

Contract Management Manual

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¹ Several people have contributed to this manual, but the University's Office of General Counsel has advised that those people remain unnamed.

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Acceleration Clause

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Information:

An acceleration clause provides that one party (the party being paid) can require the other party (the party paying) to pay all outstanding amounts if certain requirements are not met. Usually, the clause will require the University to pay all outstanding amounts if the University is late on one payment, or if the University otherwise breaches the contract.

The best practice is to strike acceleration clauses. If the acceleration clause is triggered by late payment, then cite the Tennessee Prompt Pay Act as the reason for deleting the acceleration clause. Under the Prompt Pay Act, the state can pay up to 1.5% per month when late on a payment, but no more than 1.5% per month.

Accessibility

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Information:

Certain federal or state laws govern accessibility standards. These accessibility standards relate to electronic media, such as websites.

Language to add to contract:

Section X:

- a. **Licensee** is committed to purchasing or recommending electronic and information technology (EIT) that provides the same programs, benefits and services that they do to individuals without disabilities except when it is technically unfeasible to do so. Electronic and information technology (“EIT”) is information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. EIT includes, but is not limited to, the following:
 - Telecommunications products
 - Information kiosks
 - Automated teller machines
 - Internet and intranet websites
 - Electronic books and electronic book reading systems
 - Search engines and databases
 - Course management systems
 - Classroom technology and multimedia
 - Personal response systems (“clickers”)
 - Office equipment
- b. For web-based technology, **Licensor** must ensure that products provided under this Agreement conform to the W3C Web Content Accessibility Guidelines, version 2.0 (WCAG 2.0) at conformance levels A and AA. In the event products provided under this Agreement do not fully conform to WCAG 2.0 A and AA, **Licensor** must advise Licensee in writing of the nonconformance and must provide detailed information regarding the plans to achieve conformance, including but not limited to an intended timeline.

- c. For non-web based EITs, **Licensor** warrants that the products or services to be provided under this contract comply with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), and its implementing regulations set forth at Title 36, Code of Federal Regulations, Part 1194. **Licensor** agrees to promptly respond to and resolve any complaint regarding accessibility of its products or services. **Licensor** further agrees to indemnify and hold harmless **Licensee** from any claims arising out of its failure to comply with the aforesaid requirements.
- d. Failure to comply with these requirements might constitute a breach and be grounds for termination of the agreement.

Fall-back language: This fall-back option removes the indemnity component.

Accessibility:

- a. Licensee is committed to purchasing or recommending electronic and information technology (EIT) that provides the same programs, benefits and services that they do to individuals without disabilities except when it is technically unfeasible to do so. Electronic and information technology ("EIT") is information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. EIT includes, but is not limited to, the following:
 - Telecommunications products
 - Information kiosks
 - Automated teller machines
 - Internet and intranet websites
 - Electronic books and electronic book reading systems
 - Search engines and databases
 - Course management systems
 - Classroom technology and multimedia
 - Personal response systems ("clickers")
 - Office equipment

- b. For web-based technology, Licensor must ensure that products provided under this Agreement conform to the W3C Web Content Accessibility Guidelines, version 2.0 (WCAG 2.0) at conformance levels A and AA. In the event products provided under this Agreement do not fully conform to WCAG 2.0 A and AA, Licensor agrees to use its reasonable efforts to promptly respond to and resolve any End-user's complaint regarding accessibility of its products or services. If Licensor is not able to promptly resolve an end-user's complaint regarding accessibility of Licensor's products or services, and Licensor is not able to promptly provide the End-user with equally effective alternative access to the Licensed Product, at no cost to the Licensee, then the Licensee may terminate the License immediately.
- c. For non-web based EITs, Licensor warrants that the products or services to be provided under this contract comply with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), and its implementing regulations set forth at Title 36, Code of Federal Regulations, Part 1194. Licensor agrees to use its reasonable efforts to promptly respond to and resolve any end-user's complaint regarding accessibility of its products or services. If Licensor is not able to promptly resolve an End-user's complaint regarding accessibility of Licensor's products or services, and Licensor is not able to promptly provide the End-user with equally effective alternative access to the Licensed Product, at no cost to the Licensee, then the Licensee may terminate the License immediately.

Fall-back # 2:

Accessibility: This option removes UT's ability to terminate, if the vendor fails to fix an accessibility complaint.

- a. Licensee is committed to purchasing or recommending electronic and information technology (EIT) that provides the same programs, benefits and services that they do to individuals without disabilities except when it is technically unfeasible to do so. Electronic and information technology ("EIT") is information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. EIT includes, but is not limited to, the following:
- Telecommunications products
 - Information kiosks

- Automated teller machines
- Internet and intranet websites
- Electronic books and electronic book reading systems
- Search engines and databases
- Course management systems
- Classroom technology and multimedia
- Personal response systems (“clickers”)
- Office equipment

- b. For web-based technology, Licensor must use its reasonable efforts to ensure that products provided under this Agreement conform to the W3C Web Content Accessibility Guidelines, version 2.0 (WCAG 2.0) at conformance levels A and AA. In the event products provided under this Agreement do not fully conform to WCAG 2.0 A and AA, Licensor agrees to use its reasonable efforts to promptly respond to and resolve any End-user’s complaint regarding accessibility of its products or services.

- c. For non-web based EITs, Licensor represents that to the best of its knowledge the products or services to be provided under this contract comply with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), and its implementing regulations set forth at Title 36, Code of Federal Regulations, Part 1194. Licensor agrees to use its reasonable efforts to promptly respond to and resolve any End-user’s complaint regarding accessibility of its products or services.

Accredited Investor

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Information:

Certain agreements for the University's Investments Office might ask the University to state that it is an "accredited investor." The University qualifies as an "accredited investor."

Advanced Payments

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Information:

Suppliers like to control risks, and seeking advanced payment helps the supplier: (a) keep positive cash flow, and (b) ensure that the University will follow through and buy the good or service.

Many suppliers often want to be paid in advance. There are many reasons that a supplier might want to be paid in advance. When dealing with government entities, which often has a reputation for slow payment, suppliers often ask for pre-payment.

Government entities routinely do not pay in advance, but most private-sector agencies do.

Advanced payment is a problematic issue for UT because of the “cost of recovery” (i.e. it costs a lot of money and time to recover money UT has paid to a supplier; sometimes that cost might exceed the cost of the funds paid to the supplier). It can take a long time to recover money from a supplier who fails to deliver, so the best practice is to refuse advanced payments.

In general, The University of Tennessee prohibits advanced payments, see Fiscal Policy FI0510; note, however, that FI0510 lists the following exceptions:

- (1) registration for conferences and seminars;
- (2) orders to the U.S. Government Printing Office;
- (3) purchases of postage;
- (4) subscriptions to trade magazines and periodicals;
- (5) purchases of items from specialty establishments requiring that payment accompany the order; and
- (6) advance payments to suppliers which would result in documented significant savings to the university.

If a contract requires advance payment, consider including a force majeure clause in the contract. The force majeure clause must specify that university would receive a refund if the event or order were cancelled due to a force majeure event. Also, consider adding language that the supplier must refund the university’s money if the supplier does not perform.

Note that if advance payment is required, the advance payment must be stated in the contract or purchase order.

Note, the default payment period for checks is Net 40, payment by ACH is Net 30; payment by e-Payables is Net.

Fix:

- Preferred: You must first attempt to strike advance payment clauses. Make all payments due after the event occurs or goods are received. The university prefers that the invoice payment “clock” start after the university receives the good or service, and after the university receives the invoice.
- Alternative: Propose reducing the amount that the university must pay in advance.
- Last resort: If you get email confirmation from the department that the advance payment is acceptable, then you may leave the advance payment language in the contract. The appropriate chief business officer must approve of the advanced payment.

Explanation to supplier:

The university is a government entity, and its fiscal policy generally prohibits advanced payments.

Airfare

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Information:

The university cannot use state funds to reimburse a university employee or supplier for any type of airfare, other than coach-class airfare, except in very limited emergency circumstances which must be approved by the state Comptroller. T.C.A. § 8-26-115 states that no state employee, official, or officer may be reimbursed for anything other than standard coach fare for a flight. **When an airline, such as Southwest, does not offer “coach” airfare, then the university only reimburses for the least expensive fare.**

T.C.A. § 8-26-115 states:

No official, officer, or employee compensated with state funds shall be reimbursed for airplane travel in an amount in excess of standard coach fare for the applicable flight. Unless an emergency situation arises and the purchase or reimbursement for the purchase of tickets for travel by air in excess of the standard coach fare for such emergency situation is approved by the comptroller, no state funds shall be otherwise used to purchase air travel at rates in excess of standard coach fare for the applicable flight.

Alcoholic Beverages

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Information:

When a university department wants to buy alcohol, the department may only use Restricted R-accounts that have been funded by gift funds allowing the purchase of alcohol. ***Not all R-accounts allow for the purchase of alcohol.*** (See university Fiscal Policy: Entertainment, [FI0715](#)).

Further, per Fiscal Policy FI0715, expenses for alcoholic beverages are not generally appropriate for group-arranged events attended solely by university personnel. (See university Fiscal Policy: Entertainment, [FI0715](#)).

Note that, even if a contract contains a reference to alcohol, the department might not want alcohol to be served (in other words, the language is just part of the supplier's standard contract terms). It is a good idea to first check with the department to see if alcohol will be served. Often, caterers and hotels leave in clauses regarding alcohol, even if the university will not be purchasing any. If no alcohol will be served, strike the reference(s) to alcohol.

Note that departments may use E-accounts to pay for bartenders' service fees. Why? Bartender fees are simply a service fee.

Lastly, if the university is going to hold an event where alcohol will be present, it is advisable for the university to hire a caterer to dispense the alcohol because the caterer will have insurance and will be responsible for checking IDs.

Fix:

- If no alcohol will be served: delete the references to alcohol.
- If alcohol will be served and paid with gift funds: add the language below:

Model language:

The **university** cannot use state-appropriated funds to pay for alcoholic beverages. The master account will pay for alcoholic beverages because private gift funds will be used to pay for the costs of any alcoholic beverages.

Explanation to supplier:

The university is prohibited from using state-appropriated funds to pay for alcohol. Further, university policy requires that private gift funds must be used for purchases of alcohol. The university will be using gift funds to pay for the alcohol served at this event.

Alternative Dispute Resolution

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Information:

Alternative dispute resolution (“ADR”) refers to methods attorneys use to settle disputes other than traditional litigation. Reasons for pursuing ADR vary, but are usually based on the notion that ADR is less expensive and less time-consuming than traditional litigation.

Generally, there are three types of ADR:

1. Arbitration
 - a. Binding
 - b. Non-binding
2. Mediation
3. Negotiation between high-ranking officials

ADR must never be a prerequisite to a lawsuit. You must ensure that contract language allowing ADR does not require ADR to occur before either party may file a claim against the other.

Arbitration

Information:

In arbitration, a neutral person called an “arbitrator” hears arguments and evidence from each side and then decides the outcome of the dispute. Arbitration may be either “binding” or “nonbinding.”²

All arbitration clauses must be deleted. (See Tennessee Code Annotated § 8-6-301 and § 20-13-103; UT fiscal policy FI0420).

Fix:

- Preferred: Delete the clause entirely.
- Alternative: Suggest that the dispute resolution clause be changed to informal negotiation or voluntary mediation.

² <http://www.courts.ca.gov/3074.htm>

Explanation to supplier:

The Tennessee General Assembly has created the Tennessee Claims Commission and granted it the sole jurisdiction to resolve claims against the State and its agencies. Accordingly, the university has no authority to grant jurisdiction over such claims to an independent arbitrator.

Mediation

Information:

In mediation, an impartial person called a "mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. Mediation leaves control of the outcome with the parties.

Mediation might be acceptable to the university. When considering a mediation clause, consider the following:

- Whether mediation is optional or mandatory.
 - If it is mandatory, is it a "condition precedent" to a lawsuit? In other words, must the parties go through mediation before they can file a lawsuit?
 - If it is optional, which party may invoke the option? Only one, or both? If both, what happens if one doesn't agree?
- Where will mediation take place?
- When will mediation take place?
- Who will pay for the mediator?
- What qualifications must the mediator have?

Negotiation between high-ranking officials

Information:

Simply, this is high-level officials negotiating in an attempt to avoid a lawsuit.

Amendments

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Information:

First and most importantly, consider whether you need an amendment. Traditionally, the university's contract offices have required departments to submit amendments anytime the department wanted to change anything in the original document. The appropriate procurement office, or contract office, must be involved in sending notices to the applicable supplier.

To operate optimally, it is important to avoid the "Is-Ought Fallacy." The Is-Ought Fallacy is when people (e.g. contract officers) assume that the current state (i.e. the way something is being done) is the best practice or is required by law or policy (i.e. the way things ought to be). In other words, do not assume that the university requires an amendment. Contract officers must have critical thinking skills, and contract officers must carefully consider whether the university must process an amendment. If an amendment is not required, then the university is better off not processing the amendment. Why? The unnecessary amendment is wasteful: it wastes time, resources, and slows-down workflow.

- a. Contract does not require an amendment: Sometimes, you might be able to issue a letter under a contract's notice provision instead of executing an amendment. Using the notice provision is faster and simpler, and likely a good choice for cancellation, extensions, or other changes allowed by the contract's language. For example, if a contract gives the university the unilateral right to terminate, then the university needs only to issue a letter to the other party under the notice provision.
- b. Costs: Fiscal Policy FI0420 allows for the university to pay a certain percent over the original contract's maximum financial obligation without an amendment.
- c. Simple things: Many changes do not need amendments. For example, if the vendor changes its name, if the parties accidentally left off an attachment, etc.

You may amend expired contracts. Further, you may extend an expired contract by an amendment. Note, however, that you must exercise good judgment in these circumstances. If several months, or years, have passed since the original contract expired, carefully consider whether it makes more sense to process a new contract.

Be sure that the amendment is truly needed before you move forward. When reviewing an amendment, it is important that you review the original (and previous amendments) to ensure that no prohibited provisions appear and that no other mistakes need to be corrected.

Also, it is essential that you clearly note in the amendment that the amendment amends the original contract.

Amendments must clearly indicate what the amendment is doing: i.e., the amendment must clearly state the clause in the original contract that is being modified, or clearly state that it is adding a new clause or clauses to the original contract.

Issuing too many amendments will likely create confusion, and will definitely make the documents harder to review over time.

Apostille/Apostilled Documents

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Information:

An apostille is an authentication of a public document issued pursuant the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (1961). An apostille or an authentication certifies the authenticity of the signature, seal and position of the official who has executed, issued or certified a copy of a public document. An apostille or an authentication enables a public document issued in one country to be recognized as valid in another country. Apostilles and authentications are often needed in adoptions, extraditions and certain business transactions. (Source: <http://www.tn.gov/sos/forms/apos.pdf>).

Generally, only companies or entities located in a foreign country will ask for a document from the university to be apostilled. The only document I've ever seen a foreign entity need apostilled is the university's Charter.

When an entity requests that one of the university's documents be apostilled, the university must first refuse. If the entity insists, contact the Office of General Counsel for further assistance.

Explanation to supplier (when the supplier wants the university's Charter apostilled):

The university's Charter is a series of legislative actions and not appropriate for apostille.

Apparent Authority

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Information:

Apparent authority is the concept that someone who signs without actual authority to bind an entity is construed to have bound an entity because of the signer's "apparent authority." The university cannot agree to apparent authority clauses because only certain individuals have the actual authority to bind the university. Suppliers include apparent-authority clauses to help protect the supplier regarding whether the agreement is binding. Most suppliers never consider signature authority, and salespeople are incentivized to not ask about signature authority.

Fix:

- Delete the clause entirely.

Note: **Example** of **unacceptable** clause (emphasis added):

For purposes of this agreement: "User" means the Organization, the Administrator, and any other person who has or creates the appearance of having been authorized by Administrator to use the [software] on behalf of Organization..."

Explanation to supplier:

Under the university's Bylaws and the university's Fiscal Policy, only certain individuals have authority to sign on behalf of the university. Accordingly, the university cannot agree to an "apparent authority" clause.

Artwork purchased by the university

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Information:

When the university purchases artwork, it is acceptable (and common) for the artist to retain copyright to the work. However, the university must retain title to (ownership of) the physical work. Moreover, the artist must grant the university a license to use the work in the manner the university desires. The artist may retain intellectual property ownership.

Assignment

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Information:

An assignment is when one party to a contract transfers its duties and rights to another party. It may be desirable to prohibit assignment of certain contracts (for example, contracts for personal, professional, and consulting services).

However, generally, assignment is acceptable when the good or service is fungible (able to replace or be replaced by another identical item). Unless the supplier is providing a service that requires a lot of skill or is otherwise highly specialized, you may allow assignment clauses in contracts. If UT allows the other party to assign, the University must require that both parties approve the assignment in writing.

In the event that you want to prohibit assignment of a contract, consider using the language below.

Model language:

Neither party may assign this **agreement**, or any right or duty hereunder, or enter into a subcontract for any of the services performed under this **agreement**, without the prior written approval of an authorized official of both parties.

Athletic Sponsorship Agreements—Additional Termination Rights

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Information:

Athletic sponsorship agreements usually involve long-term exclusivity obligations, and these agreements are often high-profile agreements (for example, press releases, media attention, etc.). Because of the high-profile nature of these agreements, the University prefers to reserve its right to terminate the agreement if the sponsor engages in behavior that results in a lot of controversy for the University.

Language:

Additional Termination Rights for School. School may terminate this Agreement immediately, effective as of [sponsor's] receipt of School's written notice, if a/an [sponsor] employee, in the course of his or her duties as an adidas representative, makes a public statement or commits any act that in the sole and reasonable judgment of School would either (1) substantially diminish the value of, or otherwise be detrimental to the School Marks or School's brand image; or (2) bring School Athletics, or the Teams, Coaches, or Staff, into public disrepute, contempt, scandal, or ridicule, such that continued association with sponsor would cause material harm to the reputation of School.

Attachments

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Information:

If an attachment or attachments are supposed to be part of a contract, then each attachment must be expressly referenced. The best practice is to specifically reference the schedule/exhibit by name/number, and state the purpose of the schedule/exhibit. Be sure to reference every schedule/exhibit. It is important that you define the contract to include the attachments.

If attachments or documents are references as being attached, but are not actually attached:

- If these documents must be attached, please contact the supplier or the department and obtain a copy of those documents so that you may attach them.
- If these documents are not applicable to the current transaction, then you must delete the reference to those documents.

See MSCD Section 5.64-5.105 for more guidance.

Note: See also, [Order of Interpretation](#).

Attorneys' Fees

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See, also, [Collection Costs](#)

Information:

The university, as an instrumentality of the State of Tennessee, has sovereign immunity, and is subject to only those claims allowed by its state legislature (the Tennessee General Assembly) under the Tennessee Claims Commission Act. If a claim against the State does not fall under a category listed in Tenn. Code Ann. § 9-8-307, then the State is not subject to the claim. Under the Tennessee Claims Commission Act, the university cannot be liable for the costs of litigation other than court costs. Since the university cannot be sued for this type of expense, the university cannot agree to pay for such costs in a contract.

Fix:

- Delete the reference to attorneys' fees entirely.

Explanation to supplier:

The university cannot agree to pay attorneys' fees. The university, as an instrumentality of the State of Tennessee, has sovereign immunity and is subject to only those claims allowed by its state legislature under the Tennessee Claims Commission Act. If a claim against the State does not fall under a category listed in Tenn. Code Ann. § 9-8-307, then the State is not subject to the claim. Under the Tennessee Claims Commission Act, the university cannot be liable for the costs of litigation, which would include attorneys' fees. Thus, the university cannot agree by contract to pay for another party's attorneys' fees.

Common questions from suppliers:

- 1) Is there a statute that says UT cannot pay attorneys' fees?

Response: Yes. As an instrumentality of the State of Tennessee, the university has sovereign immunity. The Tennessee General Assembly has enacted a limited waiver of the State's sovereign immunity, the Tennessee Claims Commission Act. (Tenn. Code Ann. § 9-8-307) lists claims that may be brought against the State, but

the Act expressly provides that the State cannot be liable for the costs of litigation other than court costs.

- 2) If we change the governing law to Tennessee law, but leave in the references to attorneys' fees, won't that be sufficient?

