” such as: agreement, affiliation, appointment, grant, lease, letter of understanding, license, memorandum of agreement, memorandum of understanding, option, and purchase voucher.

The point here is to not be misled by the name of the agreement. If a document contains a bargain to do or not do something then it is a contract. Only if the parties clearly agree not to be bound by the terms of the document, as in a letter of intent, is it not a contract.

If your office is responsible for a contract, it is important that you understand the terms of the deal before you sign it; or, if you do not have written signature authority from the Chancellor, before you send it to someone who has signature authority. Similarly, the Office of University Counsel is available to help you with difficult contract provisions, but is not in a position to assure the university is getting what it paid for under the contract. As the originator of the contract, you are responsible and accountable for its business terms.

Good contract negotiation and drafting reflect good business decision-making: 1) Define the need or the problem, including its scope; 2) Define the solution and how it will be implemented; 3) Agree on the time for completion; 4) Ensure everyone at UCCS with obligations in the agreement understands and agrees to those obligations; 5) Agree on the financial terms; 6) Address the plan for deviations; and, 7) What happens if the solution does not work or is not implemented in time?

THE ANATOMY OF A CONTRACT

CONTRACT. A contract in its simplest terms is a “mutual agreement” supported by “consideration.”

A mutual agreement has two components: an offer and an acceptance. The offer is a definitive, clearly stated offer to do something: sell a product or perform a service. In the university context, which party is making the offer depends on the deal. For example, a vendor may publish a list of products (the offer) with a price list and when a university representative places an order (the acceptance), a contract is made. In other instances, a university representative may propose a research project (offer) with a budget and when a foundation accepts the proposal (acceptance), a contract is made.

Consideration is usually the payment of money or the promise to pay money, but in some instances may be taking an action based on the offer and acceptance.

RECITALS OR “WHEREAS” CLAUSES. Recital clauses usually appear at the beginning of a contract. Although they are technically not a part of the contract, they are useful to establish the context for the transaction and demonstrate the purpose of the agreement.

BODY OF THE CONTRACT. The body of the contract will take various forms and can be simple, or, in a complex transaction, complicated. In essence, the body of the contract describes who does what, when, and/or how much.

- When does the contract start and when is it completed?
- Who is responsible for what?
- Are deliverables well defined?
- Are there intermediate performance deadlines?
- Payment terms should be clear and in accordance with university policy – how much, when, to whom, and how?
- What warranties or assurances are provided that what we paid for will work?
- Are changes acceptable? If yes, how are those made?
- What are the consequences of nonperformance?
- How will disputes be managed?

Included below (and at the back of this guide as Attachment 1 is a simple checklist to help with the body of the contract. It is not intended to include all the issues you will need to address, but it will help structure the basics of the deal.

CONTRACT CHECKLIST.

- Adequate due diligence on the vendor/product has been completed and documented.
- The parties are accurately identified and contact information is clear. (“The Regents of the University of Colorado, a body corporate” is the proper designation for the university.)
- There is a start date and an end date, unless the contract is intentionally indefinite in nature.
- The document accurately reflects UCCS’s understanding of the contract.
- UCCS is able to perform its obligations under the contract.
- All UCCS people/departments with roles in the contract’s performance are aware of and agree to their obligations.
- All financial provisions are clear and correct, and budgetary authorization has been obtained.
- The obligations of each party are clearly described.
- The benefits and risks of the contract have been assessed and are understood.
- The appropriate signature authority has been determined.

BOILERPLATE. Do not be fooled by boilerplate or standard provisions. They are critically important to the contract and must be thoroughly understood in each case. In many instances, these are the provisions that really count when things do not work the way they are supposed to. Sometimes, these are the provisions where you will need the assistance of the Office of University Counsel. Below are eight common boilerplate clauses that require special attention:

1. Arbitration and Attorney’s Fees

Binding Arbitration is a method of resolving disputes by submitting the issue to a third party who listens to the evidence and makes a determination of how the dispute will be resolved. This process does not involve going to a court of law and the individual making the decision is not a judge. CU cannot agree to a contract requiring binding arbitration or attorney’s fees because it is impossible to know what issues may be in dispute or what the maximum financial exposure would be for the university. The Colorado Constitution has limits on payment of money by the state and a contract requiring binding arbitration could violate that provision. Therefore, CU will not agree to a contract requiring binding arbitration or the payment of attorneys’ fees.