Response: No. If we both agree that the university cannot agree to pay attorneys' fees under Tennessee law, then there is no reason to leave the attorneys' fees language in the contract. Moreover, the university cannot give the appearance of having waived sovereign immunity. Leaving in the attorneys' fees language gives the appearance that the university is attempting to waive its sovereign immunity. No one at the university has authority to waive the State's sovereign immunity. Accordingly, we must delete the reference to attorneys' fees.

Audit—UT’s right to audit

(Standard university language/university’s right to audit other party)

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Information:

Tennessee Code Annotated § 8-4-116 subjects entities contracting with state or local government to audit by the comptroller of the treasury.

Explanation to supplier:

Tennessee Code Annotated § 8-4-116(a) subjects entities contracting with state or local government to audit by the comptroller of the treasury.

Model language:

The Contractor hereby states that it will retain all books, records, and other documents (“materials”) relating to this **agreement** for 5 years after final payment, or until audited by the state of Tennessee or **the University**, whichever is sooner. The University of Tennessee, its authorized agents, or state auditors, may have access to, and the right to examine, any of the Contractor’s materials during the 5-year period.

Audit—other party’s right to audit UT

(university pays for costs of)

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Information:

Many contracts will give the supplier the right to audit UT. These types of clauses are common in software contracts and library database subscription contracts. The supplier wants the ability to see if UT is complying with the agreement. Sometimes a supplier’s contract will require UT to pay for the costs of an audit of UT. However, UT cannot agree to pay for the costs of the audit. Article II § 31 of the Tennessee Constitution prohibits lending of the State’s credit. Agreeing to a clause requiring the university to pay for the costs of an audit would be obligating the university to pay for unknown/unlimited costs, which is an unauthorized extension of the state’s credit.

Sometimes, suppliers are not willing to remove the audit clause. Before agreeing to include a modified audit clause, be sure to ask the supplier if the supplier will be able to prevent unauthorized use on its end. If so, then there is no need for an audit clause.

If a draft contract allows the other party to audit UT, you must obtain written approval from the department stating that the department can comply with the audit provision, before proceeding with processing the contract. Limit other party’s right to audit to:

- 1) Must first provide reasonable advanced notice in writing, and
- 2) May only audit once per calendar-year

Software:

Many software agreements will contain a clause allowing the vendor to audit UT for compliance with the agreement. Such clauses are legally acceptable, but they often present significant legal and business risks. Because of the structure of the University’s IT systems and due to the very large size of UT, the University often needs extra time to comply with an audit request. You are encouraged to check with your IT department to see if the vendor’s proposed timeline is reasonable for the University. Additionally, you must check with the Office of General Counsel to determine whether the vendor’s audit rights are legally acceptable.

If the software is a “Software as a Service” (“SaaS”), then it makes no sense to allow the supplier to audit the university’s use in-person on university property. Why? Because Software-as-a-Service solutions are always housed on the supplier’s servers. Also, if the software is SaaS, then the supplier must be able to monitor usage on its end, and thus eliminate the need for an audit because the university would not be able to obtain licenses other than authorized licenses.

Fix:

- Preferred fix: Strike the language entirely. Carefully consider whether the clause is truly necessary, or whether the supplier thoughtlessly included the clause in its contract.
- Fall back: Specify a dollar amount or cap on costs of an audit.

Note: Example of unacceptable clause (emphasis added):

If material discrepancies are found or a discrepancy of two percent (2%) or more in university’s use of license benefits during the applicable audit period, university agrees to reimburse Microsoft for all reasonable out-of-pocket costs and expenses incurred by Microsoft in conducting such audit, including, but not limited to, any amounts paid to any auditor or attorney.

Explanation to supplier:

The university cannot agree to uncapped costs. Article II, Section 31 of the Tennessee Constitution prevents lending of the State’s credit.

Automatic Renewal

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Information:

Many companies want to reduce paperwork and help increase profits, so many contracts will include language stating that the contract automatically renews unless the university provides notice of its intent not to renew within a specified time period. Often, the time period is very long, such as no less than 180 days before the end of the then-current term. **Automatic renewal clauses are the clauses that present the highest amount of practical risk to departments. Automatic renewal is a very common clause, and it is increasingly being used by suppliers.**

Note that a supplier might use sneaky language. For example, they might say something like:

“University must notify Supplier at least 90 days in advance of the then-current term if the University no longer wants to renew this agreement.”

Automatic renewal is very problematic for several reasons.

1. The university cannot extend the State’s credit. An automatically renewing contract arguably extends the State’s credit indefinitely.
2. A very practical reason that automatic renewal is problematic is that most of the departments will not understand what auto renewal means. Moreover, most departments do not even read their contracts. Therefore, the department will assume that the contract expires in a year, two years, or whatever time frame they put on the contract review form. An automatic renewal could lock the department into a contract that it no longer wants.

Fix:

- Limit contract term to five years (be sure to include the ability to cancel for convenience).

Explanation to supplier:

Because the university is funded with State tax appropriations on an annual basis, the university cannot agree to an automatic renewal clause. Moreover, the university’s contract fiscal policy prohibits automatic renewal for any payable contract.

Model language:

Unrestricted Termination. The University may terminate this agreement for any reason by giving the Supplier at least 30 days prior written notice.

Availability of Funds/Cancellation for Convenience (Funding “Out Clause”)

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Information:

For multi-year payable contracts, a funding “out-clause” must be inserted in the contract to allow the university to cancel the contract for convenience (which includes insufficiency of funds). **Note that merely stating that the university has the right to “cancel for convenience” is not sufficient.**

Explanation to supplier:

The university is funded by State of Tennessee appropriations and the State of Tennessee’s fiscal year runs from July 1 – June 30. The university cannot obligate itself to pay with funds that have not been appropriated because this would be an unauthorized extension of the State’s credit. Article II, Section 31 of the Tennessee Constitution prevents lending of the State’s credit. Further, Article II, Section 24 prohibits expenditures except pursuant to appropriations made by law.

Model language:

Unrestricted Termination: **The University** may terminate this agreement for any reason by giving the **Supplier** at least 30 days prior written notice.

Back-dating a contract

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Information:

Generally, departments must start the contract process soon enough to avoid the need to back-date a contract (i.e., sign the contract after performance has already started, and set the start-date of performance as before the signature date). However, it is acceptable to back-date contracts within a reasonable time, when necessary.

When you back-date a contract, be sure to consider the cumulative dollar amount. See [Fiscal Review](#) for more information.

Background Checks

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Information:

The Office of General Counsel recommends that contract and procurement staff members include background check language when the University enters into a contract or PO for services that will require the supplier's staff members to have interactions with University staff members/students/or the general public, or access to University property, that exceeds transient interactions. Transient interactions include delivery, short-term installation services, and boxed-lunch catering.

Language:

Example language 1:

Every employee that a **Contractor** places in service on the campus of the **University** must undergo a criminal background check by the **University** at the **Contractor's** expense. The minimum requirements for a background check are: a verification of identity, a check of the national sex offender registry and the Tennessee felony offender database, and federal and local criminal records checks. **The University** reserves the right to reject any employee of a **Contractor** based on information obtained through the background check. With advance approval of the **University's** Human Resources department, **the University** will permit a **Contractor** to conduct its own background checks. Background checks performed by a **Contractor** must meet the **University's** minimum requirements listed above, and the **Contractor** must inform the **University** about any criminal history for any person who will be working on campus.

Example language 2:

Background Checks: This clause applies if Supplier will provide services on the University's property.

- i. General Obligation: Supplier will not knowingly assign any individual to provide services to University if the individual has a history of criminal conduct. For purposes of this agreement, "criminal conduct" means (a) that the person is listed on any state's sexual offender registry; (b) that

person is listed on the Tennessee Abuse Registry, or (c) that the person has been convicted of a felony in any state.

- ii. Prompt Background Checks: If the University requests, Supplier must perform a comprehensive criminal background check on any Supplier employee or sub-contractor using the University's background check vendor.

Boilerplate

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Information:

“Boilerplate”: Generally speaking, “boilerplate” refers to an assortment of “standard” terms and conditions that cover issues that arise in most contracts, such as governing law, dispute resolution, notice, etc.

Colloquially, many people use the word “boilerplate” as a dismissive term, inferring that the “boilerplate” terms and conditions are not important and must not be reviewed at all (or, if reviewed, the “boilerplate” must be skimmed). You must never merely skim boilerplate. You must carefully review every clause in a contract. Simply stated, the “boilerplate” language tends to contain the most problematic items to the university. To quote Professor George W. Kuney, “Much mischief can be hidden [in boilerplate]...Transactional attorneys are cautioned against taking the other side’s boilerplate for granted.”

Typical Boilerplate in contracts ([note: UT cannot agree to certain usual boilerplate terms](#))

- Assignment: Unless a contract specifies otherwise with an anti-assignment clause, parties to a contract are, generally, free to assign their rights and delegate their duties. Most of the time, it is fine for a supplier to assign their contract to another party. The University might not want to allow assignment if the services are very highly specialized, such as artists, lecturers, etc.
- Attorneys’ fees: A clause that shifts the responsibility for paying attorneys’ fees to the losing party, in the event of litigation.
- Counterparts: A clause that’s purpose is anti-fraud. The idea is that the parties each need an original, but the parties sign remotely. The parties express the intent to allow each party to sign their own copy, and once all parties have sign their own copy, the agreement is considered fully signed. Counterparts clauses are acceptable.

- Dispute resolution: This clause states the parties' intent for how disputes will be handled before either party may file a lawsuit. Often, the dispute resolution clause will contain provisions for informal negotiation, mediation, or arbitration, or perhaps a combination of these.
- Entire agreement (also known as an "integration clause" or a "merger clause"): This clause states that the entire agreement is contained in the contract itself, and that neither party may rely on verbal promises, etc. This is very important, and helps reduce the risk of disputes between the parties when it comes to the contract's content (especially if the contract allegedly lacks something).
- Force majeure: A clause that states that neither party will be liable if circumstances beyond their reasonable control prevent the party from complying with the contract. Note: it is not necessary to have a "laundry list" of force majeure events. Note further, however, that when dealing with hotels or entities in foreign countries, a "laundry list" might be the safest approach to force majeure clauses.
- Forum-selection: Parties use this clause to prevent either party from objecting to lawsuits being in a specified court ("forum"). Sometimes, a party might perceive that one court is more friendly, or familiar with their industry, than another.
- Governing law: Parties use this clause to eliminate uncertainty about which state's law will apply. In federal-law cases, it doesn't matter because federal law is the same in every state and federal court. State-law claims are based entirely on state law, and subject to the various laws of each state.
- Modification: This clause specifies how the parties may make valid/binding modifications (amendments) to the contract.
- Notice: This clause specifies how the parties will notify the other, officially, under the contract.
- Severability: This clause expresses the parties' intent for what they want a court to do if a court finds part of the contract unenforceable.
- Waiver: This clause allows a party to waive compliance with a contract term, but prevents the other party from relying on future waivers.

Bonds

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Information:

A “surety” is one who undertakes to pay money or to do other acts if the principal fails to perform. The surety provides this guaranty through a “surety bond.” Although a surety may be an insurance company, the assurance provided by a surety bond is not insurance, but is more appropriately characterized as a guaranty of the principal’s performance (essentially an extension of credit).

There are several common types of surety bonds:

- Proposal/Bid Bond = secures a bidder’s response to a solicitation; protects the State if the bidder refuses to enter into a contract after it is awarded
- Performance Bond = ensures completion of a contract/project
- Payment Bond = ensures payment of a contractor’s subcontractors and material suppliers
- Protest Bond = protects the State from protests brought in bad faith or without a valid basis

Under Tennessee law, payment bonds are required on all contracts for any “public work” exceeding \$100,000 in the State of Tennessee. Such payment bonds must be for 25% of the contract price. Tenn. Code Ann. § 12-4-201. TCA 64-5-109 defines “public works projects.”

Public works projects authorized. The authority is authorized and empowered to construct and/or operate and maintain any public works project within the region. No such project shall be constructed without the authority first having obtained the consent of the county or municipality within whose jurisdiction the project is located. For this purpose, "public works project" includes any one (1) or more or any combination of the following: airports, bridges, tunnels, viaducts, hospitals, sanitarium, dispensaries, nursing homes, almshouses, public buildings, plazas, schools, roads, flood control works, water mains and lines, highways, port and dock facilities, including any terminal storage and transportation facilities incident to port and dock facilities, industrial parks, which are defined as lands, and rights, easements and franchises relating to lands, and may

include adequate roads and streets, water and sewer facilities, utilities and docks and terminals as required for the use of industry, in aid of the state's public policy of industrial growth and expansion, and all property, real and personal, appurtenant thereto or connected with such work, undertaking or project and the existing work, if any, to which such work, undertaking or project is an extension, addition, betterment or improvement. This enumeration shall not exclude any other project for the benefit of the people in the region where any state or federal agency will match the funds of the county with grants-in-aid or gratuities to subsidize or assist the development of such project.

When authorized by state statute, administrative agencies are allowed to issue regulations that have the same effect as law. TCA 4-15-102 allows the State Building Commission to set regulations. See TCA 4-15-102(f)(2)(A)-(B). The SBE requires a “contract bond,” which the SBC intends to mean both a “payment” and a “performance” bond. The value must be at 100% of the contract.

Additionally, Tennessee law requires that protest bonds must be submitted contemporaneously with a protest. Exemptions to this protest bond requirement may be granted under certain circumstances, when requested by certain bidders, including a minority-owned businesses, woman-owned businesses, or small businesses. Tenn. Code Ann. § 12-3-514.

All other types of bonds are discretionary (i.e., not legally required) under Tennessee law. Such discretionary bonds include the following:

- Proposal/bid bonds
- Performance bonds on “public work” contracts
- Performance and payment bonds on other contracts (i.e., not a “public work”)
- There is broad authority for discretionary surety bonds to be required on State contracts: “Procurement and performance bonds or other security may be required for any contract. Any such requirement shall be set forth in the solicitation.” Tenn. Code Ann. § 12-3-502.

Departments will determine whether University contracts will require discretionary bonds based upon consultation with the Procurement Office, the Office of General Counsel, the Risk Management Office, and the Office of Capital Projects.

Breach

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Information:

The university may agree that certain conduct constitutes a breach, or a material breach. When reviewing a contract, you need to consider any breach or material breach language very carefully.

Ultimately, you may agree in contract language that certain action (or inaction) by UT constitutes a breach or material breach. If you have questions, please consult with the Office of General Counsel. You must make a judgment call based on good business practices when reviewing a breach clause. The risk that arises from this language is that UT has agreed in writing that an action or omission is a breach of contract.

Cancelling a Contract

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Information:

When cancelling a contract, you must ensure that you follow the contract's terms exactly. Please pay specific attention to the "termination" and "notice" clauses. You must provide the cancellation notice to the other party as specified in the contract.

Cancellation Fees and Clean-Up Fees

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Information:

Often, hotels, caterers, speakers, etc. will charge UT a cancellation fee if UT cancels the event. Moreover, this fee is often tiered, such that cancellation within a specified number of days (e.g., 60-31) carries a certain cancellation fee and cancellation within another specified period (e.g., 30-0) carries with it a higher, specified cancellation fee. Similarly, hotels often want to charge UT a clean-up fee for use of their property.

Agreeing to either type of fee is a business decision, but they generally are acceptable to UT provided that

- (1) the fee is a reasonable amount that does not constitute a penalty against UT;
- (2) the fee is capped at a specific dollar amount; and
- (3) the appropriate business officials approve of such fees.

Do not hesitate to negotiate with the supplier to delete or lower the amount.

UT may pay for cancellation or clean-up fees, provided that the fees are capped and reasonable. UT cannot pay for uncapped costs, or unreasonably high (i.e. penalty), fees.

Capital Improvements

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Information:

The Office of Capital Projects must review and approve of all contracts for capital improvements to UT property when the total price of the contract is \$100,000 or more. Many such capital improvements also require review and approval by the State Building Commission. Please note that capital improvements could involve construction, renovation, demolition, remodeling, or similar actions. Also, anytime the University will install something that involves affixing the item to a building, or if it will alter the use of space, and the amount is \$100,000 or more, the Office of Capital Projects must review.

Capital improvements may be undertaken in various ways, such as through contracts with general contractors, construction managers, food-service vendors (e.g. Aramark or Sodexo), and third-party sponsors (e.g. athletics sponsors). Please note that it is irrelevant who pays for the improvements. For example, if a food-service contractor pays for the improvements, the State Building Commission rules still apply. The State Building Commission places certain requirements on all capital improvements to state property, regardless of who pays for the improvements. The Office of Capital Projects will ensure that UT follows the proper guidelines.

Any investment over \$100,000 to the physical property of the University would require State Building Commission approval which would include submissions of: contract bond, insurance requirements as specified by State Building Commission, submission of final plans and specifications for approval, and State Fire Marshal Office approval if applicable. Example: Sodexo, Aramark, Barnes & Noble. This type of work is considered a Gift in Place project by the State Building Commission (SBC), and the project will require SBC approval prior to any design or construction work occurring. The following are the requirements as associated with this type of work. Please note that items 1-8 must be approved prior to proceeding with any construction. All information must be submitted to the Office of Capital Projects.

1. Provide final plans and specifications for approval
2. Provide approval letter from State Fire Marshal's Office

3. Provide certificate of sufficient coverage protection that the project will be completed and that the State will not be subject to liens or claims by material suppliers or workmen. For projects values at \$100,000 or more this protection must be provided in the form of a contract bond executed on the State Building Commission standard contract bond form in an amount of no less than 100% of the estimated value of the project.
4. Provide certificate of sufficient coverage of property insurance if project involves existing State Improvements. This must take the form of Commercial General Liability with minimum coverage of \$1,000,000 for each occurrence, and \$3,000,000 aggregate
5. Provide certificate of coverage and indemnification of the State by the donor or third party, as determined by the SBC, against damage claims incurred incident to the delivery of the project. For projects in excess of \$100,000 value, this must take the form of liability insurance and workmen's compensation at a level no less than the amount and limits required on general SBC projects.
6. Provide certificate of sufficient coverage protection against losses due to fire, theft, acts of God, nature, etc. which must take the form of Builders Risk Insurance in amounts no less than required on general SBC projects.
7. Provide certification of full funding for this project.
8. Review by Tennessee Historical Commission, if applicable
9. Provide project close-out information, which shall include "as-built" drawings depicting the actual construction conditions, operations and maintenance manuals for building systems and components, warranties, and subcontractor/material supplier names and contract information.

Capital “T” in the word “The” in The University of Tennessee

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Information:

The legal, proper name of UT is “The University of Tennessee” with a capitalized “T” on the word “the.” Here is the justification for it:

<http://bot.tennessee.edu/charter.html>. In the Charter of the university, the university’s official name is, The University of Tennessee. Some people may be confused about this because the UTK Office of Communications and Marketing generally advises that people must not capitalize the word “the” in front of the university’s name, unless the word “the” begins a sentence. <http://communications.utk.edu/resources/editorial.php>

The university’s official legal name is “The University of Tennessee.” If you make changes to a contract, you must fix the name and capitalize the word “The.” If no other changes are needed in the contract, capitalizing the word “The” isn’t crucial.

Cash

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Information: In accounting terms, “cash” means readily available funds. This includes ACH, checks, etc.

Code of Conduct (Presented by Vendor/Sponsor/Other Party to university)

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Information:

Sometimes, other parties will ask the university to agree to the other party's code of conduct, code of ethics, code of corporate conduct, etc. The university has its own Code of Conduct (UT Policy # HR0580). Further, UT is a large governmental organization. It would be practically impossible to guarantee that UT could comply with another entity's Code of Conduct.

Hospitals and other healthcare facilities often require students who will be interns, residents, etc. to agree to the facility's code of conduct.

If other party will not agree to delete the other party's code of conduct, refer the contract to the University's Office of General Counsel.

Explanation to supplier:

The university has its own Code of Conduct, available for review at http://policy.tennessee.edu/hr_policy/hr0580/. As an instrumentality of the State of Tennessee, the university does not agree to comply with the codes of conduct or ethics of other governmental or private entities.

Fix: Delete the language entirely.

Fall-back: Make appropriate revisions to the code of conduct, after discussing with the department and the Office of General Counsel.

Confidentiality and Non-Disclosure

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Information:

Please see Board of Trustees Policy on Public Records, [BT0014 – Public Records](#).

Confidentiality obligations are very common, and the university's contract and purchasing staff members must be diligent when reviewing contracts containing these types of clauses. You will encounter issues surrounding confidentiality in one of three settings:

1. A formal confidentiality agreement (also known as a non-disclosure agreement (which you may hear referred to as an "NDA"), or a confidential disclosure agreement (which you may hear referred to as a "CDA")). The titles are substantively irrelevant, and for purposes of this Manual, I will refer to "confidentiality agreements" (since lawyers and governments each love acronyms, you might even see someone refer to confidentiality agreements as "CAs"); or
2. A confidentiality clause or set of confidentiality clauses that appear in a contract addressing a larger subject matter; or
3. A header or footer, or sometimes a background "watermark," simply stating "confidential," "proprietary," "proprietary and confidential," "do not disclose to third parties," "not to be published," "not to be released," or "not to be disclosed." Note that these almost always appear only in documents containing pricing.

All three of these instances present the same issues. For purposes of this section, I will refer only to "confidentiality agreements," but please understand that the same principles apply to all three settings.

Why would someone want a confidentiality agreement? Basically, a confidentiality agreement helps protect sensitive information from being released to the public. Suppliers often want to protect their pricing, customer lists, etc. from public disclosure. Also, in other contexts, a supplier might want the university to test a new drug, textile, or other item, and the supplier wants to keep details of the item secret.

In general, private companies can agree to keep any type of information confidential, and they would only be required to release it when ordered to do so by a court. It is important to keep this fact in mind because the party the university is negotiating with will likely not understand why the university requests revisions to confidentiality language. The university is an instrumentality of the State of Tennessee. As such, it is

subject to public-records laws. When it comes to contracts, the most relevant public-records law is the Tennessee Public Records Act. Please note that certain federal laws might also affect public records.

The Tennessee Public Records Act allows any Tennessee citizen (that means any natural person who is a Tennessee citizen, it does not include Tennessee corporations) to:

- 1) inspect records and**
- 2) request copies of records.**

Often, suppliers will ask the university to provide the supplier with notice when the university discloses information that the supplier views as confidential. The problem with agreeing to notice requirements is that the university does not track confidentiality clauses, and complying with these types of clauses is extremely difficult for multiple reasons.

Generally speaking, a confidentiality agreement or confidentiality language must include the following information:

- Define the type of information deemed confidential;
- Define the time period;
- State exclusions from the definition of confidential information;
- State allowable disclosures;
- State the permitted use of the confidential information;
- State who may have access to the confidential information; and
- Address the return or destruction of confidential information.

As a state agency, the university is subject to a very broad freedom of information act known as the Tennessee Public Records Act, T.C.A. § 10-7-503. Note, the federal Freedom of Information Act (FOIA) does not apply to the university.

Under the Tennessee Public Records Act, simply labeling a document “confidential” or including a confidentiality clause does not make the document confidential as a matter of law under the act. There are several statutory and case law exceptions to the Public Records Act, but the terms and conditions of a contract are commonly subject to inspection under a public records request. Accordingly, the university must not agree to a contract clause that makes the terms and conditions, or pricing, confidential.

The university cannot agree to be contractually obligated to take legal action or cooperate with a supplier in seeking to limit disclosure or stop disclosure altogether. When a contract contains a confidentiality provision, the clause must be modified to include a reference to the Tennessee Public Records Act and applicable regulations. Alternatively, a reference to disclosure “allowed by law and regulations.”

In the event that information is disclosed pursuant to laws or regulations, the university cannot agree to ensure that any recipient of information treats disclosed information in a confidential manner.

Often, a supplier will seek to add a clause stating that the university will assist the supplier in blocking a public records request. The university cannot agree to such a clause.

If you are working on a contract that will be presented to the Fiscal Review Committee and that contract contains a confidentiality clause, be sure to see the [Fiscal Review Committee](#) section of this guidebook.

Explanation to supplier:

General

The university is subject to the Tennessee Public Records Act, which allows inspection of most state records by Tennessee citizens. Pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503 et seq., the university is legally required to disclose state records upon request, unless the records are considered “confidential” or otherwise prohibited from disclosure by applicable Tennessee law.

Supplier wants the university to provide notice of disclosures:

It is not practical for the university to agree to provide notice of every disclosure. The State of Tennessee’s Comptroller’s Office has real-time access to all of the university’s contracts, and the university also makes several hundred routine disclosures to the State of Tennessee General Assembly every quarter. We simply do not have the resources to provide notice for every disclosure. Moreover, the Public Records Act requires the university to respond “promptly” to requests, when possible. By practice, the University considers “promptly” to mean “as fast as possible,” which might mean close to an immediate response. Note further that the existence of this agreement, the terms and conditions of this agreement, and any pricing data is public record in Tennessee. Accordingly, we will not agree to provide you with notice of the types of disclosures I mentioned.

When the supplier wants the university to agree via contract language that the supplier’s pricing is a trade secret (or is otherwise confidential):

The Tennessee Public Records act does not allow for the university to treat pricing, or the contract documents themselves, to be treated as confidential information. Accordingly, because the university would be required to disclose pricing or the contract documents, or both, upon

request, the university cannot agree that your pricing or the terms of the contract are trade secrets or are otherwise confidential.

When the language requires UT to sign a confidentiality contract with its employees or requires UT employees to sign as a party [add this language to the “general” language above]:

The university prohibits its employees from entering into agreements to which the university is a party. Further, only a limited number of university officials are authorized to sign contracts on behalf of the university, and all other university employees cannot sign on behalf of the university. The university can agree to be responsible for its employees’ (but not agents or contractors) compliance with the confidentiality requirements imposed on the university under this agreement. Further, the university can agree to inform its employees of the confidentiality requirements under this agreement.

When the language requires UT to assist the supplier in limiting disclosure under the Public Records Act or other law [add this language to the “general” language and the “employee signing a contract” language above, if applicable]:

Because the university is an instrumentality of the State of Tennessee and is subject to the Tennessee Public Records Act, the university does not have the legal authority to, and thus cannot agree to, assist anyone or any entity in limiting the university’s disclosure obligations under the Tennessee Public Records Act.

When the language involves software:

Regarding the software and related items: I would direct you to Tenn. Code Ann. 10-7-504(a)(17). Under that statute, "computer programs, software, software manuals, and other types of information manufactured or marketed by persons or entities under legal right and sold, licensed, or donated to Tennessee...higher education institutions shall not be open to public inspection..." This statute might address your concerns. That said, the contract itself between the university and your company almost certainly would be a public document, which would be subject to disclosure upon the university’s receipt of a valid Public Records Request, and there is nothing we can do to prevent that outcome.

When the language requires an infinite obligation of confidentiality:

In general, the university cannot agree to contractual obligations of more than five years. Moreover, as a practical matter, it would be very difficult

for the university to monitor compliance with a contractual obligation of an indefinite length.

When the language requires the university to take steps (which may be phrased as “make best efforts” or “make reasonable efforts”) to ensure that any recipient treats disclosed information in a confidential manner.

The Public Records Act does not place, and does not allow the university to place, any restrictions on how a citizen of Tennessee may use records obtained pursuant to the Act.

Language requiring the university to use reasonable efforts to ensure confidential treatment for any information released under the Public Records Act.

The Public Records Act does not place, and does not allow the university to place, any restrictions on how a citizen of Tennessee may use records obtained pursuant to the Act.

Model language:

The University of Tennessee’s obligation to keep information confidential will not apply if disclosure is required by state or federal law or regulations, including without limitation, the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503.

Confidentiality agreements often contain the following problematic issues:

- No end date;
 - Ultimately, it is a business decision, but an infinite confidentiality obligation would be very challenging to comply with.
- Clause requiring UT to make efforts to ensure that any recipient of disclosed information treats the information in a confidential manner;
- Vague definition about what constitutes confidential information;
- Injunction/Equitable Remedies;
- Employees of UT required to sign separate agreement;
- Employees of UT required to sign as a party;
- Clause requiring UT to initiate or assist supplier in seeking court intervention to shield a contract or other documents from public record disclosure;
- Clause making the contract itself confidential;
- Governing Law;
- Venue.

Confidentiality of Bid Documents

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Information:

While a bid is open for submissions, the submissions are confidential.

Pursuant to Tenn. Code Ann. §12-3-203(e), *after bid evaluation*, all data relating to a university procurement is available for inspection upon request *by any bidder* on the procurement.

The university cannot award a contract without providing bidders a reasonable opportunity for such inspection. Bid documents are not restricted from such inspection solely because a bidder has identified or labeled the documents as “confidential.”

After the university makes an award, the files are open to any bidder **and** any Tennessee human citizen.

Explanation to supplier:

Under Tenn. Code Ann. §12-3-203(e), after bid evaluation, all data relating to a university procurement is available for inspection upon request by any bidder on the procurement. The university cannot award a contract without providing bidders a reasonable opportunity for such inspection. Bid documents are not restricted from such inspection solely because a bidder has identified or labeled the documents as “confidential.” Additionally, most bid documents are state records subject to inspection by Tennessee citizens pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503 *et seq.* Accordingly, the university is legally required to disclose bid documents upon request, unless the records are considered “confidential” or otherwise prohibited from disclosure by applicable Tennessee law.

Confidentiality for Sponsored Research

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Information:

Tenn. Code Ann. § 49-7-120 is a limited statutory exception to the Public Records Act. Note that § 49-7-120 exempts certain information (e.g., trade secrets) from disclosure when that information was provided to the university under an agreement for sponsored research or services.

Model language:

The University of Tennessee's obligation to keep information confidential will not apply if disclosure is required by the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503 *et seq.*.

Explanation to supplier:

The university is subject to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503 *et seq.*, which allows inspection and copying of most university records by Tennessee citizens upon request. The university is not required to allow a citizen to inspect university records or provide copies of the records if the records are deemed confidential by a provision of the Tennessee Public Records Act or other Tennessee law, such as Tennessee Code Annotated § 49-7-120. Tennessee Code Annotated § 49-7-120 exempts certain records or materials (e.g., trade secrets or potential trade secrets; patentable material or potentially patentable material; proprietary information) from disclosure under the Tennessee Public Records Act when the university receives or obtains such records or materials during the course of sponsored research or service conducted by the university. The university recommends that you or your legal counsel independently review the applicable laws to determine whether particular records related to this agreement would be protected from disclosure under these laws.

Contracting Party

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Information:

The University of Tennessee must be identified as the party to a contract. You may list the particular campus, institute, or department, provided that the campus, institute, or department is named as follows:

- The University of Tennessee, on behalf of its _____;
- The University of Tennessee, through its _____; or
- The University of Tennessee, acting on behalf of its _____.

Explanation to supplier:

The correct legal entity is The University of Tennessee. The university's campuses, institutes, departments, etc. do not have an independent legal existence. All of the university's campuses, institutes, and departments have the same Federal I.D. number.

Contractor's Licenses

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Resources:

- You can verify the status of a license here: <http://verify.tn.gov/>
- State's website: <https://www.tn.gov/commerce/regboards/contractor.html>
- Rules: <https://publications.tnsosfiles.com/rules/0680/0680.htm>

Information:

Campus Contract Officers must consult with the Office of Procurement Services for any questions about contractor's licenses. Also, please see Exhibit 1 (contractor's license flowchart).

Under certain circumstances, individuals and companies that perform construction related services for the State of Tennessee, and the University, must be Tennessee-licensed "contractors." In general, when the total cost of a project is twenty-five thousand dollars (\$25,000) or more, the following "contractors" must be licensed:

- prime/general contractors
- electrical contractors and subcontractors
- mechanical contractors and subcontractors
- plumbing contractors and subcontractors
- roofing contractors and subcontractors
- masonry contractors
- construction managers

The licensing requirement is applicable to any contractor that bids/proposes on a contract (at the time the bid/proposal is submitted) or signs a contract with the University. Please note that using a GSA or cooperative contract falls under the same rules listed above.

When a contractor's license is required, please note that the general contractor does not have to actually do the work. The general contractor may sub-contract to others, including an original equipment manufacturer. If UT is buying something that a general contractor does not normally sell, such as electronics, then UT may either: 1) issue a PO or contract for the full amount to the general contractor; or 2) issue a PO or contract to the original equipment manufacturer for the costs of the goods, and then issue a PO or contract to the general contractor for the installation. If the original

equipment manufacturer and the general contractor agree to the second option, that option will save the university money because the general contractor would charge a fee for buying the goods for the university (option 1).

The state of Tennessee's contractors' licenses are divided into classes. The University requires a BC license. The type of license UT prefers is a BC-B class license.

The monetary value of the license is located on the front of the license under the expiration date:



The value is also listed on the Verify TN website:

Classification and Limit	
CLASS	BC-15
CLASS	BC-26
CLASS	BC-8
MONETARY LIMIT	\$130,000.00

IS A CONTRACTOR'S LICENSE REQUIRED?

Under Tennessee law, a "contractor" is generally defined as any person or entity that submits a price or bid "to construct, supervise, superintend, oversee, schedule, direct, or in any manner assume charge of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down, or furnishing labor to install material or equipment for" any building, road, improvement, or other construction undertaking.

QUESTION #1: GENERAL/PRIME CONTRACTOR

Will the person or entity be submitting a bid to serve as a general/prime "contractor" on a University project that will have a total cost (including materials and labor) of \$25,000 or more?

Yes



Bidder **must** have a Tennessee general contractor's license before submitting a bid.

No



Bidder is **not** required to have a Tennessee general contractor's license.

QUESTION #2: SUBCONTRACTORS

Will any subcontractor be performing electrical, mechanical, plumbing, or HVAC work that will have a total cost (including materials and labor) of \$25,000 or more

OR

masonry or roofing work that will have a total cost (including materials and labor) of \$100,000 or more?

Yes



All subcontractors performing any of these portions of the work, at or above these dollar values, must have appropriate Tennessee licenses.

No



Subcontractors are **not** required to have a Tennessee licenses.

“Contracts” between UT departments/campuses

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Information:

Regarding “contracts” between departments of The University of Tennessee (all campuses, institutes, and units): because the university is one legal entity, departments/campuses cannot have a legally enforceable contract with other UT departments/campuses. In essence, UT would be entering into a contract “with itself.” You can’t enforce a contract against yourself. Anytime a transaction will be paid using a university transfer voucher in IRIS, this transaction is intra-university. For zero-dollar transactions, if both parties are UT departments, campuses, units, etc., then the transaction is intra-university.

With the exception of order forms (such as UT-Knoxville Conferences) or a room reservation form, “contracts” between two UT departments are disfavored and must only be entered into in very rare circumstances. Such a decision must be approved by both the campus/unit CBO and system CFO, in consultation with the Office of General Counsel. Except, intra-UT contracts related to the various University departments of athletics do not need to go through any special review process. By practice, when two UT teams play each other, the departments will formalize the event in a formal contract. The formal contract needs to follow the usual game-contract review process.

Intra-university order forms and room/space reservation forms are extremely common. Intra-university order forms do not need to be entered in the contract system, do not need to be reviewed by a contract office, and do not need to be reviewed or revised by the General Counsel.

Contracts with Current University Employees (and former UT employees within 6 months of termination)

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Information:

Certain state laws prohibit contracting with current or former UT or State of Tennessee employees. Please refer to FI0420 and FI0125. Consult with your campus business office, the Office of General Counsel, and the Payroll office, if you have questions.

When you have a draft contract with a UT employee, you must notify the UT Systemprocurement director. The director will determine whether the University employee is full-time, part-time, or another status.

(Contractual) Limitation of actions or claims (a/k/a Statute of Limitations)

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Information:

Sometimes, suppliers will try to limit the amount of time that UT has for filing a legal action against them. Typically, suppliers try to limit it to one year. Suppliers like these types of clauses because it limits the supplier's exposure to risk, which in turn helps the supplier manage risk and reduce uncertainty, thus lowering costs.

Pursuant to Tenn. Code Ann. § 28-1-113, statutes of limitation, which limit the time in which a party has to file a legal action, do not apply to the university. These types of clauses are problematic because the clause limits the university's remedies. You must strike the clause entirely.

Example of **prohibited** language:

Any claim, suit, cause of action which either party has against the other party for breach of any provision of this agreement shall be brought no later than two (2) years from the date it becomes known or must have been known by the party making the claim.

Fix:

- Strike the limitation-of-action clause entirely.

Explanation to supplier:

Limiting the time within which the university may bring suit is an impermissible waiver of the State's sovereign immunity. Only the Tennessee legislature can determine how and when the State shall sue or be sued. Pursuant to Tenn. Code Ann. § 28-1-113, statutes of limitation, which limit the time in which a party has to file a legal action, do not apply to the university. Additionally, under Tenn. Code Ann. § 20-13-103, compromise of any state claim requires approval by the state attorney general, comptroller, and governor. Limiting statutes of limitation could be deemed to constitute such a compromise of a claim.

Contractual terms that can be changed by the supplier at any time after the contract is executed (the supplier seeks a unilateral right to change the terms and conditions)

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Information:

Some contracts, especially software agreements, contain language that references a document (usually something located on the supplier's website) other than the contract and incorporates the terms of that document into the contract. The danger is that the supplier could change the terms of the other document (and thereby change the terms of the contract) without UT's approval. This is a unilateral right to change the terms and conditions of an agreement. Most click-through/electronic/online terms and conditions allow the supplier to modify the terms and conditions at any time.

Explanation to supplier:

Because the university is an instrumentality of the State of Tennessee and has limited ability to agree to various types of contractual language, the university cannot agree to allow one party the right to make unilateral changes.

Fix:

- Best practice: delete unilateral
- Preferred fix: Attach the referenced documents as exhibits to the contract. State that the attached document(s) prevail over any online terms and conditions.
- Next best fix: Specify that certain stated provisions, such as governing law, cannot be changed except by mutual written agreement by authorized officials of both parties. See the Prevailing Terms Agreement.
- Fall-back: Include a statement that the supplier will provide the university written notice no less than 60 days before such a change would be binding on the university. Further, add language that the university may terminate the contract without penalty within a stated time period upon written notice to the supplier.

Company Change of Name

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Information:

A company changing its name might trigger the need for an amendment, depending on the circumstances.

The items below offers guidance on whether an amendment is needed:

Is the supplier changing FEIN numbers?

- Yes: Go to next question.
- No: An amendment is not needed. Work with AP to change the vendor-record information in SAP/iRIS.

Does the original contract (as amended) allow for assignment?

- Yes: An amendment is not needed. [Ensure that the new vendor is set-up with a vendor number in IRIS]
- No: An amendment is needed.

Name change only:

If the situation involves only a name change (i.e., the name change is not because of a merger or acquisition), then the introductory language must state something like, "This agreement is by and between The University of Tennessee and ABC Corporation (f/k/a XYZ Corporation)."

(Please note that f/k/a means "Formerly Known As.")

Merger/Acquisition: If the situation involves a name change that resulted from a merger or acquisition, then you must explain the nature of the change in the contracting parties in the recitals or in the body of the contract

Recitals example of "Doing Business As" name change only:

“Acme Vendor Limited has adopted a new doing business as (“dba”) designation of Great Vendor, LLC, effective March 1, 2011.”

Costs of Collection

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Information:

The university, as an instrumentality of the State, has sovereign immunity and is subject to only those claims allowed by the Tennessee General Assembly under the Tennessee Claims Commission Act. If a claim against the State does not fall under a category listed in Tenn. Code Ann. § 9-8-307, then the State is not subject to the claim. No category under that statute allows for collection costs. Additionally, under the Tennessee Claims Commission Act, the university cannot be liable for the costs of litigation other than court costs.

Explanation to supplier:

The university, as an instrumentality of the State, has sovereign immunity and is subject to only those claims allowed by the Tennessee General Assembly under the Tennessee Claims Commission Act. If a claim against the State does not fall under a category listed in Tenn. Code Ann. § 9-8-307, then the State is not subject to the claim. No category under that statute allows for collection costs.

Court Costs

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Information:

UT fiscal policy prohibits UT from agreeing to pay court costs. However, please note that the Tennessee Claims Commission Act allows the State to be liable for court costs [See TCA 9-8-307(d)].

Fix: Strike the court costs language entirely.

Explanation to supplier:

The university's contracts fiscal policy prohibits it from paying another party's court costs.

Ultimately: State law does, in fact, allow for the state and its agencies to pay for court costs. If a supplier will not agree to strike a court-costs provision, whether to agree to this clause is a business decision.

CPI – Consumer Price Index

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Information:

There are multiple CPIs.