- **Example of Language CU cannot agree to:**

Any controversy or claim arising out of or relating to this Agreement, or the parties’ decision to enter into this Agreement, or breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the

award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof, along with attorneys' fees assigned by the arbitrator(s).

2. Choice of Law – State other than Colorado or International Laws

Because we are public university of the State of Colorado we have certain protections afforded to us through Colorado law. (See the Standard Language Regarding CU's Liability, in number 5 below, as an example.) Therefore we cannot agree to be subject to the laws of another state or country where we could lose those protections, without a risk analysis by the Office of University Counsel.

- **Example of Language CU cannot agree to:**

This contract shall be governed by and construed in accordance with Louisiana law. By executing this agreement, the university consents to the exercise of personal jurisdiction over it by the courts of the State of Louisiana, and agrees that all litigation regarding this contract shall be brought and maintained only in the courts of Nachitoches Parish, Louisiana.

- **CU's Standard Language Regarding Choice of Law:**

Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this contract, to the extent capable of execution.

- **Option Regarding Choice of Law:**

If a contractor is not comfortable with CU's standard provisions, check with the Office of University Counsel, as it may be possible to remain silent on the choice of law.

3. Confidential Information

Anytime a vendor has access to the university's confidential information (employee records, student records, patient records or research data, etc.) then we want to be assured that the vendor protects that information with at least as much care as would the university. Access to the university's confidential information may trigger application of federal privacy laws such as FERPA or HIPAA and should be reviewed by the Office of University Counsel.

Sometimes contractors seek protection of their information. As a public entity in Colorado, the university is subject to state “sunshine” and open record laws and has limitations on what information it can keep private. Below is the standard language used by CU. If that language is unacceptable to a contractor, seek review from the Office of University Counsel.

- **CU’s Standard Language Regarding Confidentiality:**

COLORADO OPEN RECORDS ACT. Neither party shall disclose any confidential information of the other party. Contractor acknowledges that University is subject to the Colorado Open Records Act (C.R.S. §§ 24-72-201, et seq.). Contractor further acknowledges University information may also be subject to protections under other federal and state laws and regulations and shall handle any such information in accordance with applicable law.

4. **Exclusive Purchase Agreements**

Generally, the University does not agree to contracts that would create an exclusive relationship between the vendor and the University. Language that creates this relationship might include terms such as “sole provider”, “exclusive provider”, or similar language. If a contract contains a provision proposing exclusivity, it should be reviewed by the Vice Chancellor for Administration and Finance and the Office of University Counsel.

- **Example of Exclusivity Provision CU cannot agree to:**

The University agrees that ABC Company will be the sole provider of handheld devices for its school of engineering. The University will not contract with any other party during the term of this Agreement for these products.

5. **Indemnification**

The University is prohibited from agreeing to take responsibility for the actions of the other party to an agreement. Therefore, we cannot agree to indemnification. Using the words “*to the extent permitted by law*” does not make it appropriate. Indemnification language does not always appear in sections of a contract pertaining to liability, damages or insurance. Sometimes this language may appear in intellectual property provisions, confidentiality language or in a provision on warranties. If a contractor will allow you to delete the language or to strike the language with both parties initialing the strikeover, that will solve the problem. Otherwise, ask for review from the Office of University Counsel.

- **Example of Language CU cannot agree to:**

The university shall indemnify, defend, and hold harmless the XYZ Hotel and its officers, directors, partners, agents, members and employees from and against any and all demands, claims, and damages to persons or property, losses and liabilities, including reasonable attorneys’ fees

(collectively “claims”) arising out of or caused by CU’s negligence in connection with the use of Hotel’s facilities.

- **CU’s Standard Language relating to Liability:**

The University shall be responsible for the negligent acts and omissions of its officers, agents, employees and representatives with respect to its obligations under this Agreement, provided however, the Parties hereto understand and agree that liability for claims and injuries to persons or property arising out of the negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of C.R.S. § 24-10-101 *et seq.*, as amended. Any provision of this Agreement, whether or not incorporated by reference, shall be controlled and limited and otherwise modified so as to limit any liability of the University and the State to the above cited laws. It is specifically understood and agreed that nothing contained in this paragraph or elsewhere in this Agreement shall be construed as an express or implied waiver by the University of its governmental immunity or of the governmental immunity of the State of Colorado, as an express or implied acceptance by the University of liabilities arising as a result of actions which lie in tort or could lie in tort in excess of the liabilities allowable under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.*, as a pledge of the full faith and credit of the State of Colorado, or as the assumption by the University of a debt, contract or liability of the [other party] or its affiliates, in violation of Article X, Section 1 of the Constitution of the State of Colorado.