In the United States, there is a federal government agency that issues consumer price index (“CPI”) data to measure inflation. Many suppliers tie annual price increases to CPI. The problem with referring to just CPI is that the U.S. Bureau of Labor Statistics (BLS) has multiple ways that it calculates CPI. So, a vague reference to just CPI allows the supplier to pick the CPI that reflects the highest amount. In actuality, the difference from one CPI to another usually only means a few dollars, but it’s important to control costs and also eliminate ambiguity from a contract.

You can find more information on the BLS’s website: <http://www.bls.gov/cpi/>

The Bureau of Labor Statistics has the following types of CPI:

- All Urban Consumers
- Urban Wage Earners and Clerical Workers
- All Urban Consumers (Chained CPI)
- Average Price Data

For sake of clarity, if a supplier includes language in a contract specifying the amount of future increases, the supplier must pick either a particular CPI (listed above) **or** a specific number.

An example of an unacceptable clause would be: “Any renewals will be subject to a 3% CPI increase.” That language:

- Makes no sense because CPI is never forecasted in advance and CPI does not mean “corporate cost of living” (the unacceptable language seeks to forecast CPI at 3%); and
- Is vague: First, there are multiple types of CPI. Further, what does 3% CPI increase mean? Does it mean, “3% increase over whatever CPI supplier chooses?” A supplier could reasonably argue that the language means 3% plus CPI.

What drafter of the unacceptable language probably intended was, "The cost for any renewal will increase 3% per year."

Credit Applications

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Information:

Generally, suppliers will request other businesses to fill out a business credit application to check on the creditworthiness of the business. In lieu of requiring advanced payment or cash on delivery (“COD”), the supplier offers “credit” to the businesses wishing to order from the supplier. The credit application allows the supplier to investigate the business’s credit history. Also, in the private sector, most suppliers will not extend “credit” to a business unless one of the officers of the business provides a personal guaranty of the payment.

The University of Tennessee is creditworthy and is backed by the full faith and credit of the State of Tennessee. As of May 2013, the university’s practice regarding credit applications changed to bring the university’s practices in line with several other major colleges and universities. The practice is now: to send suppliers the university’s list of credit references and a letter explaining that the university will not fill out or sign the supplier’s credit or direct bill application. The vast majority of suppliers (approximately 95% or more) will accept the university’s standard letter and list of references in lieu of the supplier’s form.

The current process for handling credit applications is more efficient, and it also serves as a “canary in the coalmine.” If the supplier does not accept the university’s letter and references form, that is often an early indication that the supplier might not (1) be easy to work with, and (2) be willing to negotiate with the university. In instances where the supplier will not accept the university’s letter and references, consider asking the department whether the department can find another supplier to perform the same service or provide the same goods at an acceptable price. In the rare event that the supplier will not accept the university’s letter and list of references, and the department cannot find an acceptable alternate supplier, then you will need to review the credit application as thoroughly as you review contracts. You must be sure to delete all prohibited provisions.

Items that must be deleted:

- References to individual Social Security Numbers, personal/home addresses; etc.;
- Personal guaranties;
- Personal credit checks;
- All other problematic clauses that would be deleted from contracts..

Credit Cards

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Information: See FI0311. When a third party will accept credit cards on behalf of the University, or have access to University p-card data, you must include language that the third party is required to comply with all appropriate credit card company security requirements and annually complete the PCI SAQ.

Data Security

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Information:

The University's standard data security language is below. You will use this language when the supplier will have access to sensitive data.

Also, when you deal with a cloud-based vendor, be sure to obtain the vendor's completed HECVAT (Higher Education Cloud Vendor Assessment Tool³). The HECVAT allows the supplier to provide the University with a general overview of the supplier's approach to data security. Please be sure to obtain the latest version of the HECVAT.

If the software or online resource will be available to students or the general public, staff, or faculty, (or all of the previously mentioned groups), be sure to obtain the vendor's completed VPAT 2 (if the vendor does not have a VPAT 2, ask the vendor for a VPAT). The VPAT (Voluntary Product Accessibility Template) is a document that evaluates how accessible a particular product is according to government standards.

Language to add to contract:

1. **Definitions:** For purposes of this Schedule 3, the following definitions apply:
"Brand Features" means the trade names, trademarks, service marks, logos, domain names, and other distinctive brand features of each party, respectively, as secured by such party from time to time.

"End User" means the individuals authorized by the University to access and use the Services.

The University uses the Federal Information Processing Standards Publication 199 to categorize systems and information. University classifies moderate and high information as follows:

- The potential impact is "moderate" if the loss of confidentiality and integrity could be expected to have a serious adverse effect on organizational operations,

³ <https://library.educause.edu/resources/2016/10/higher-education-cloud-vendor-assessment-tool>

organizational assets, or individuals. For example, the loss of confidentiality and integrity might: (i) cause a significant degradation in mission capability to an extent and duration that the organization is able to perform its primary functions, but the effectiveness of the functions is significantly reduced; (ii) result in significant damage to organizational assets; (iii) result in significant financial loss; or (iv) result in significant harm to individuals that does not involve loss of life or serious life threatening injuries.

- The potential impact is "high" if the loss of confidentiality and integrity could be expected to have a severe or catastrophic adverse effect on organizational operations, organizational assets, or individuals. For example, the loss of confidentiality and integrity might: (i) cause a severe degradation in or loss of mission capability to an extent and duration that the organization is not able to perform one or more of its primary functions; (ii) result in major damage to organizational assets; (iii) result in major financial loss; or (iv) result in severe or catastrophic harm to individuals involving loss of life or serious life threatening injuries.

The system might store, process, and transmit university information that is classified as moderate, including Personal Information. Personal Information is defined by the state in Tennessee Code Annotated § 47-18-2107 as the following:

(4) "Personal information":

- (A)** Means an individual's first name or first initial and last name, in combination with any one (1) or more of the following data elements:
- (i)** Social security number;
 - (ii)** Driver license number; or
 - (iii)** Account, credit card, or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; and
- (B)** Does not include information that is lawfully made available to the general public from federal, state, or local government records or information that has been redacted, or otherwise made unusable;

"Securely Destroy" means taking actions that render data written on media unrecoverable by both ordinary and extraordinary means.

"Security Breach" means a security-relevant event in which the security of a system or procedure used to create, obtain, transmit, maintain, use, process,

store or dispose of data is breached, and in which University Data is exposed to unauthorized disclosure, access, alteration, or use.

2. **Rights and License in and to University Data**: All rights including, all intellectual property rights, in and to University Data remain University's exclusive property, and University hereby grants Supplier a limited, nonexclusive license to use these data as provided in this agreement solely for the purpose of performing its obligations. This agreement does not give a party any rights, implied or otherwise, to the other's data, content, or intellectual property, except as expressly stated in the agreement. If Supplier will use third parties to fulfill its obligations under this agreement, Supplier must first obtain the University's permission before transferring University data to any third parties.
3. **Intellectual Property Rights and Disclosure**:
 - a. Unless University agrees otherwise in writing, Supplier will not disclose to any third party any materials that Supplier creates for University under this agreement.
 - b. Supplier states that University will own all rights, title and interest in any and all intellectual property rights the University creates in the performance or otherwise arising from this agreement and will have full ownership and beneficial use it, free and clear of claims of any nature by any third party including, without limitation, copyright or patent infringement claims. Supplier hereby assigns all rights, title, and interest in any and all intellectual property created in the performance or otherwise arising from this agreement, and will execute any future assignments or other documents needed for the University to document, register, or otherwise perfect such rights.
4. **Data Security**: Supplier shall protect University's information in compliance with the controls defined in (select one):
 - ☐ Center for Internet Security;
 - ☐ ISO 27001;
 - ☐ NIST SP 800-53;
 - ☐ NIST Cybersecurity Framework.
5. **Data Privacy**:
 - a. Supplier will use University Data only for the purpose of fulfilling its duties under this agreement and will not share such data with or disclose it to any

third party without the prior written consent of University, except as required by this agreement or as otherwise required by law.

- b. Supplier will not store University Data on servers located outside of the United States, unless the University agrees in writing that Supplier may store University Data outside of the United States.
- c. Supplier will provide access to University Data only to its employees and subcontractors who need to access the data to fulfill Supplier's obligations under this agreement. Supplier shall ensure that employees who perform work under this agreement have read, understood, and received appropriate instruction as to how to comply with the data protection provisions of this agreement.

6. **Background Checks:**

- a. Supplier shall ensure that its employees have undergone appropriate background screening and possess all needed qualifications to comply with the terms of this agreement including but not limited to all terms relating to data and intellectual property protection.
- b. Supplier shall perform the following background checks on all employees who have potential to access University Data in accordance with the Fair Credit Reporting Act: Social Security Number trace; 7-year felony and misdemeanor criminal records check of federal, state, or local records (as applicable) for job related crimes; Office of Foreign Assets Control List (OFAC) check; Bureau of Industry and Security List (BIS) check; and Office of Defense Trade Controls Debarred Persons List (DDTC).

7. **Data Authenticity and Integrity:** Supplier will take reasonable measures, including audit trails, to protect the confidentiality, integrity, and availability of the University's Data against deterioration or degradation of data quality and authenticity. Supplier shall ensure that University Data is preserved, maintained, and accessible throughout their lifecycle, including converting and migrating electronic data as often as necessary so that information is not lost due to hardware, software, or media obsolescence or deterioration.

8. **Security Breach:**

- a. **Response:** Immediately upon becoming aware of a Security Breach of Moderate or High information, or of circumstances that could have resulted in unauthorized access to or disclosure or use of University Data, Supplier will notify University, fully investigate the incident. Supplier will cooperate fully with the University's investigation of and response to the incident, including

providing University or its agents, or both, with access (physical and logical) to Supplier's related documents and facilities. Except as otherwise required by law, Supplier will not provide notice of the incident directly to individuals whose Personal Information was involved, regulatory agencies, or other entities, without University's prior written permission.

- b. Liability: In addition to any other remedies available to University under law or equity, Supplier will reimburse University in full for all costs incurred by the University in investigation and remediation of such Security Breach, including but not limited to providing notification to individuals or entities whose Personal Information was compromised and to regulatory agencies or other entities as required by law or contract; providing one year's credit monitoring to the affected individuals if the Personal Information exposed during the breach could be used to commit financial identity theft; and the payment of legal fees, audit costs, fines, and other fees imposed by regulatory agencies or contracting partners as a result of the Security Breach.

9. **Response to Legal Orders, Demands, or Requests for Data:**

- a. Except as otherwise expressly prohibited by law, Supplier will:
 - i. immediately notify University of any subpoenas, warrants, or other legal orders, demands or requests received by Supplier seeking University Data;
 - ii. consult with University regarding its response;
 - iii. cooperate with University's reasonable requests in connection with efforts by University to intervene and quash or modify the legal order, demand or request; and
 - iv. upon University's request, provide the University with a copy of its response.
- b. If University receives a subpoena, warrant, or other legal order, demand (including request pursuant to the Tennessee Public Records Act) or request seeking University Data maintained by Supplier, University will promptly provide a copy to Supplier. Supplier will promptly supply the University with copies of data required for University to respond, and will cooperate with University's reasonable requests in connection with its response.

10. **Data Transfer Upon Termination or Expiration:**

- a. Upon termination or expiration of this agreement, Supplier will ensure that all University Data are securely returned or destroyed as directed by University in its sole discretion. Transfer to University or a third party designated by University shall occur within a reasonable period of time, and without significant interruption in service. Supplier shall ensure that such transfer/migration uses facilities and methods that are compatible with the relevant systems of University or its transferee, and to the extent technologically feasible, that University will have reasonable access to

University Data during the transition. In the event that University requests destruction of its data, Supplier agrees to Securely Destroy all data in its possession and in the possession of any subcontractors or agents to which the Supplier might have transferred University data. Supplier agrees to provide documentation of data destruction to University.

b. Fees:

- i. Destruction: Supplier will not charge University any fees for Securely Destroying University data.
- ii. Return: Supplier will not charge University any fees for returning University data.

- c. Supplier will notify the University of impending cessation of its business and any contingency plans. This includes immediate transfer of any previously escrowed assets and data and providing the University access to Supplier's facilities to remove and destroy University-owned assets and data. Supplier shall implement its exit plan and take all necessary actions to ensure a smooth transition of service with minimal disruption to University.

11. Audits:

- a. If Supplier must create, obtain, transmit, use, maintain, process, or dispose of the University Data which has been identified to Supplier as having the potential to affect the accuracy of University's financial statements, Supplier will at its expense conduct or have conducted at least annually a:
 - i. American Institute of CPAs Service Organization Controls (SOC) Type II audit, or other security audit with audit objectives deemed sufficient by University, which attests Supplier's security policies, procedures and controls;
 - ii. Vulnerability scan, performed by an industry standard scanner, of Supplier's electronic systems and facilities that are used in any way to deliver electronic services under this agreement; and
 - iii. Formal penetration test, performed using an industry standard process and qualified personnel, of Supplier's electronic systems and facilities that are used in any way to deliver electronic services under this agreement.
- b. University will review Supplier's results of the above, and determine whether Supplier complies with industry standards.
- c. Additionally, Supplier will provide University upon request the results of the above audits, scans and tests, and will promptly modify its security measures as needed based on those results in order to meet its obligations under this agreement. University may require, at University expense, Supplier to perform additional audits and tests, the results of which will be provided promptly to University.

12. Technology Professional Liability (Errors & Omissions)/Cyber Liability Insurance:

Supplier shall maintain technology professional liability (errors & omissions)/cyber liability insurance appropriate to Supplier's profession in an amount not less than \$10,000,000 per occurrence or claim, and \$10,000,000 annual aggregate, covering all acts, errors, omissions, negligence, infringement of intellectual property (except patent and trade secret); network security and privacy risks, including but not limited to unauthorized access, failure of security, information theft, damage to destruction of or alteration of electronic information, breach of privacy perils, wrongful disclosure and release of private information, collection, or other negligence in the handling of confidential information, and including coverage for related regulatory fines, defenses, and penalties. Such coverage must include data breach response expenses, in an amount not less than \$10,000,000 and payable whether incurred by University or Supplier, including but not limited to consumer notification, whether or not required by law, computer forensic investigations, public relations and crisis management firm fees, credit file or identity monitoring or remediation services and expenses in the performance of services for University or on behalf of University.

Debarment

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Information:

Multiple government agencies might “debar” a supplier. Debarment is when a government agency excludes a supplier from being able to contract with the government agency.

For purposes of this manual, we will focus on two entities:

- GSA’s SAM⁴: <https://www.sam.gov/SAM/>
- State of Tennessee Central Procurement Office (CPO):
<https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/local-units-of-governments-/procurement-information.html>

Debarment is distinct from the Iran Divestment Act, and the various federal government listings related to Export Control.

When you are reviewing a contract, please be sure to check the above websites to ensure that the supplier is not listed on SAM or the CPO websites. If you find that the supplier has been debarred, please contact the Office of General Counsel immediately and do not proceed with the contract until you obtain advice from the Office of General Counsel.

Language:

Debarment: Supplier hereby attests that the following are true statements:

- Supplier is not currently debarred by the U.S. federal government.
- Supplier is not currently suspended by the U.S. federal government.
- Supplier is not currently named as an “excluded” supplier by the U.S. federal government.

⁴ GSA is the federal government’s “General Services Administration,” and SAM is the “System for Award Management.”

Disclaimer of Warranties

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Information:

When you review contracts, you will likely encounter disclaimers-of-warranty clauses. Generally, disclaimers of warranty are acceptable. The purpose of this section is to provide you with general background information.

Express (i.e. explicit) warranties are the typically warranties that you probably think of: a seller's guarantee to repair or replace an item under certain circumstances within a stated timeframe.

In most jurisdictions, states have enacted laws that impose implied warranties on sellers. Because these are implied, these warranties exist whether or not the seller offers these warranties. The traditional implied warranties are:

- Merchantability: a guarantee that the goods are fit for ordinary purposes. For example, that food is non-toxic.
- Fitness for a particular purpose: a guarantee that the goods are going to function as the buyer intends. For example, that a specialized helicopter will fly under dangerous weather conditions.

Suppliers often include clauses disclaiming warranties to help reduce their exposure to risks and costs.

Donations to the university

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Information:

If UT is paying a supplier for a good or service, the supplier cannot ask UT to pay or retain a portion of the supplier's fee as a donation to the university. In such a case, we need to delete the language and state that UT will pay the supplier the specified amount. Explain to the supplier that they are free to turn around and write us a check for a donation, but we can't write the check to ourselves.

Note: **Example of unacceptable clause:**

Vendor's speaking engagement fee is \$10,000.00. UT will pay supplier \$2,500.00 within 30 days of receipt of invoice and UT will donate the remaining \$7,500.00 for a student scholarship.

DUNS Number

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Information:

The DUNS number (issued by Dun and Bradstreet) is simply a number assigned to a business entity to facilitate/populate a data base. When one applies for DUNS number, the application process includes providing financial data, fiscal and physical data (address, number of employees, budget, etc). The DUNS number is typically requested whenever the University does any business with federal folks. Generally, the DUNS number has nothing to do with credit rating. There might be credit rating agencies that link an entity's credit score to the company's DUNS number.

The University's official DUNS number is 003387891.

Early Completion Bonus (Receivable to university – Sponsored Programs)

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Information:

In some rare cases, a sponsor might offer the university a bonus for early completion of a project. Any proposal for UT to receive an early completion bonus must be reviewed by the Controller and the Office of General Counsel.

Educational Assistance Contracts

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Information: If a University campus will provide tuition assistance to an employee, and this is handled via contract, you must provide Payroll with a copy of the contract.

Electronic Terms

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Introduction:

Generally, when assessing software license agreements, you must make some initial determinations:

1. Is the software hosted on the university's servers or on the supplier's servers?
2. How quickly will the software be operational?
3. How important is this software? Is it an Enterprise Resource Planning software, for example?
4. What types of data will be in the software?
 - a. Healthcare?
 - b. Financial?
 - c. Student?
5. When the contract expires, or if either party terminates the contract, what can the university do? Download its data?
6. Who may use the software?
7. How can the supplier use the university's data?

Information:

Many companies have click-through, shrink-wrap, or other online terms and conditions. Many times, these types of agreements are referred to as "EULAs," or "End User License agreements."

Generally speaking, there are two broad types of electronic terms and conditions:

1. Browse-wrap (also, browserwrap or browse-wrap license): In a browse-wrap agreement, the terms and conditions of use for a website or other downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, where the user must manifest assent to the terms and conditions by clicking on an "I agree" box, a browse-wrap agreement does not require this type of express manifestation of assent. Rather, a web-site user purportedly gives his or her assent by simply using the product — such as by entering the website or downloading software.

2. Clickwrap (also, click-wrap, click-through, or click-to-accept): Users are prompted to actively indicate their acceptance of terms and conditions (for example, by checking a box, clicking “I agree,” etc.).

Click-wrap agreements are generally considered legally binding in the U.S. Whether browse-wrap agreements are enforceable is controversial, but let’s assume for our purposes that they are legally binding. Even though click-through, shrink-wrap, or other online terms and conditions are not signed like a traditional contract, they are legally binding.

Note that these types of agreements have lots of different names (a non-exclusive list is below):

- Browse-wrap
- Click-to-accept
- Click-wrap
- Terms of Service
- Terms of Use
- Wrap agreements

These types of agreements are problematic because the online or shrink wrap terms and conditions could contradict any agreement between the university and a supplier. Another problematic issue is that, almost always, the person allegedly agreeing on behalf of the university is a departmental staff member and not someone who has signature authority. Also, terms and conditions that are electronic can be changed at any time (i.e., the other party has a unilateral right to modify the terms and conditions).

There are three general types of terms and conditions:

- Click-through, clickwrap, click-wrap, or click-to-accept: The end user must signify their acceptance of the license terms in some manner, usually by clicking “I Agree.”
- Shrink-wrap: The terms and conditions are included with, and often affixed to, the item that the user is using, such as a seal over a product that says: “By using this product, you agree to the terms and conditions listed on Vendor’s website, located at...”
- Browserwrap, Browsewrap, Browse-wrap, TOS, Terms of Service, Terms of use: Most websites have only a set of terms and conditions located on the site, and use of the website constitutes agreement to the terms and conditions. Often, the link will be labeled: “Legal,” “Legal Notice,” or “Terms of Use.”

Practically every supplier has a website, and most websites contain electronic terms and conditions in some format. The language below must be inserted into every contract where UT is acquiring a good or service from a company.

Model language:

This agreement constitutes the entire understanding between the parties with respect to the subject matter of this agreement and supersedes all other agreements, wither written or oral, between the parties. In the event that Supplier's goods or services contain electronic terms and conditions, Supplier states that such terms and conditions do not apply to the University.

Explanation to supplier:

Online terms of use, whether accepted via mere use or via "click-to-accept" or "click-through" present several problematic issues for the university. The primary issue is signature authority. The Tennessee Claims Commission Act, TCA 9-8-301(a)(1)(L), states that (emphasis added):

Actions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract; provided, that the group insurance agreements created pursuant to §§ 8-27-201 and 8-27-302 shall be considered contracts for purposes of this subsection (a) in order for the commission to determine insurance claims which have been previously rejected by the state insurance committee or the local education insurance committee

Only people on this website have actual authority to bind the university:

<http://treasurer.tennessee.edu/contracts/contractsignature.html>

No one who would use this software has authority to bind the university. There are other issues, such as additional or conflicting terms that appear in the Terms of Use. Virtually all such agreements can be unilaterally modified by the supplier, and that raises even more problematic issues because the university's contract authority is limited by State law.

Fix:

Option 1 (best case):

The best case is when the supplier agrees that the click-through agreement does not apply to UT. If the supplier will agree to this, then the following language must be used.

Model language:

This agreement constitutes the entire understanding between the parties with respect to the subject matter of this agreement and supersedes all other agreements, wither written or oral, between the parties. In the event that Supplier's goods or services contain electronic terms and conditions, Supplier states that such terms and conditions do not apply to the University.

Option 2:

However, in many cases, the supplier will not agree to remove the click-through language. In such case, try to get the supplier to agree that the click-through language does not apply to the university, but only to the end users as individuals.

Model language:

The parties agree that the click-through and other online terms and conditions apply to end users in their individual capacity (but do not apply to the university).

Option 3:

If the supplier objects to both options 1 and 2, the next best option would be to revise the click-through language such that it is acceptable to the university.

Option 4:

If the supplier objects to options 1-3, then the last option would be to revise specific provisions of the click-through agreement and state that those key provisions can only be modified in a written amendment that is signed by authorized officials of both parties. Key provisions would be governing law, the university's liability, etc. The following is an example of an addendum that would cover the most important provisions to the university:

Prevailing Terms Addendum

This prevailing terms agreement is dated _____, 20____, and is between The University of Tennessee, an instrumentality of the State of Tennessee ("University"), and _____, a/an _____ ("Supplier").

Background:

- A. The University utilizes Supplier's website to conduct business with Supplier.
- B. Supplier's website contains terms and conditions ("terms of use").
- C. The University, as an instrumentality of the State of Tennessee, cannot agree to certain terms and conditions.

Agreement:

The parties agree as follows:

- 1. **Precedence**: The parties intend for the terms of this agreement to prevail over any conflicting terms in **Supplier's** terms of use. Supplier states that any conflicting terms in Supplier's terms of use are deleted.
- 2. **University's Indemnification of Supplier**: The **University** will not indemnify, defend, or hold harmless **Supplier**. **Supplier** states that there are no circumstances under which **University** would indemnify, defend, or hold harmless **Supplier**.
- 3. **Governing Law**: The laws of the state of Tennessee, without giving effect to its principles of conflicts of law, govern this agreement. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions between the **University** and **Supplier**.
- 4. **Venue**: In the event that **Supplier** files a lawsuit against **University**, **Supplier** will only file a lawsuit in the Tennessee Claims Commission.
- 5. **Automatic Renewal**: **Supplier** acknowledges that the **University** does not agree to a term that automatically renews if the automatic renewal would require the **University** to incur any costs.
- 6. **Fees and Costs**: The **University** will not pay **Supplier's** attorneys' fees, court costs, costs of collection, or costs of an audit.

7. **Third-Party Beneficiaries**: No person or entity, other than the **University** and **Supplier** and their successors and permitted assigns has any rights, remedies, claims, benefits, or powers under this agreement, and this agreement will not be construed or interpreted to confer any rights, remedies, claims, benefits, or powers upon any third party. There are no third-party beneficiaries of this agreement.
8. **Insurance**: Except for shipping/transit insurance, the **University** will not buy insurance or name the **Supplier** as an additional insured.
9. **Confidentiality**: The **University's** obligation to keep information confidential will not apply if disclosure is required by state or federal law or regulations, including without limitation, the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503. The existence of any agreement between **Supplier** and **University** is not confidential.
10. **Sovereign Immunity**: Any provisions stating that the **University** waives sovereign immunity do not apply to the **University**.
11. **Exclusivity**: Any agreement between **University** and **Supplier** is not exclusive.
12. **Non-Solicitation**: Any clause prohibiting the **University** from hiring **Supplier's** employees, officers, contractors, or suppliers do not apply to the **University**.
13. **Counterparts**: If the parties sign this agreement in several counterparts, each will be deemed an original but all counterparts together will constitute one instrument.
14. **Apparent Authority**: Any provision that states that an end user has authority to bind the University does not apply to the University.
15. **Modification; Waiver; Authorized Signature**: No amendment of this agreement will be effective unless it is in writing and signed by authorized officials the parties. No waiver of satisfaction of a condition or failure to comply with an obligation under this agreement will be effective unless it is in writing and signed by the party granting the waiver, and no such waiver will constitute a waiver of satisfaction of any other condition or failure to comply with any other obligation. To be valid, any document signed by the University in according with this section must be signed by an official listed on this website:
<http://treasurer.tennessee.edu/contracts/contractsignature.html>.
16. **Entire Agreement**: This agreement constitutes the entire understanding between the parties with respect to the subject matter of this agreement and supersedes all other agreements, whether written or oral, between the parties.

The parties are signing this agreement on the date stated in the introductory clause:

The University of Tennessee

Supplier

Signature: _____

Signature: _____

Name: _____

Name: _____

Title: _____

Title: _____

Employee as a party to an agreement

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See also [Principal Investigators](#).

Information:

Sometimes suppliers will want a UT employee to sign as a party to an agreement in addition to the university being a party to the agreement. This type of clause is especially common in confidentiality agreements.

Fix:

Delete the clause that requires the UT employee to sign as a party to the contract or as a party to a separate contract.

Note: **Example** of **unacceptable** clause (emphasis added):

Receiving Party agrees to protect the Confidential Information by using the same degree of care as Receiving Party uses to protect its own confidential or proprietary information (but not less than a reasonable degree of care): (i) to prevent the unauthorized use, dissemination or publication of the Confidential Information, (ii) not to divulge Confidential Information to any third party, (iii) not to make any use of such Confidential Information except as necessary to perform its obligations or exercise its rights under this Subscription agreement (the "Subscription Purpose"), (iv) not to copy except as reasonably required in direct support of the Subscription Purpose, and any copies made will include appropriate marking identifying same as constituting or containing Confidential Information of the Disclosing Party; and (v) not to reverse engineer any such Confidential Information. Receiving Party shall limit the use of and access to the Disclosing Party's Confidential Information to Receiving Party's employees and the employees of Receiving Party's respective parent, subsidiaries and affiliated entities or authorized representatives who have: (i) a need to know and have been notified that such information is Confidential Information to be used solely for the Subscription Purpose; and (ii) entered into binding confidentiality obligations no less protective of Disclosing Party than those contained in this Subscription agreement. Receiving Party may disclose Confidential Information pursuant to any statutory or regulatory authority or court order, provided Disclosing Party is given prompt prior written notice of such requirement and the scope of such disclosure is limited to the extent possible. The obligations of Receiving Party regarding use and disclosure of the Confidential Information shall survive any termination or

expiration of this Subscription agreement for a period of three (3) years after the Subscription agreement expiration date or termination date.

Explanation to supplier:

The university prohibits its employees from being a separate party to contracts. Further, only authorized officials have authority to sign on behalf of the university and all other individuals are prohibited from signing contracts.

Employees required to sign related paperwork

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Information:

Sometimes, the other party will request that a UT employee or student sign some paperwork while on the other party's premises, or before being allowed to participate in the activity for which the University and other party executed a contract.

This arises often in four contexts:

- Non-disclosure agreements: Often, when a College of Business, IPS, or other UT department provides consulting services for a private-sector business, the business will require that each individual sign a confidentiality agreement (in addition to the confidentiality agreement between UT and the business). Requiring individuals to sign their own NDA provides the business with comprehensive protection because, in the event that the UT employee leaves UT before the confidentiality agreement expires, the former employee is no longer under any confidentiality obligations.
- Liability waivers: The University does not have the legal capacity to waive the individual rights of its employees or students against other parties, in the event that the employee or student is injured while participating in activities under a contract. Requiring individuals to sign their own liability waivers is a good practice for the other party.
- Policy acknowledgement: The other party might have a policy, such as gift policy, conflict of interest policy, etc., and the other party wants to document the individual's agreement to that policy.
- Film/photography/video waivers: Similar to liability waivers, the University does not have the ability to sign film/photograph/video waivers on behalf of employees or students.

With the exception of photo/video waivers, employees cannot sign documents that are related to a contract that the University signs. Please note that, legally, students are not employees of the University and may sign anything they want to sign (provided that the student does not attempt to bind the University). If an employee signs a document in their individual capacity, the employee runs the risk of incurring individual liability.

Equitable Remedies/Injunction/Injunctive Relief/Specific Performance

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Information:

Classically, under the common law systems, “there were two distinct systems of courts; the courts of law which had the power to award monetary damages and the courts of equity of chancery which were presided over by a chancellor and had the power to grant equitable remedies.”⁵ “In the early American legal system, chancery courts were founded to issue equitable remedies, but those courts have been abolished in all but a few jurisdictions and, today, American courts of law can issue both legal and equitable remedies.”⁶

Often, a contract will provide that the supplier will have a right to seek equitable remedies (or remedies in equity) in the event of a lawsuit with the university. The State is not subject to equitable remedies, including injunctive relief. The phrase “equitable remedies” or “remedies in equity” must be deleted. The real issue here is that UT cannot agree by contract to give another party the right to seek an injunction against it.

An element to prove that equitable remedies are needed is “irreparable harm,” and “inadequate monetary relief.” UT cannot agree by contract that a particular breach would cause irreparable harm or inadequate monetary relief to the other party because UT cannot agree that the necessary element to get an injunction or other equitable relief has been met.

Fix:

- Preferred fix: Delete the unacceptable language entirely.
- Preferred fall back: Delete the unacceptable language and replace it with the following: “This **agreement** does not limit, and **[supplier]** is entitled to pursue, all available remedies to the fullest extent permitted by Tennessee law.”
- Last resort: Delete the unacceptable language and replace it with the following: “**[Vendor]** may pursue any available remedies at law or in equity to the extent permitted by Tennessee law.”

⁵ <http://www.west.net/~smith/equity.htm>

⁶ <http://smallbusiness.chron.com/differences-between-legal-remedies-equitable-remedies-contract-law-66084.html>

Explanation to supplier:

The Tennessee Claims Commission Act. Tenn. Code Ann. § 9-8-307 allows only monetary claims against the State. The State has sovereign immunity from claims for injunctive relief and equitable remedies and, therefore, cannot agree to contract provisions that would provide such remedies to another party.

Exclusivity

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Information:

Exclusivity clauses restrict the university to doing business with just one supplier for particular goods or services. **Exclusivity agreements are especially risky because the university is such a large entity. Generally, the university cannot agree to exclusivity clauses.**

The UT System Office of Procurement Services manages the exclusive-contracts list. FI0420 makes all contracts with any exclusivity provisions non-delegated. Please be sure to send contracts with exclusivity clauses through the non-delegated review process.

However, such clauses may be acceptable with large, receivable items that are bid (such as Athletic sponsorship agreements). In very rare cases, such clauses may be acceptable in payable contracts, usually only allowed when the contract was bid (e.g., food services or package delivery).

If a contract contains an exclusivity obligation, you must make the obligation as narrow as possible, and as clear and specific as possible. In particular, if the supplier and the university agree to an exclusivity arrangement for UTHSC, you must make it clear that the exclusivity arrangement only applies to the UTHSC and not other areas of the university. This is especially important because the university is one legal entity (the campuses do not have an independent existence).

Exclusivity clauses make a contract non-delegated, and the director of the UTSA Procurement Services is responsible for maintaining a database of these agreements.

Watch out for words like “primary” in contracts. Some suppliers might try to use this language as a sneaky way to create an exclusivity arrangement. The word “primary” does not convey exclusivity, but you must still delete such language because we don’t want to fight about the language in the future with the supplier.

The UT System Procurement Office maintains a list of exclusive contracts.
--

Explanation to supplier:

The university, as a public entity, is generally prohibited under its fiscal policy and Tennessee law from entering into exclusive contracts.

Fix:

- Delete the unacceptable language entirely.
- Fall-back: limit the exclusivity to a specific department on a specific campus.

Export Control

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U.S. export controls are federal regulations that restrict the shipment, release, or other transfer of certain controlled hardware, software, technology, and services from the United States to foreign countries, as well as re-exports of such U.S.-controlled items from locations outside the United States to third country destinations. The two primary sets of U.S. regulations that govern exports are the International Traffic in Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”).

In general, it is acceptable for a contract to require all parties to agree to comply with U.S. export control laws and regulations.

However, you should seek guidance from the campus export control officer and/or Office of General Counsel in any of the following circumstances:

- If a bid or contract is directly with, or involves a purchase from, an individual, entity, or government from a restricted country
- If a bid or contract includes detailed references to export control laws (such as ITAR or EAR), other than general statements that the parties will comply with applicable export control laws or that the University will not use purchased items for a prohibited use
- If a bid or contract restricts the University’s right to publish results
- If a bid or contract restricts who may work on a University project, such as limiting involvement only to U.S. citizens
- If the University is attempting to procure or transfer export controlled technology or software source code
- In general, if a contract includes relates primarily to University research or to the transfer of very technical items or information, consider whether the campus research office should be involved in reviewing and/or processing the contract

Films Featuring University Property (Real Property and Intellectual Property)

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Information:

Often, companies (such as sports television companies or other media companies) will want to shoot video, and to a lesser extent still photos, either (1) on university-owned property or (2) off university-owned property, but use university intellectual property in the film or photos.

Generally speaking, the other party must seek a property release from the university. Note that the university's standard property release may not need to be included in a contract provided to the university by the producer.

Note that the producer is responsible for obtaining releases from each university employee or student that the producer films or photographs.

Language to include in contract:

Names, Logos, and Trademarks. The **Producer** acknowledges and agrees that the **university** is the exclusive owner of its name, logos, and trademarks and that the **Producer** does not have the right to use the **university** names, logos, or trademarks except in association with the **project** and related materials, as provided for in this **agreement**. The **Producer** will use the appropriate trademark and copyright notices as necessary.

Usage. Notwithstanding anything herein to the contrary, **Producer** agrees that it shall use the footage made in connection with the **project** only in and for the **project** and related materials, as defined herein. **Producer** agrees that it shall not use such footage in or for any other purpose without the prior written consent of an authorized representative of the **university**.

Compliance with Law: Compliance with Laws. Producer shall comply with all applicable Federal and State laws and regulations in the performance of this agreement.

Non-Disparagement. The **Producer** agrees not to portray the **university**, its trustees, officers, employees, students, or agents in a disparaging or defamatory manner in the **project**, and that the footage recorded by the **Producer** will not be used in such a manner as to cause embarrassment to **The University of Tennessee**.

In the event that the producer/licensee does not agree to the university's preferred Non-Disparagement language, here is language that the university can use:

The **Producer** agrees not to portray the **university**, its trustees, officers, employees, students, or agents in a manner that constitutes actionable defamation.

Finance-Related / Financial Agreements

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Agreements related to payment systems, credit card processing, banking, ATMs, etc. must be sent to the Treasurer's Office (Tim Mapes) for review.

Fiscal Review Committee

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Information:

The state's Fiscal Review Committee (FRC) is a statutorily created joint sub-committee of the Tennessee General Assembly. The FRC was created by T.C.A. § 3-7-101, et. sec. The FRC performs many vital functions for the General Assembly. One of those functions is the Contract Services Subcommittee. For our purposes, we will focus on T.C.A. § 3-7-112 and the FRC's regulations.

Under T.C.A. § 3-7-112, the FRC has the power to review all contracts from all state agencies (regardless of dollar value) (See, T.C.A. § 3-7-112(d)). The FRC does not review contracts between State of Tennessee entities, T.C.A. § 3-7-112(c)(4).

The UTSA Procurement Services office provides various monthly, quarterly, and annual reports to the FRC.

The Fiscal Review Committee is a joint committee of the Tennessee General Assembly, consisting of members from both the House and Senate. The Fiscal Review Committee performs several important functions, but for purposes of this Manual, the discussion below will focus on the Committee's contract review. The Fiscal Review Committee's rules are in addition to the university's rules governing contracts. See [FI0420](#) for more details.

The Fiscal Review Committee's website is:

<http://www.capitol.tn.gov/joint/committees/fiscal-review/>

The terms and conditions of contracts that are presented to the Fiscal Review Committee are posted online on the Committee's website. Consider this issue carefully if the supplier's contract has a confidentiality clause in it—the university's preference is for the clause to be deleted entirely. Most likely, the supplier will push back, so be sure to make it clear that the contract itself and any financial terms are not confidential.

It is extremely important to comply with the Fiscal Review Committee's rules. The UT System Contract Office acts as the university's liaison with the Fiscal Review Committee. Note that the UT System Contract Office does not present contracts to the Fiscal Review Committee, unless that contract is for the UT System (i.e. on

an E-17 cost center). If you have any questions, please feel free to contact the UT System Contract Office.

Under T.C.A. § 4-56-107, the Committee must review all contracts that meet all of the following elements:

1. Non-competitive (i.e. not bid through Purchasing);
2. Length/term of contract is longer than one year; and
3. Cumulative dollar value is equal to or more than \$250,000.00.

The Fiscal Review Committee must also be presented with any amendments to a contract meeting the following two criteria: \$250,000.00 or more and longer than one year. This means that a contract that was originally bid can fall into Fiscal Review if the contract is amended.

The Fiscal Review Committee wants to see all amendments. For sake of clarity, the Committee reviews amendments that:

- Increase or decrease the maximum financial obligation;
- Extend or shorten the original term of the contract;
- Changes the entity or name of the entity with which the state is contracting; or
- Otherwise changes an original contract or amended contract in a substantive manner.

Any contract or amendment requiring Fiscal Review must be presented to the Committee no less than 60 days in advance of the start date of the contract or amendment. Accordingly, contracts that must be presented to the Fiscal Review Committee must go through the normal contract review process, and they must be presented to the UT System Contract Office no less than 90 days in advance of the start date (which allows for 30 days to work on the Fiscal Review Committee paperwork and contract terms and conditions, if needed).

As of the date of this Manual, the Fiscal Review Committee has granted the university the following exceptions (please read each item very, very carefully):

- Real estate contracts (leases and construction/design/demolition) that are approved by the State Building Commission;
- Utilities;
- Research contracts;
- Revenue-producing agreements;
- Maintenance agreements;
- Library subscription agreements, database access agreements, and other electronic publications;
- Athletic Conference membership dues; and
- Enterprise Resource Planning System amendments (only amendments).

There are no other exceptions.

One common question is: Does the funding source matter? No. Fiscal Review ignores the funding source. You cannot use gift funds or third-party funds to avoid Fiscal Review.

FERPA (Family Education Rights and Privacy Act of 1974)

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Information:

The university is subject to the Family Education Rights and Privacy Act of 1974, which restricts the university's ability to release certain information about students. Whenever a supplier will have access to student data, please include the following language in the contract:

Model language:

The university is subject to the Family Education Rights and Privacy Act of 1974 (20 U.S.C. 1232g) and related regulations of the U.S. Department of Education (34 C.F.R. Part 99) regarding access to and privacy of certain student records. **The Contractor** is responsible for complying with these requirements to the same extent as **university**. The **Contractor** will indemnify and hold the **university**, its trustees, officers, and employees harmless for any violation of FERPA by the **Contractor**.

Force Majeure (“Acts of God”)

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Information:

“Force majeure” means “greater force,” and such clauses are often referred to as “acts of God” clauses. A force majeure clause is a clause that excuses non-performance due to an act that prevents performance, provided that the act was beyond the party’s control. Although no fiscal policy or law requires that university contracts contain a force majeure clause, you might consider adding such clauses to hotel contracts, catering contracts, study abroad contracts, etc.