6. Insurance Requirements

The University carries insurance at specific levels that are dictated, in part, by the Colorado Governmental Immunity Act. The University cannot agree to name another party as an “additional insured” on our insurance policies and will not agree to do so by contract.

7. Intellectual Property

Intellectual property is tricky and can appear in a number of places in a contract. The Office of Grants and Contracts works closely with the Technology Transfer Office to protect the university’s rights to intellectual property in sponsored programs. However, intellectual property can appear in vendor contracts as well. If in doubt, discuss these provisions with the Office of University Counsel. Some considerations are described below:

- Work for Hire. It is important that the University does not give away any of its intellectual property rights to a third party vendor without adequate consideration – i.e., if the University pays a vendor to help develop software for the university, it is important that the University owns the resulting software, not the vendor. This is true of promotional videos, artwork, music, white papers and other examples.

- Warranties. A vendor that is asked to create something “intangible” such as software or a video recording, etc., must provide the university with warranties that the vendor’s deliverable will not infringe any third party intellectual property rights. These vendors also must provide warranties that their deliverables will perform as promised under the terms of the agreement.
- University Logos and Trademarks. A third party vendor may not use the University’s name, logo, or other trademarks for any purpose without the express, written permission of the University for a specific purpose. Currently, only University Advancement may provide this permission to a third party. A third party vendor may not use the University’s name, logo, or other trademarks in any advertising to state or imply that the University endorses any particular product or service.

8. Limitation of Liability

We ask that the parties with whom we are contracting take responsibility for their liability and therefore we generally will not agree to language that limits the other party’s liability for damages. In some circumstances, the risk of limiting damages to the value of the contract is sufficiently low that it is acceptable, but that determination should be made after consulting legal counsel to help with the risk assessment.

- **Example of Limitation of Liability Provision the University cannot agree to:**

In no event shall the PQR Company or its affiliates be liable for any direct, indirect, punitive, incidental, special or consequential damages arising out of, or in any way connected with, the services provided by them whether based on a theory of negligence, contract, tort, strict liability, or otherwise.

**FOUR SIMPLE STEPS FOR LEGAL SUFFICIENCY
ON PROCUREMENT CONTRACTS FOR LESS THAN \$5,000**

For procurement contracts less than \$5,000 and not subject to review by PSC:

1. Add the *Special Provisions* (see attachment 2 of this policy) attachment to the Agreement
2. Either edit the agreement electronically or write in the following sentence:

The University of Colorado Special Provisions are attached hereto and in the event they conflict with the terms of this Agreement, the Special Provisions shall control.

3. Both parties must initial the attachment and the additional sentence.
4. Delete electronically or cross out any provision that begins, “The University shall hold harmless...” or “The University shall Indemnify...”

ATTACHMENT 1

CONTRACT CHECKLIST.

- Adequate due diligence on the vendor/product has been completed and documented.

- The parties are accurately identified and contact information is clear. (“The Regents of the University of Colorado, a body corporate” is the proper designation for the university.)

- There is a start date and an end date, unless the contract is intentionally indefinite in nature.

- The document accurately reflects UCCS’s understanding of the contract.

- UCCS is able to perform its obligations under the contract.

- All UCCS people/departments with roles in the contract’s performance are aware of and agree to their obligations.

- All financial provisions are clear and correct, and budgetary authorization has been obtained.

- The obligations of each party are clearly described.

- The benefits and risks of the contract have been assessed and are understood.

- The appropriate signature authority has been determined.

ATTACHMENT 2

SPECIAL ATTACHMENT A

This Agreement shall include the following terms and conditions as required by the University of Colorado on purchases for goods or services of less than \$10,000. This Special Attachment A shall control in the event these terms conflict with any other terms and conditions in any Contractor provided agreement.

A. SPECIAL PROVISIONS. This Agreement shall include the Special Provisions which are required pursuant to the University of Colorado Fiscal Procedures. Signature by the University Controller delegate is not required for purchases of \$50,000 and less. The Special Provisions shall always control over other parts of the Agreement. All references to "Contractor" shall be deemed to apply to _____.

1. CONTROLLER'S APPROVAL. This contract shall not be valid until it has been approved by the University Controller or designee.