Model language:

Neither party will be liable for failure or delay in the performance of any duties under this **contract** when such delay or failure is due to causes beyond the party’s control that could not have been avoided by the exercise of due care, including, but not limited to, acts of God; natural disasters; riots; war; epidemics; terrorist activities; government restrictions; failure of suppliers, subcontractors, or carriers; or the like. The impacted party shall give the other party notice of the failure or delay as soon as possible.

Model language (for Study Abroad contracts):

Neither party will be liable for failure or delay in the performance of any duties under this **agreement** when such delay or failure is due to causes beyond the party’s control that could not have been avoided by the exercise of due care, including, but not limited to, acts of God; natural disasters; riots; war; epidemics; terrorist activities; government restrictions; failure of suppliers, subcontractors, or carriers; or the like. The impacted party shall give the other party notice of the failure or delay as soon as possible. Further, without limiting the foregoing, **The University of Tennessee** may cancel without penalty, and with full refund of all deposits made, if the World Health Organization or any U.S. federal government agency, including without limitation the Centers for Disease Control and the U.S. Department of State, issue a travel notice for **Japan**.

Dual or Multi-Language Contracts / Foreign Language (Contract Written In)

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Information:

When the university enters into a contract with a foreign entity, the foreign entity may want to include a copy of the agreement in their native language. English is the international business language. In fact, sometimes, two companies from different non-English-speaking countries might enter into a contract in English simply because it is the international business language. See, *A Manual of Style for Contract Drafting (Third Edition)*, by Ken A. Adams.⁷

Before this Second Edition of the Manual, the university's approach was to add the following language:

The parties agree that, in the event of a conflict between the documents, the English language translation of the agreement will govern and control.

The major problem with this language is that it does not account for additional terms and conditions (i.e., terms and conditions that do not appear in the English version). Additional terms and conditions in the foreign-language version are, arguably, not in conflict with the English version. At the January 2014 Chief Business Officers' meeting, the CBOs approved using the following language:

The parties agree that this agreement has been drafted and signed in English and _____[foreign language] and that the parties intend for all versions of this agreement to contain identical terms and conditions regardless of the language used. Notwithstanding any other provision of this agreement which may appear to be to the contrary, in the event that any version of this agreement does not contain all of the terms and conditions included in the English version, or in the event that any version contains any terms and conditions that either conflict with, are contrary to, or are in addition to the terms and conditions contained in the English version, then the English version will prevail over such other versions and be controlling and legally binding on the parties.

Fix:

- Preferred Model language:

The parties agree that this agreement has been drafted and signed in English and _____[foreign language] and that the parties intend for all

⁷ Introduction section of MSCD, 3rd Ed.

versions of this agreement to contain identical terms and conditions regardless of the language used. Notwithstanding any other provision of this agreement which may appear to be to the contrary, in the event that any version of this agreement does not contain all of the terms and conditions included in the English version, or in the event that any version contains any terms and conditions that either conflict with, are contrary to, or are in addition to the terms and conditions contained in the English version, then the English version will prevail over such other versions and be controlling and legally binding on the parties.

- Fall-back Model language:
The parties agree that, in the event of a conflict between the documents, the English language translation of the agreement will govern and control.
- Last resort: If neither option is acceptable to the other party or other parties, then the appropriate CBO and the CFO must determine whether the business risk is acceptable without either clause.

Forum-Selection (a/k/a Jurisdiction or Venue)

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Information:

The university cannot agree to being sued in venues (courts) outside of Tennessee. Moreover, the university cannot agree to the state and/or federal courts of Tennessee. The reason is because the state courts and federal courts in Tennessee lack jurisdiction to hear state law claims against the university. However, note also that the federal courts may have jurisdiction to hear certain federal law claims against the university.

Fix (listed in order of preference):

- Delete forum-selection clause and replace with TCC;
- Delete without TCC;
- Mutual venue.

Explanation to supplier:

The university, as an instrumentality of the State of Tennessee, has sovereign immunity under Article I, Section 17 of the Tennessee Constitution and therefore is prohibited from agreeing to the law or courts of another state, as this could be deemed a waiver of that immunity. No representative of the university is authorized to waive its sovereign immunity; this can be done only by the State General Assembly.

Explanation to supplier when issue is venue within Tennessee:

As it relates to venue in Tennessee, the University can only agree to be sued in one forum: the Tennessee Claims Commission.

General Data Protection Regulation (GDPR)

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Information:

UT is subject to the European Union’s General Data Protection Regulation, which is a broad privacy regulation that may apply when UT is collecting, controlling, or processing personal data of an individual that is physically located in the EU. The GDPR does not apply to personal data that is collected from individuals when they are physically located outside of the EU (even if the individual is a citizen of an EU country). Among many other GDPR compliance requirements, UT is required to use specific contract language when it hires a third-party contractor to collect or process student data from individuals located in the EU

See here for more details about the GDPR and model contract language:

<https://audit.tennessee.edu/compliance/gdpr/#Where-can-I-get-more-information-about-the-GDPR>

Governing Law

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Information:

The university, as an instrumentality of the State of Tennessee, has sovereign immunity under Article I, Section 17 of the Tennessee Constitution and therefore is prohibited from agreeing to the law or courts of another state, as this could be a waiver of that immunity. No representative of the university is authorized to waive its sovereign immunity; this can be done only by the State General Assembly.

Fix:

- Preferred Fix: Change the governing law to the State of Tennessee.
- Fall back: Remain silent on governing law.
- Last resort: State that claims brought by the supplier against the university will be governed by Tennessee law, but claims brought by the university against the supplier will be governed by the supplier's preferred state/country's laws.

Explanation to supplier:

The university, is an instrumentality of the State of Tennessee, has sovereign immunity under Article I, Section 17 of the Tennessee Constitution and therefore is prohibited from agreeing to the law or courts of another state. No representative of the university is authorized to waive its sovereign immunity; this can be done only by the State General Assembly.

Model language (preferred fix):

The internal laws of the State of Tennessee (without regard to its conflict of law principles) govern all matters arising under or relating to this **agreement**.

Model language (last resort):

Alternative 1:

All claims brought by **university** against **Vendor** will be governed by the laws of the **Netherlands** (without regard to its conflict of law provisions)

and will be submitted in the courts of **Rotterdam**. All claims brought by **Vendor** against **university** will be governed by the laws of the State of Tennessee (without regard to its conflict of law provisions) and will be submitted in the Tennessee Claims Commission.

Alternative 2:

All claims brought by **university** against **Vendor** will be governed by the laws of the **Netherlands** (without regard to its conflict of law provisions). All claims brought by **Vendor** against **university** will be governed by the laws of the State of Tennessee (without regard to its conflict of law provisions) and will be submitted in the Tennessee Claims Commission.

Hotels

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Introduction:

One of the most common types of contracts processed at the university are contracts with hotels. Most hotels, like most suppliers, do not work with the government on a regular basis. Accordingly, the vast majority of hotels do not have special terms for government entities. Moreover, many hotels are not familiar with the reasons why the university must make revisions to the hotel's terms. Accordingly, it is especially important that you explain the reasons behind your revisions when you work with a hotel.

When a department reaches out to a hotel for a contract, the hotels usually send the hotel's standard contract to the university's departments for processing. Hotel contracts generally contain the same issues, regardless of the specific hotel. A discussion of common issues that appear in hotel contracts is below.

Hotels are unique from many other types of suppliers because hotels have limited space available and the hotel must reserve that space in advance for a client. When a hotel reserves space for a client, the hotel will reject other potential clients who might want to use the space at the same time (or when the time overlaps).

When you review a hotel contract, it is very important that you look at the applicable deadlines.

Negotiating hotel contracts:

When you consider negotiating hotel contracts, it might be useful to remember that average hotel profit margins are as follows:

Sleeping Rooms: 70-80%

Function Space: 90%

Food and Beverage (non-alcoholic): 30%

Alcohol: 80%

A/V: 20% or more (varies depending on whether the hotel has in-house A/V capabilities or whether the hotel outsources A/V to a third-party provider).

Adjustment of Room Block:

Complimentary Rooms:

A standard practice with hotels is that the hotel will provide a group with 1 free hotel room per X booked. Generally, the industry standard is a 1-to-50 ratio, but the ratio can range from 1-to-35 to 1-to-50.

Carefully review how the hotel calculates the complimentary rooms. There are two ways a hotel can calculate the complimentary rooms:

- 1) Rooms per night: The hotel will allocate free rooms based on the number of rooms that the customer books per night, ignoring the cumulative number of rooms.
- 2) Cumulative number of rooms: The hotel will allocate free rooms based on the cumulative number of rooms that the customer books, ignoring the customer's per-night usage.

	Room Block					
	Monday	Tuesday	Wednesday	Thursday	Friday	
Rooms	15	75	100	75	35	
Comp. room calculation (using 1/40 ratio)						
						Total free rooms
Using cumulative method						6
Using per-night method	0	1	2	1	0	4

Last-Room Availability:

It is critical that any framework order for a hotel allow the University to get the CONUS (or other agreed-upon rate) at “last-room availability.” This means that the hotel will offer all rooms to the university at the agreed-rate.

Banquet Event Orders (BEOs):

State that all BEOs are governed by the PO or contract, and that any additional terms don’t apply to UT.

Entire Transaction:

Many hotels have different people in charge of the hotel’s catering, a/v, and rooms. Sometimes, every department in a hotel will have its own contract. It’s very important that the contract documents contain the entire transaction.

Payment:

It’s important to determine who is paying for what charges. When contracting with hotels, entities have a few choices:

1. Individuals pay own charges
2. Individuals pay some charges; Group pays some charges
3. Group pays all charges, except incidentals

Itemized Charges:

In order to make the accounts payable process easier for departments, it’s important that the hotel list all possible charges in the contract.

Deadlines:

A hotel’s business model is based around booking rooms in the future. Hotels usually put super short deadlines in their contracts (e.g. 2-3 days). In general, many departments are poor communicators with hotels, and the hotels are not aware of the NCJ/bid rules or the contract routing/review procedures at the university. Often, by the time the contract gets to the contract office, the hotel is already very frustrated. Contacting the hotel early and often via email will help keep the relationship on good terms.

Service Fees:

Many times, hotel contracts will allow the hotel to increase the service fee at any time and without notice to the university. For example:

- “university will also pay the Hotel service fee, currently 20%”
- “university will also pay the Hotel service fee, currently 20%--subject to change”

The University cannot agree to unknown costs, so the service fee must be capped. UT prefers that the service fee not exceed 20%.

Force Majeure:

Carefully review and consider force majeure language in hotel contracts. Many times, a hotel's force majeure clause will only apply to the hotel's ability to hold the event, and UT has no ability to cancel without penalty due to force majeure. Because bad weather, natural disasters, terrorism, etc. could cause UT to need to postpone or cancel an event, it's important that force majeure language give both parties the ability to cancel without penalty in the event that either party's performance is prevented due to a force majeure event.

Attrition:

Attrition clauses guarantee that UT spend a certain amount of money at the hotel, usually this applies to booked rooms. The industry standard is 80% of the contracted amount. Note that attrition fees can apply to booked rooms, meeting rooms, food & beverages, or audio/visual equipment. The key to understanding attrition clauses is that attrition kicks in when: (1) the university shows up and (2) the university utilizes less than the guaranteed amount of rooms (or other goods/services) as specified in the contract.

If the university fails to meet its attrition, then the hotel will charge the university the difference of the number of rooms used and the attrition amount. Here are two examples:

- Example 1 (UT owes attrition): A university department books 100 rooms, but only 70 people show up. The hotel's contract that the university signed contains an attrition clause stating that the university guarantees that it will utilize at least 80% of booked rooms. The hotel will charge the university for 10 additional rooms ($70 + 10 = 80$).
- Example 2 (UT would not owe attrition): A university department books 100 rooms, and 80 people show up. The hotel's contract that the university signed contains an attrition clause stating that the university guarantees that it will utilize at least 80% of booked rooms. The university has met its 80% utilization requirement.

Example language:

Attrition:

- a) Group Room Block (GRB): The University and hotel will review GRB and meeting space 21 days prior to the event and, if necessary, the University will make adjustments to the GRB and meeting space without penalty. This will be the cutoff date.
- b) The University will be responsible for a portion of nights not utilized on a cumulative basis below eighty percent (80%) of

the total GRB after the cut-off date. This will be considered attrition damages and these will be capped at seventy-five percent (75%) of the negotiated room rate, multiplied by the number of rooms below 80% of the GRB after the cutoff date. This amount shall be deemed to include all applicable service charges and taxes, and shall constitute full and complete settlement of any and all obligations that the University may have in conjunction with attrition damages.

- c) The GRB will be credited for any and all reservations made and used by the University meeting attendees, regardless of the rate paid or method of booking, including all reservations made after the cut-off date.
- d) If the hotel achieves occupancy levels above 90% on peak nights of a University event, or if it becomes sold out on any night of a University event, the University will not be required to pay attrition damages.
- e) If attrition damages are caused by one or more force majeure events, the University will not be liable for attrition damages. Force majeure events include acts of God, war, government regulation; actual, threatened or suspected terrorism; disaster; outbreak of disease in Knoxville or surrounding area; strikes; civil disorder; curtailment of transportation, or any cause, that makes it impossible for 25% of the attendees to attend the meeting. This would also include a threat of an imminent natural disaster that interferes with the hotel's operations or the ability of attendees to safely travel to Knoxville. Under any of these circumstances, it is agreed that the University would not be liable for failure to meet GRB or food & beverage minimums for the event. The University would be liable for actual services and food & beverage used.
- f) For purposes of calculating attrition damages, the hotel will provide to the University or its representative, within 30 days, records reasonably required to substantiate any damages claimed by the hotel. The hotel general manager will certify that records are complete and accurate.

Cancellation:

Cancellation clauses are different from attrition because in order to “activate” a cancellation clause, UT does not show up at all. Cancellation charges are usually based on the time between notice of cancellation to the hotel and the event.

Below is an example cancellation structure that might appear in a hotel contract:

If UT cancels

- 100 or more days before event: 0%

- 99-60 days before the event: 50% of the contracted amount will be due
- 59-30 days before the event: 80% of the contracted amount will be due
- 29 days or less: 100% of the contracted amount will be due

Negotiating with hotels:

When you negotiate with a hotel, consider asking for the following concessions:

- Airport transportation
- Better complimentary room ratio
- Discounted audio-visual rates
- Discounted menu prices for food and beverage functions
- Early check-in and late check-out
- Elimination of the resort fee
- Increased number of sleeping room upgrades
- Free internet
- Function space internet access for free
- Meal coupons
- Free storage
- Free parking
- Shuttle service
- Welcome amenities for VIPs
- Access to the rewards program members' lounge area

Illegal Immigrant

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Information:

Under Tennessee law, contractors must attest that they will not use the services of an illegal immigrant before entering into contracts with Tennessee state government entities. Most often, UT includes the illegal immigration language as a term in the contract. Occasionally, contractors do not want to include the illegal immigration language as part of the contract because violation of the provision would be a breach of contract. In those cases, the contractor must sign an attestation form before UT signs the contract and the signed attestation form must be attached with the contract for filing purposes.

There is no exception for foreign entities, so the illegal immigrants language must be included in contracts with foreign suppliers.

Fix:

- Preferred Fix: Include the illegal immigrant language in the contract.
- Fall back: Have the supplier sign an attestation form.

Explanation to suppliers:

For suppliers located in the U.S.:

Tennessee Code Annotated § 12-3-309 requires all suppliers who provide a good or service to attest that the supplier will not knowingly utilize the services of an illegal immigrant in the United States or knowingly hire a subcontractor who will knowingly utilize the services of an illegal immigrant in the United States. If including this language in the body of the contract is unacceptable, then the only alternative is for the university to prepare a separate attestation form for your signature. The attestation form will contain this same language.

For foreign suppliers:

While the addition of this language might seem unnecessary, the state law requiring this language does not exempt suppliers located outside of the U.S. Please note that this language only applies to illegal immigrants in the

U.S. If including this language in the body of the contract is unacceptable, then the only alternative is for the university to prepare a separate attestation form for your signature. The attestation form will contain this same language.

Model language:

In compliance with the requirements of Tenn. Code Ann. § 12-3-309, Contractor hereby attests that it shall not knowingly utilize the services of an illegal immigrant in the United States in the performance of this agreement and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant in the United States in the performance of this agreement.

Indemnification/Indemnity/Hold Harmless/Defense (Requirement for the university to indemnify others)

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Information:

Generally speaking, indemnification/hold harmless/defense clauses require the party who agrees to indemnify the other party (or third parties) to accept all costs/risk associated with damages, costs, penalties, or claims, regardless of who is at fault.

For our purposes, hold harmless and indemnification clauses are clauses whereby the State agrees to assume the risk of liability which might otherwise fall on another party. Such clauses also usually include a requirement that the university defend claims against the other party. These clauses are void as both an unauthorized attempt to abrogate Tennessee's sovereign immunity and an unauthorized attempt to lend the State's credit. Strike all clauses that would require the university to indemnify, defend, or hold harmless other parties. You must also strike the header/title "indemnity," "hold harmless," or other such language.

You also must be aware of provisions with the substantive effect of an indemnification or hold harmless clause, even if such provisions do not contain specific language such as "indemnification" or "hold harmless" (such as: unlimited reimbursement clauses, clauses requiring the university to accept liability or responsibility for all damages, or clauses requiring the university to pay an uncapped amount in another party's expenses, costs, or damages). You must also delete such clauses.

Please read indemnification clauses carefully. Sometimes, suppliers will agree to indemnify the university. These types of clauses must not be deleted. Note, however, that mutual indemnification clauses must be deleted. While it is acceptable for the supplier to indemnify the university, the "mutual" clause must be deleted and replaced with a one-way clause (i.e. only the supplier indemnifies the university).

If you are deleting an indemnification clause: the word "indemnification" or "indemnity" must be removed from the title of the section and replaced with "Tennessee Claims Commission" or "Liability of [The University of Tennessee]."

Common Supplier Question:

Without indemnity, how can we (supplier) be protected against third-party claims?

Response:

If the University's acts or omissions lead to a third-party claim, your company has remedies via breach-of-contract claims and tort claims.

Explanation to supplier:

The university has no legal authority to agree to an indemnification, defense, or hold harmless provision in a contract. Tennessee Attorney General Opinions No. 93-01 and No. 99-095, evidence the position that the State cannot indemnify, defend, or hold harmless another party. Please note that adding language such as, "To the extent allowed by law, the university will indemnify..." will not make this indemnification clause acceptable to the university. Further, there are no instances under Tennessee law where the university would be allowed to indemnify, defend, or hold harmless another party.

Model language:

Any liability of the university to Contractor and third parties for any claims, damages, losses, or costs arising out of or related to acts performed by the university under this agreement will be governed by the Tennessee Claims Commission Act, Tenn. Code Ann. §§ 9-8-301, et. seq.

Insurance

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Information:

The University of Tennessee is subject to the provisions of the State's self-insurance program which insures all liability created under Title 9, Chapter 8 of the Tennessee Code Annotated, for all State departments, agencies and institutions, including State institutions of higher education. The limits of liability are \$300,000 per person and \$1 million dollars per occurrence. The limits of liability under workers' compensation are those set forth in T.C.A. §§ 50-6-101, et. seq. Copies of the statute which authorize actions against the State of Tennessee, establish the State's limit of liability and authorize self-insurance through the Claims Award Fund, are set forth in T.C.A. §§ 9-8-101 et. seq.

UT typically does not purchase insurance.

The university may purchase private insurance for special items (e.g., the UT airplane), but it must go before a state governmental agency in Nashville and request approval before purchasing private insurance.

Note: The university can agree to pay shipping insurance fees, such as the fees charged by Fed-Ex, UPS, DHL, etc.

Note 2: The university does have insurance for certain medical professionals and for a few other scenarios. Please contact Risk Management if you have questions.

Fix:

- Delete the supplier's language and replace it with the university's standard insurance language, which is below.

Model language:

The **university** is self-insured under the Tennessee Claims Commission Act, Tenn. Code Ann. §§ 9-8-301 et seq., which covers certain tort liability for actual damages of up to \$300,000 per claimant and \$1,000,000 per occurrence.

Explanation to supplier:

The university is self-insured under the Tennessee Claims Commission Act, Tenn. Code Ann. §§ 9-8-301 et seq., which covers certain tort liability for actual damages of up to \$300,000 per claimant and \$1,000,000 per occurrence.

For more information about insurance, please see Risk Management's website:

<https://riskmanagement.tennessee.edu/insurance-and-bonding-guidelines/>

HIPAA

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Information: Whenever any contract permits or requires the University to receive, access, use, store or disclose health information and/or records, the University is required to comply with all applicable state and federal laws and regulations, as well as applicable University policies and procedures, to ensure that the privacy and security of such health information and/or records is maintained at all times. Depending upon the nature of the contract, these laws and regulations include, but are not limited to the privacy and security provisions of the Family Educational Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended by the Health Information Technology for Economic and Clinical Health Act (HITECH) and various Tennessee state laws and regulations. We recommend that you consult with the Office of General Counsel regarding making the determination of which such laws and regulations apply to the contract (and which do not) and with drafting any contract language to be included in the contract.

Indemnification/Indemnity/Hold Harmless/Defense (Vendor contractually agrees to indemnify the university)

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Information:

In some contracts, particularly in library subscription and software agreements, the supplier will agree to indemnify the university. As long as the indemnity requirement is not mutual (in other words, as long as the university is not agreeing to indemnify the supplier), the university can agree that the supplier will indemnify the university.

Typically, these clauses will require the university to give the other party the control over negotiation and settlement of any claims against the university. Be sure to add the [settlement](#) language required by Tennessee law:

No settlement will be binding against the **university** without the consent of the **university's** Office of General Counsel and the Tennessee Attorney General.

When a contract has a mutual indemnification requirement, we have two options: 1) modify the language such that the university's requirement to indemnify the other party is removed (i.e. only the supplier indemnifies the university and the clause is no longer mutual); or 2) delete the indemnity language entirely. In general, your first step must be to revise the language in a manner such that only the supplier indemnifies the university. Most suppliers will agree to this. Some suppliers will not, and you must carefully consider the risks before deleting the requirement for the supplier to indemnify the university. In some cases, such as when the [safety](#) language is required, the university requires the supplier to indemnify the university.

Most hotel contracts will contain a mutual indemnification clause. In hotel contracts, the best tactic is to delete this clause entirely on the first round of revisions, and cite the standard explanation for why the university cannot indemnify others.

Independent Contractor

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Information:

Please see FI0540 – Independent Contractors. Individuals who provide a service to the university must complete the university's Worker Classification Questionnaire before performing the services.

Contracts between UT and individuals always raise the issue of whether the individual must be considered an employee or independent contractor. Only if an individual meets all of the following conditions, he/she may be classified as an independent contractor:

- The university controls only the results of the work, not how it gets done.
- The individual assumes a business risk (assumes all expenses for personnel, equipment and materials) as a result of this association with the university.
- The individual is responsible for paying and reporting applicable self-employment tax.
- The individual is free to complete the assigned task without control or direction from the university.
- The individual's association with the university normally ceases upon completion of a specified project.
- The individual is free to work for other entities.
- The individual has declared himself/herself to be an independent contractor when providing similar services to the general public.

If the individual does not meet all of the above requirements, then the person must be put on the university's payroll as an employee.

Model language when the other party is an individual:

Independent Contractor. It is expressly acknowledged by the parties hereto that such parties are independent contracting entities and that nothing in this **Contract** will be construed to create an employer/employee relationship or to allow either to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The **Contractor**, being an independent contractor, agrees to carry adequate public liability and other appropriate forms of insurance, and to pay all taxes incident to this **Contract**. The **university** has no liability except as specifically provided in this **Contract**.

Individual Employee Likeness

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Information:

If a transaction will involve the University or a third party, or both, using the likeness of a UT employee, the employee must sign a letter to the University granting permission for the University and third parties to use the person's name, likeness, etc. See TCA 47-25-1105. This situation typically arises with game contracts for Athletics, and sometimes arises when speakers or performers seek to photograph or videotape their performances.

Sample letter content:

In connection with **[event, activity, etc.]** at the expense of the University of Tennessee, I authorize the University of Tennessee to use my name, photograph, and likeness in connection with that portrait. I understand that the University will **[state what UT will or might do with the images/video]**.

I further authorize third parties to use **[photos, videos, etc.]** for the following purposes: **[complete]**.

Individual Rights (Waiver of)

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Information: Please note that the University does not have the legal ability to waive an individual's rights (students, employees, or invitees), such as the right to sue or bring a claim against a party with whom the University has a contract. This issue arises fairly often, especially in relation to an individual's likeness (photo or video release), or an individual's liability waiver. Without exception, the University does not have authority to waive an individual's rights. The best practice is to delete any such language, and inform the supplier that the University cannot legally waive the individuals' rights because the University does not have the legal capacity to do so.

Iran Divestment Act

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Information: must be included in all payable contracts valued at \$1,000.01 or more. TCA §12-12-106 requires that the language below be included in all payable contracts. According to TCA 12-12-104, the Iran Divestment Act language does not apply to “a procurement or contract valued at \$1,000 or less.”

Model language:

Iran Divestment Act. **The Contractor** certifies, under penalty of perjury, that to the best of its knowledge and belief **the Contractor** is not on the list created pursuant to Tenn. Code Ann. § 12-12-106. **The Contractor** further certifies that it shall not utilize any subcontractor that is on the list created pursuant to Tenn. Code Ann. § 12-12-106.

Explanation to supplier:

See Tenn. Code Ann. § 12-12-106.

Intellectual Property

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Intellectual Property (General Information)

Introduction:

“Intellectual property” is generally defined as the legal concept granting exclusive rights in innovations or creations. To simplify this discussion, we will only discuss intellectual property laws as they relate to patents, copyrights, trademarks, and trade secrets. Intellectual property laws are a “hot button” political topic, and this manual will avoid political discussions and focus solely on the basics of “how it is,” thus this manual does not get into a discussion of “how it ought to be.”

The discussion below will focus primarily on copyright law because the university’s contract offices will encounter copyrighted works far more often than any other type of intellectual property.

The university has a policy statement on Patents, Copyrights, and other Intellectual Property, which can be found here:

http://utr.f.tennessee.edu/PDF/IP_Policy.PDF

Basics of intellectual property:

Patent Law: Patent law protects inventions and patent holders have the exclusive right to make, use, sell, and import their invention, and the right to prevent others from doing so.

Copyright Law: Copyright, a form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed. The Copyright owner does have certain exclusive rights in the copyrighted work and the right to allow others to any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

A very important point about copyright protection is that, in the U.S., the work is under copyright protection the moment it is created and fixed in a tangible form that is perceptible either directly or with the aid of a machine or device, also referred to as a tangible medium of expression. Registration is not required for a work to have copyright protection. Note, however, that registration does provide extra benefits to the copyright holder in case of infringement. Works are protected even though the work may not have the symbol © displayed.

Copyright law does not prohibit all copying or use of a work. For example, the fair use doctrine, codified by the Copyright Act of 1976 as 17 U.S.C. Section 107, permits some copying and distribution without permission of the copyright holder or payment to same. “Fair Use” is not clearly defined in Section 107, and an in-depth discussion of Fair Use exceeds the scope of this manual.

Trademarks: A trademark is a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of the goods or services of one party from those of others. Trademark protection does not prohibit all uses of the protected mark.

Trade Secrets: A trade secret is a formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which the owner of the trade secret can obtain an economic advantage. Trade secrets are often mentioned in confidentiality agreements.

Licenses:

When dealing with a license for intellectual property, the license must specify the following concepts:

1. **Exclusive vs. Non-Exclusive:** Does the license grant an exclusive or non-exclusive right to use the intellectual property?
 - a. Very important: a grant of an exclusive license means that the person or entity granting the license ("licensor") can no longer use the intellectual property during the term of the license. For example, if the university granted "Acme Inc." the exclusive right to use one of the university's registered trademarks for 5 years, the university could not use the trademark for the 5-year term. ***Generally, all intellectual property grants from the university to others must be non-exclusive.***
 - b. If exclusivity is granted, the specific type of exclusivity must be addressed. In other words, exclusive rights to do what with the intellectual property.
2. **Term:** Is the license short-term, long-term, or perpetual? Note that a perpetual term would not mean until the end of time, but until the end of the life of the intellectual property rights. Further, a license can also be revocable (i.e., terminable by the license owner). See below.
3. **Revocability:** "Revocability" means the extent to which a license can be revoked (terminated) before its expiration date, by the licensor. Contracts must specify whether a license is revocable, and if so, what steps must be taken and how much notice must be given to revoke the license.
4. **Geography:** "Geography" refers to geographic (territorial) restrictions on an IP license. Does the license allow worldwide use of the intellectual property or is the use limited to a certain region (e.g., North America)?
5. **Scope:** Scope relates to the extent to which and purposes for which the licensee may use the intellectual property. The specific scope must be mentioned in the contract. In other words, what use or uses are allowed by the licensee? For example, can the licensee make derivative works of a copyrighted work?
6. **Right to Sublicense:** The license agreement must indicate whether or not the licensee has the right to further sublicense the rights given, and if so what restrictions or terms govern such sublicenses.

7. **Quality Control:** In trademark licenses, it is very important to include quality control provisions that give the university the right to monitor and control the licensee's use of the trademark. Failure to do so could result in a "naked license" that could undermine the university's trademark rights.
8. **UT Office of Trademark Licensing:** Please note that the UT Office of Trademark Licensing (<http://licensing.tennessee.edu/>) needs to be involved in any licensing of university trademark rights.
9. **The University of Tennessee Research Foundation ("UTRF"):** Please note that UTRF (<http://utrf.tennessee.edu/techtransfer/index.shtml>) has to be involved in the licensing of any inventions made by UT personnel.

Use of the university's Intellectual Property/Name

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Information:

The University of Tennessee's trademarks and service marks include all university names, logos, slogans, insignias, symbols, team names, and other indicia. These indicia or marks are valuable intangible property, protected by federal and state laws, and regulated by the university's Indicia Licensing Program. This program is administered by the Office of Trademark Licensing. Requests by a supplier or contractor to use the university's marks must be referred to the Office of Trademark Licensing and/or the Office of General Counsel.

Additionally, all proposals for promotional and/or sponsorship activities involving the university's marks and/or personnel must be handled pursuant to university Fiscal Policy FI0320 and approved by the appropriate campus or unit administrator and the chief financial officer (or designee). Because sponsorships may be subject to federal Unrelated Business Income Tax, proposals must also be submitted to the university [Controller](#).

In general, it is acceptable for a supplier to use the university's name in relation to the fact that UT is a client or UT otherwise transacted with the supplier. The use of the university's name must be limited to the duration of the contract between UT and the supplier. Further, consult with the Office of Trademark Licensing in the event that the supplier wants to use any of UT's logos.

If UT is agreeing to language in a supplier's contract (rather than a UT form) that allows the supplier to use UT marks, you must include clauses addressing the following:

- (1) limits the use of UT's marks to those purposes expressly stated in the contract;
- (2) terminates the supplier's right to use UT's marks immediately upon termination of the contract;
- (3) allows UT to pre-approve specific uses of UT marks by the supplier; and requires the supplier to indemnify and hold UT harmless for claims related to the supplier's use of UT marks.

Model language:

The University of Tennessee retains all rights to its names, logos, copyrights, trademarks, service marks and all other intellectual property ("Intellectual Property"). Vendor must seek the university's written approval in advance of any proposed use of university's Intellectual Property. In the event that the university grants such permission to Vendor, university retains the right to revoke such permission at any time, for any reason. If the university revokes such permission, then Vendor shall immediately cease using the university's Intellectual Property. Any use of the university's Intellectual Property must be solely in connection with this agreement and the right to use the Intellectual Property ceases upon termination of the agreement.

International Shipping

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Information:

The University often buys specialty items from suppliers located outside of the United States. Various laws and practices affect international shipping. To ensure that your department receives items in a timely manner, we've listed best practices below.

UPS and FedEx are worldwide and specialize in international shipping. The best practice is to request that suppliers use UPS or FedEx when shipping internationally.

If a supplier is unable or unwilling to use UPS or FedEx for an international shipment, when sending the PO (or placing the order if under \$10,000), the department must ask the vendor to forward the airway bill, flight details, and a copy of the invoice upon departure. The department then must forward all documentation to UT's customs broker (John S. James) so the broker can negotiate customs and have the package delivered to your destination. Please note, if the customs broker is unaware of a shipment, the package will be detained in customs and may be moved to storage at your department's expense.

The customs broker under contract with the University is listed below. Please contact Blake Reagan (breagan@tennessee.edu) with the System Purchasing Office if you have any questions.

John S. James Company

Attn: Jeanne Sanderson
2718 John Deere Drive
Knoxville, TN 37917
Phone: 865-544-0530

Late Payment

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Information:

Most contracts contain a clause that imposes interest, fees, or penalties on the university for late payment. The university can only agree to pay interest on late payment and the interest cannot be more than 1.5% per month, per the Tennessee Prompt Pay Act. Note, sometimes the contract will impose a lower interest rate than 1.5%. In such a case, do not raise the interest rate.

The Tennessee Prompt Pay Act sets the allowable interest rate that the state may pay (1.5% per month). The statute also sets a default late-payment period at 45 days. Please note that the statute allows for the state and the vendor to agree “by contract” to a different deadline for payment.

Because of processing delays, the best practice is to negotiate for a 45-day payment window.

Note: when the university contracts with the U.S. federal government or U.S. federal government contractors, the university can agree to pay interest per the Federal Debt Collection Act.

Note: If the supplier’s interest rate is lower than 1.5%, then you must not try to increase the rate to 1.5%.

Model language when the rate in contract is less than 1.5% per month:

In the event that the University pays late, Supplier may charge up to 1.5% interest. Any interest on a late payment will not exceed the rate allowable under the Tennessee Prompt Pay Act, Tenn. Code Ann. §§ 12-4-701 et. seq.

Model language when rate in contract is unlimited, higher than 1.5% per month, or equal to 1.5% per month:

In the event of late payment by **The university**, any interest on a late payment will not exceed the rate allowable under the Tennessee Prompt Pay Act, Tenn. Code Ann. §§ 12-4-701 et. seq., **currently 1.5% per month.**

Explanation to supplier:

The Tennessee Prompt Pay Act governs what type of fees/penalties the State of Tennessee and its agencies, including the university, are legally allowed to pay on late payments. The university cannot agree to late fees, penalties, etc., except that the university can agree to pay up to 1.5% per month (18% per year) pursuant to the terms of the Prompt Pay Act.

Library Contracts

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Archiving and Preservation

Information

Libraries must seek to establish clear requirements for the archival and preservation of electronic materials with perpetual access.

Business issues: Please be sure to include costs for perpetual access in the contract, if costs are applicable.

Model language:

Providing that full payment is made, the Licensor will provide the Licensee an archival file on DVD-ROM or other appropriate media, as agreed upon between the Licensee and Licensor, containing the content of all permanent use purchased items. The content of the annual archive may also be made available for download/retrieval via other means as mutually agreed upon by the parties. Licensee is authorized to make further copies in perpetuity as it may deem necessary for purposes of archival preservation, refreshing, or migration, including migration to other formats, so long as the purpose of such copying is solely for continued use and/or archival retention of the data and does not violate or extend the use rights contained in this agreement.

Consortia Purchases

Information

Libraries that are members of consortia must ensure that they receive any discounts they are entitled to for resource purchases. Generally this is not an issue when orders are placed via the consortium and a consortium license is in place. It can, however, prove problematic when an order is placed via the consortium but the license is in place with the product's supplier instead; for example a master agreement with a supplier.

Fix:

- Add language to all licenses that ensure libraries will receive applicable discounts.

Model language:

Licensee will be eligible for any applicable discounts for orders placed via eligible consortia.

Copyright

Information

Watch for language that requires the library to agree to requirements that are more restrictive than existing United States Copyright Law or requires the library to agree to foreign copyright law.

Fix:

- Preferred: Include language establishing that library will only follow United States Copyright Law.
- Alternative: Include language establishing that nothing in the license will limit the library's rights under United States Copyright Law.

Model language:

Licensee and Authorized Users may make all use of the licensed materials as is consistent with U.S. Copyright Law.

OR

Nothing in this agreement will limit either party's rights under U.S. Copyright Law.

Course Packs/Electronic Reserves/Virtual Learning Environments

Information

Course Packs and Electronic Reserves are collections of materials assembled by staff for the purpose of instruction. These materials allow

students to easily access compilations of material without locating sources on their own. Libraries must work to include this clause when appropriate to allow the widest possible dissemination of information and assist instructors to share material with students.

Fix:

- Add clause allowing incorporation of materials into Course Packs, Electronic Reserves and virtual learning environments.

Model language:

The Licensee may incorporate parts of the Licensed Materials in printed Course Packs, Electronic Reserve collections and in virtual learning environments for use by Authorized Users only. Each such item incorporated will carry appropriate acknowledgement of the source, title, author of the extract and the name of the Publisher. Course packs in non-electronic non-print perceptible form, such as audio or Braille, may also be offered by the Licensee to Authorized Users.

Explanation to the supplier:

The Library is mandated with ensuring that purchases provide students with access to resources in a variety of easily accessible ways. Allowing instructors to share resources with students in Course Packs, Electronic Reserves or virtual learning environments fulfills the library's requirement.

Geographical/Institution/Unified Campus

Information

Watch out for contract language that restricts access to physical address. This can be problematic in cases where a library may have multiple branches on a campus or city that share the same IP range(s).

Fix:

- Preferred: Delete the clause.
- Alternative: Add language clarifying that sites sharing the same IP range(s) will be considered one location.

Model language:

For sake of clarity, the parties agree that it is acceptable for any of Licensee's locations based in the same city to use the same IP range(s).

Informing Authorized Users of Limitations

Information

Most library contracts will include language that requires the library to ensure that authorized users are made aware of limitations on usage.

Fix:

- Preferred: Delete the clause entirely.
- Alternative: Include language requiring that only reasonable efforts or best efforts be made to notify authorized users of limitations.

Model language:

Licensee will use all reasonable endeavors to ensure that all Authorized Users are aware of the importance of respecting the intellectual property rights in the Licensed Materials and of the terms and conditions of this License, and must notify Authorized Users of the terms and conditions of this License and take steps to protect the Licensed Materials from use which is not expressly authorized by this License.

Inter-Library Loan

Information

Vendors will occasionally try to prohibit inter-library lending or restrict inter-library lending to other libraries in a specific geographic region; i.e. North America.

Fix:

- Preferred: Add inter-library loan language.
- Alternative: Delete any language that restricts inter-library lending to a specific geographic region.

Model language:

As part of the practice commonly known as "interlibrary loan," deliver a reasonable number of copies of Articles (including through use of Ariel or a substantially similar interlibrary loan transmission software) to fulfill requests from non-commercial, academic libraries; provided that such practice complies with Section 108 of the U.S. Copyright Act.

Explanation to the supplier:

The University of Tennessee libraries support both study abroad programs and lending partnerships with libraries in both developed and developing countries.

Monitoring and Reporting Misuse

Information

Watch out for language that requires the library to ensure that authorized users comply with any limitations such as copyright, inter-library, etc. and to report any violations to the supplier. Under the Tennessee Claims Commission Act, the university is only responsible for employees' conduct that is within the course and scope of their employment; UT is not responsible for students' conduct.

Fix:

- Preferred: Delete the clause entirely.
- Alternative: Include language requiring that only reasonable efforts be made to monitor usage by authorized users.

Model language:

Licensee will use reasonable endeavors to monitor compliance and upon becoming aware of any unauthorized use of the Licensed Materials or other breach of this License, inform the Licensor of such unauthorized use or breach and take all reasonable and appropriate steps, including disciplinary action, both to ensure that such activity ceases and to prevent any recurrence.

Patron Record Maintenance

Information

Libraries must not agree to clauses that require that patron records be kept full and up-to-date.

Fix:

- Delete the clause entirely.

Explanation to the supplier:

Patron information maintenance is an internal policy matter. university libraries will not commit to keeping full and up-to-date patron records.

Return of/Destruction of Materials

Information

Watch out for language that requires the library to ensure that all materials are returned or destroyed at the end of a subscription or when a material breach by the library has occurred. This is problematic in cases of electronic resources because it is completely possible that patrons have printed or saved copies of the material and it would be impossible for the library to guarantee that all copies have been returned or destroyed.

Fix:

- Preferred: Delete the clause entirely.
- Alternative: Include language requiring that only reasonable efforts be made to return or destroy all materials in the university's possession.