2. FUND AVAILABILITY. Financial obligations of the University payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

3. GOVERNMENTAL IMMUNITY. No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, CRS §24-10-101 et seq., or the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq., as applicable now or hereafter amended.

4. INDEPENDENT CONTRACTOR. Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither Contractor nor any agent or employee of Contractor shall be deemed to be an agent or employee of the University. Contractor and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the University and the University shall not pay for or otherwise provide such coverage for Contractor or any of its agents or employees. Unemployment insurance benefits will be available to Contractor and its employees and agents only if such coverage is made available by Contractor or a third party. Contractor shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this contract. Contractor shall not have authorization, express or implied, to bind the University to any agreement, liability or understanding, except as expressly set forth herein. Contractor shall (a) provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by law, (b) provide proof thereof when requested by the University, and (c) be solely responsible for its acts and those of its employees and agents.

5. COMPLIANCE WITH LAW. Contractor shall strictly comply with all applicable federal and state laws, University policies, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.

6. CHOICE OF LAW. Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this or any other Special Provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this contract, to the extent capable of execution.

7. BINDING ARBITRATION PROHIBITED. The University of Colorado does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this contract or incorporated herein by reference shall be null and void.

8. EMPLOYEE FINANCIAL INTEREST/CONFLICT OF INTEREST. CRS §§24-18-201 and 24-50-507. The signatories aver that to their knowledge, no employee of the University has any personal or beneficial interest whatsoever in the service or property described in this contract. Contractor has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of Contractor's services and Contractor shall not employ any person having such known interests.

9. VENDOR OFFSET. [Not Applicable to intergovernmental agreements] If required by CRS §24-30-202.4 (3.5), the University Controller or designate may withhold payment under the State's vendor offset intercept system for debts owed for: (a) unpaid child support debts or child support arrearages; (b) unpaid balances of tax, accrued interest, or other charges specified in CRS §39-21-101, et seq.; (c) unpaid loans due to the Student Loan Division of the

Department of Higher Education; (d) amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State as a result of final agency determination or judicial action.

10. PUBLIC CONTRACTS FOR SERVICES. CRS §8-17.5-101. [Not Applicable to agreements relating to the offer, issuance, or sale of securities, investment advisory services or fund management services, sponsored projects, intergovernmental agreements, or information technology services or products and services]

Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this contract, through participation in the E-Verify Program or the Department program established pursuant to CRS §8-17.5-102(5)(c). Contractor shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. Contractor (a) shall not use E-Verify Program or Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed, (b) shall notify the subcontractor and the University within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this contract, (c) shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three days of receiving the notice, and (d) shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to CRS §8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the Department program, Contractor shall deliver to the University a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and shall comply with all of the other requirements of the Department program. If Contractor fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., the University may terminate this contract for breach and, if so terminated, Contractor shall be liable for damages.

11. PUBLIC CONTRACTS WITH NATURAL PERSONS. CRS §24-76.5-101. Contractor, if a natural person eighteen (18) years of age or older, hereby swears and affirms under penalty of perjury that he or she (a) is a citizen or otherwise lawfully present in the United States pursuant to federal law, (b) shall comply with the provisions of CRS §24-76.5-101 et seq., and (c) has produced one form of identification required by CRS §24-76.5-103 prior to the effective date of this contract.

B. COLORADO OPEN RECORDS ACT

Neither party shall disclose any confidential information of the other party. Contractor acknowledges that University is subject to the Colorado Public Records Act (C.R.S. §§ 24-72-201, et seq.). Contractor further acknowledges University information may also be subject to protections under other federal and state laws and regulations and shall handle any such information in accordance with applicable law.

C. MISCELLANEOUS PROVISIONS

Any intellectual property that arises during the course of this agreement shall be owned by The Regents of the University of Colorado. There is no implied license and any license to intellectual property shall be the subject of a separate written agreement. In no event shall this Agreement provide for an exclusive relationship between the parties. University shall own all intellectual property that may arise during this Agreement. Contractor hereby represents and warrants that no deliverable shall infringe any third party intellectual property rights. Contractor further represents and warrants that all deliverables shall perform as promised under the terms of the agreement. In no event shall University indemnify the Contractor. In no event shall University pay Contractor's attorney's fees. Any provisions in the Agreement which is an attempt by Contractor to limit damages shall be null and void. In no event shall University name another party as an "additional insured" on University insurance policies or agree to any specific levels of insurance. Contractor shall not to identify University in any advertising, press releases, sales literature or other promotional materials.