Model language if the supplier does not agree to total deletion:

On termination of this License, the Licensee shall immediately cease to distribute or make available the Licensed Materials to Authorized Users and shall make reasonable efforts to return to the Licensor or destroy all Licensed Materials locally stored in accordance with the rights granted in this License.

OR

The Licensee will make reasonable efforts to ensure that Authorized Users return to the Licensor or destroy all Licensed Materials locally stored in accordance with the rights granted in this License.

Single Username/Password of email Format**Information**

Be sure that language is included that provides remote access through a username and password or email authentication format. Many authorized users will access databases from their dorms, homes, etc.

Fix:

- Add language establishing that remote access will be via proxy/IP authentication.

Model language:

Remote access will be provided to Authorized Users through the use of a secured network with IP authentication.

Supplying Patron Records

Information

Libraries cannot agree to clauses that require that full patron records be shared with suppliers upon request. In rare cases, such as using a Cloud Based Integrated Library System (ILS), personal information may need to be shared with a supplier. In such cases the library must ensure it retains sole ownership of the data, restricts usage of the data solely for the purpose of supplying the service and reserves the right to access, modify or delete the data at any time.

Fix:

- Preferred: Delete the clause entirely.
- Alternative: Add language establishing ownership and restricting usage.

Model language:

Licensee retains ownership of the personal information and may, at any time during the term of this agreement, access, modify and delete personal information that Licensor is storing. Licensor shall not use the personal information for any purpose except to provide the services and support services to Licensee and its permitted users.

Explanation to the supplier:

Library privacy policies prohibit the supplying of patron records to suppliers.

Usage Statistics

Information

Vendors must supply COUNTER compliant usage statistics for all electronic resources. Additionally, usage statistics must be campus specific.

Fix:

- Add or revise language requiring COUNTER compliant usage statistics be supplied.

Model language:

The Licensor will be compliant with the COUNTER code of practice and incorporate the latest compliancy rules where applicable in relation to the Licensed Materials and the Licensor's obligations under this License. All

usage data will be campus specific and tracked by IPs specific to each campus. All usage data will be compiled by the Licensor in a manner consistent with privacy and data protection laws applicable to the United States including the anonymity of Authorized Users and the confidentiality of their searches. In the case that the Licensor assigns its rights to another party the Licensee shall be entitled to require the assignee to confirm that it agrees to fulfill the obligations of privacy and data protection laws herein mentioned.

Walk-In Users

Information:

Walk-in users are patrons who are not affiliated with the university but who are physically present at the library. university libraries must not agree to definitions of authorized users that exclude walk-ins.

Fix:

- Add walk-ins to the definition of authorized users.

Model language:

Walk-ins. Patrons not affiliated with university who are physically present at university's site(s) (so-called "walk-ins").

Explanation to the supplier:

The library is tax payer funded. As such, resources must be made available to members of the general public who physically visit the library.

License of University Property

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Information:

The University has a wide range of facilities, and often allows third parties to “rent” its property. In most cases, these “rentals” are actually licenses to use UT property because the third-party acquires no interest in the property. Do not use the word “lease” to describe such transactions.

See FI0625 and consult the office of Real Estate with questions. Tony Hopson is the primary point of contact.

The rules regarding minors on campus might be triggered when a third-party licenses a UT facility.

Letters of Credit/ Letters of Commitment / Letters of Guaranty

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Information:

In most circumstances, the university will not agree to provide a letter of credit, commitment, or guaranty to a supplier. Such documents could be interpreted as extensions of the university's liability for claims beyond those authorized by Tennessee law. Therefore, they could be deemed an unauthorized attempt to abrogate sovereign immunity and/or an unauthorized attempted to lend the State's credit.

Limitations of Liability

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Information:

Businesses seek to limit their exposure (risk) to lawsuits, and a solid way to help shield a business from unexpected liability is through contractual limitations of liability. A limitation of liability clause limits a business's amount of exposure in the event of a lawsuit over the contract. The provisions typically limit a business's liability in two ways:

- 1) Limit the amount of time during which a party may file a lawsuit (this type of clause is unacceptable to the University); and
- 2) Limit the amount of money that a party may recover in the event of a lawsuit. Usually, the amount is limited to the amounts UT pays the vendor (sometimes further limited to the amounts UT pays the vendor during a particular time, such as 12 months). When evaluating this portion of a limitation of liability clause, evaluate the reasonableness of the clause. Generally, this type of limitation of liability is OK.

Loss

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Information: Some contracts, especially contracts when the University leases or evaluates equipment, contain a clause stating that the University is liable for losses, regardless of how the losses occur.

Sample unacceptable clause:

Customer shall bear all risk of loss, damage, destruction, theft, and condemnation to or of the Loaner Unit from any cause whatsoever ("Loss"). Customer shall notify BrainScope in writing within 10 days of any such Loss. If BrainScope determines in its sole discretion that the Loss has materially impaired the Loaner Unit or in the event Customer fails to return the Loaner Unit in accordance with Section 4 above, Customer shall pay to BrainScope, within 30 days of receipt of invoice, the applicable replacement value published by BrainScope (not to exceed the list price for the applicable Device).

The clause above could be interpreted as an indemnification clause. Moreover, the clause imposes a repayment obligation on the University that is uncapped and could exceed what the Claims Commission would allow. Delete these types of clauses, and replace with: Subject to the limitations of the Tennessee Claims Commission Act, Customer will be responsible for claims, damages, losses, or costs that arise from Customer's acts or omissions.

Master Agreements

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Information:

Blake Reagan started the master agreement initiative in late 2012. **Please note that the phrase “master agreements” is not a proper noun, and some attorneys or companies use the phrase to mean something very different than what the university calls a “master agreement.” Remember, the title of a document is irrelevant, so just because a document is called a “master agreement,” that does not make it a university-wide master agreement.** All of the university’s master agreements are listed in the University’s contract management system.

Generally speaking, a master agreement sets out all of the legal terms and conditions that will govern the parties’ transactions that are made during the term of the master agreement. This is very advantageous because these agreements permit the parties to quickly negotiate future transactions because they can rely on the terms of the master agreement, thus avoiding the need to repetitively negotiate legal terms and conditions. In short, master agreements allow the university to stop “reinventing the wheel.”

In order to be considered a university master agreement, the agreements must meet the following elements:

1. Zero-dollar/no-cost with no obligation to make a purchase;
2. All campuses/institutes/units may order under the master agreement;
3. Negotiated by the UT System Office of Procurement Services; and
4. Purchases made via a purchase order (issued by the appropriate purchasing office) or a simplified order form that would go through the appropriate contract office.

One major challenge with master agreements is keeping all of the interested people on the same page:

- The supplier needs to remember that we have the master agreement;
- university departments need to remember to check the website, and then order via a purchase order (instead of requesting a contract from the supplier); and
- Contract offices must remember to check the website and reject contracts from departments if there is a master agreement in place that governs the particular goods or services the department seeks to order.

Maximum Financial Obligation/Maximum Payment Obligation

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Information:

Historically, the University's Contracts Fiscal Policy required that all contracts contain a "maximum liability" clause. Frequently, suppliers objected to the phrase "maximum liability" because they fear that this language would serve as the cap for the amount of money they could win if they sued UT. So, the best practice was to call these clauses "maximum financial obligation" or "maximum payment obligation" clauses.

The UT System Procurement Office recommends that you do not use a maximum financial obligation clause. Instead, focus on clearly articulating the deliverables and the cost of each deliverable.

Contemporary: Whether to include such a clause is a business decision.

Please do not include a maximum payment obligation clause in zero-dollar or receivable contracts as it is likely to confuse the supplier. **Further, if the contractual language is clear that the university will not be incurring any financial costs, then it is completely unnecessary to include the "maximum liability" clause.**

The intent of the maximum financial obligation clause is to limit the amount of money that the university can spend under a contract.

Explanation to supplier:

The maximum financial obligation clause is not intended to be a limitation of liability. The clause is intended to represent the most that UT will be required to pay under the contract for the goods or services.

Model language:

The maximum amount that **the university** will pay for goods and/or services under this **contract** is \$_____ (fill in the amount).

Model language (Alternative):

The maximum amount that the university will pay for goods and services under this agreement is \$_____ (“Maximum Financial Obligation”). University’s Maximum Financial Obligation is not subject to increase for any reason, unless this agreement is amended by a written amendment that is signed by authorized officials of both parties.

Merger Clause / Entire Agreement

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Information:

Also known as an “integration clause” or “entire agreement clause.” This type of clause states that the entire understanding of the parties and, thus the entire transaction, is contained within the contract.

Model language:

This agreement constitutes the entire understanding between the parties with respect to the subject matter of this agreement and supersedes all other agreements, wither written or oral, between the parties.

No Oral Modification/Modification Clause

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Information:

If you are drafting a contract and you decide to include a no-oral-modification clause, please consider using the following language:

Model language:

No amendment of this **agreement** will be effective unless it is in writing and signed by authorized officials of both parties. To be valid, any document signed by **the University** must be signed by an authorized official listed on this website:

<http://treasurer.tennessee.edu/contracts/contractsignature.html>

Non-Solicitation (Covenant Not to Hire)

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Information:

This type of clause forbids UT from hiring an employee from a supplier, usually within a specific time frame during and/or after termination of the contract. This clause is problematic because the university's various offices of human resources does not keep track of these types of clauses.

With few exceptions, the university's job openings are posted publicly. UT allows anyone legally allowed to work at UT to apply.

Explanation to supplier:

The university is a large public institution and its various human resources departments do not track these types of clauses. Also, except for positions that seek only internal university applicants, all other open positions are posted on a publicly available website and anyone legally allowed to work in the U.S. may apply for those jobs.

Fix:

- Preferred fix: Strike the clause entirely.
- Next option:
 - ✓ State that the University will not actively engage in employment recruitment efforts specifically targeted toward one or more of the supplier's employees.
 - ✓ State that, if the Supplier's employee(s) applies through UT's public portal, and the University hires the person, the University is not in breach of the agreement.
 - ✓ Further, limit the applicability to a particular department within UT.
 - ✓ Set a time limit on this obligation.

The University of Tennessee's [campus + department] will not actively engage in targeted recruitment of Supplier's _____ employees.

“Actively engage in targeted recruitment” means to knowingly initiate personal contact for the purposes of hiring, but does not include responding to an unsolicited application, receiving unprompted responses to advertisements, or receiving candidates who are, without The University of Tennessee involvement, presented to The University of Tennessee by a recruiting firm.

This section only applies to the University’s [campus + department].

The University’s obligation to avoid actively engaging in targeting recruitment expires when this agreement ends.

- Another option: Require the supplier to specify names and/or general categories of types of employees (e.g., managers) and limit the time frame to 6 months – 1 year. Further, require the supplier to provide UT with a list of employees that UT cannot hire.
- Another option: This provision does not restrict in any way the right of either party to solicit generally in the media for required personnel, and shall not restrict employees, contractors, or representatives of either party from pursuing employment opportunities on their own initiative from or with the other party.

Tips:

If the supplier requires a non-solicitation clause, use the tips below as a guideline for drafting an acceptable non-solicitation clause:

- Time limit: Be sure that the non-solicitation period is limited in time: usually 6 months or 1 year.
- Limited scope: Be sure that the non-solicitation period is limited in scope (i.e., the type of employees that UT cannot hire is limited).
- Limited applicability: Determine whether you could limit the applicability to one particular university department or location.
- What types of employees is the supplier worried about? Unless the supplier is a small company offering highly advanced consulting or technology services, the odds are low that the supplier is worried about all possible employees.

Notice

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Information:

Notice provisions set forth the manner in which the parties will deliver official communications to each other during a contract's term.

Note: Sometimes, notice by email may be acceptable. Use your judgment to determine when email would be acceptable and when a letter or fax would be required.

Model language:

Notices.

(a) For a notice or other communication under this agreement to be valid, it must be in writing and delivered (1) by hand, (2) by a national transportation company, with all fees prepaid, or (3) by registered or certified mail, return receipt requested and postage prepaid

(b) Subject to this Notices section, a valid notice or other communication under this agreement will be effective when received by the party to which it is addressed. It will be deemed to have been received as follows:

(1) if it is delivered by hand, delivered by a national transportation company, with all fees prepaid, or delivered by registered or certified mail, return receipt requested and postage prepaid, upon receipt as indicated by the date on the signed receipt; and

(2) if the party to which it is addressed rejects or otherwise refuses to accept it, or if it cannot be delivered because of a change in address for which no notice was given, then upon that rejection, refusal, or inability to deliver.

(c) For a notice or other communication to a party under this agreement to be valid, it must be addressed using the information specified below for that party or any other information specified by that party in a notice in accordance with this section.

To **Supplier**:

[Name][Address]

To **University**:

[Name][Address]

(d) If a notice or other communication addressed to a party is received after 5:00 p.m. on a business day at the location specified in the address for that party, or on a day that is not a business day, then the notice will be deemed received at 9:00 a.m. on the next business day

Numbers

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Information:

When including money in a contract, it's best to use digits and not words. Many contract professionals are probably in the habit of using digits and words together (e.g. "five thousand dollars (\$5,000)"), and many probably view this as a safe, "belt-and-suspenders" approach to drafting. Using only digits makes it easier and faster to proofread a clause. Also, using only digits eliminates the possibility of a conflict between the words and the digits (such conflicts happen far too often).

Order of Interpretation

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Information:

When a contract has addenda, exhibits, etc., consider whether an order of interpretation clause is needed. Documents prepared by UT, such as a UT addenda and UT's Standard Terms and Conditions, must usually have precedence over the contractor's documents in this list.

If so, the sample following language must work in most circumstances:

The following documents make up this agreement: [list names of documents that make up the agreement]. Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among those documents, the following order of precedence will govern: 1) [document that is interpreted first]; 2) [document that is interpreted second]; and 3) [document that is interpreted third].

Original Signatures

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Information:

The university does **not** require original signatures, and the university encourage all university contract officers to scan/email documents to suppliers for signature. Scanning and emailing saves a lot of time, money, and resources. While there are certain types of documents where the law will require originals (e.g. wills), the campus contract offices will not deal with the types of contracts that require original signatures.

If another party requests original signatures, you are encouraged to ask the other party to pay for the shipping costs. With domestic entities, this strategy will often cause the other party to change their mind, and they will accept the digital copy via scan/email. With foreign entities, this strategy will often not be successful in getting them to drop their request for an original.

Partnership / Partner

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Information: A “partnership” is a type of legal association that has consequences and special meaning. Delete the word “partner” or “partnership” from all contracts, and replace with “collaborator” or “collaboration.” Often in business, salespeople or other vendor representatives use the word “partner” or “partnership” liberally to convey that UT is a customer or is otherwise working with the vendor. Legally, the word “partnership” has consequences, and the University does not enter into true partnerships. To avoid any misunderstandings, the best practice is to avoid the word “partner” or “partnership.” Acceptable words include: team, teaming, collaboration, collaborators, or cooperation.

Payable Agreements: Additional Items for You to Consider

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Introduction: This section addresses additional concerns that arise when an agreement involves UT paying the other party money.

- **Term:** All payable contracts must state the term (effective dates, start and end dates) of the agreement.
 1. Note: UT cannot agree to an automatically renewable term. Further, UT cannot agree to a term longer than 5 years, unless the term was agreed upon in a bid.
- **Specificity:** Contracts must be specific when it comes to the goods or services that the vendor will be providing.
 1. Example of unacceptable language: “Vendor will provide services to the University.”
 2. Example of acceptable language: “Vendor will provide consulting services relating to the University’s College of Nursing outreach program.”
- **Amount:** All charges must be calculable. Vendors must not charge the University for anything, unless specified in the contract.
- **Itemized Charges:** All payable contracts must include an itemized list of charges for which UT will be responsible. The contract must clearly state what UT is buying, how much, and at what price.
- **Currency of Payment:**
 1. The University strongly prefers to make payments in U.S. Dollars. As of the date of this Guidebook, the U.S. Dollar is widely used internationally for payment. The risk when paying in foreign currency is that the exchange rate might fluctuate and cause the U.S. Dollar to lose value vis-à-vis the foreign currency. When that happens, it will cost the department more money than the department might have anticipated.
 2. Do not rely on a “\$” to ensure that UT will be paying in USD. There are approx.. 35 countries that use the “\$” for their currency. You must specify “USD” when referring to US Dollars.

- Advanced Payment: University Fiscal Policy FI0510 (*Advance Payment to Vendors*) generally prohibits advanced payment to vendors.
 1. Exceptions:
 - (1) registration for conferences and seminars,
 - (2) orders to the U.S. Government Printing Office,
 - (3) purchases of postage,
 - (4) subscriptions to trade magazines and periodicals,
 - (5) purchases of items from specialty establishments requiring that payment accompany the order,
 - (6) advance payments to vendors which would result in documented significant savings to the university.
 2. Note: if advance payment is required, it must be included in the contract.
 3. Advanced payment for items outside of those allowed in FI0510 is a business decision and must be reviewed by the appropriate CBO. For example, it is common for UT to pay in advance for software licenses.

- Third-Party Payment: Many times, certain types of licenses are purchased through third parties. The most common example is library subscription agreements. Many times, the library will order a product (e.g., ProQuest), but then pay through a third party (e.g., Tenn-Share consortium). Note: **Third-party payment must be stated in the contract.**

- Travel Expenses: Travel expenses can be handled in one of four ways:
 1. Included as part of the total amount owed to vendor (common with maintenance agreements; i.e., UT does not reimburse for travel expenses). When this is done, the contract must state that the University will not reimburse the vendor for travel expenses (this is especially important when using the Standard University Contract!);
 2. Gross-up/Lump-Sum: A certain amount paid to the vendor and the vendor is responsible for paying their own travel expenses with the lump sum. When this is done, the contract must state that the University will not reimburse the vendor for travel expenses (this is especially important when using the Standard University Contract!).
 3. Reimbursement under UT's policy (cannot be a guaranteed or lump sum).
 4. Reimbursement under vendor's travel policy, but under no circumstances can UT pay for first class airfare. A copy of the vendor's travel policy must be attached to reimbursement request.

- Fiscal Review Committee: Under state law, the Fiscal Review Committee of the Tennessee General Assembly is required to review and comment on proposed non-competitive contracts with a term (time period) of more than one year and a cumulative payable value of \$250,000 or more. The Fiscal Review Committee requires all contracts and amendments to be delivered to them no less than 60 days in advance of the start date.

1. Elements: If a contract meets all of the following criteria, it may be subject to Fiscal Review:
 - Non-competitive (i.e., not bid);
 - Payable amount equal to \$250,000.00 or more; and
 - Longer than one year.
2. Note: Amendments might trigger Fiscal Review if the amendment is to a contract that was bid, longer than one year, and equal to \$250,000 or more.
3. Exceptions: Exceptions are listed in FI0420.
4. Check with the System Contract Office if you have any questions at all about whether a contract is subject to Fiscal Review presentation.

What are payment terms?

Payment terms in a contract specify the time period during which the University is supposed to make payment to the vendor. The University has three options:

1. Payment by E-Payables: Net (i.e. payable immediately upon approval of invoice). Departments are not allowed to use pcards for contract payments, however, contract payments may be made via E-Payable. Each time an invoice is processed through the University's A/P system, US Bank will send a secure email with payment instructions and a new 16-digit credit card number. The email will provide a list of invoice numbers and amounts being paid. The vendor will process the payment through their Point-of-Sale system. Payment runs are done every day for the University's E-Payable vendors as opposed to twice a week for those vendors receiving checks.
2. Payment by ACH: Net 30 (i.e., payable in 30 days) (note: ACH is direct deposit and the payment period can be faster than Net 30, if needed). ACH payment works exactly like direct deposit for payroll checks. These terms are Net 30, and payments are made daily.
3. Payment by check: Net 45 (i.e., payable in 45 days). The University can pay by University check, though payment by check is not preferred. Paying by check costs the University a lot of time and money. Note that the University cannot pay by certified checks or cashier's checks. Contract payment language must be changed to Net 45.

Why hasn't everyone signed up to be paid via E-Payables?

Vendors are charged a fee by their bank, generally a percentage of the payment, for accepting payment via E-Payables. Many vendors consider this fee the cost of

doing business, but some vendors do not want to be paid large payments in this manner. UT will never charge a fee for this payment method.

What if the contract states a different payment time period/term?

Scenario # 1: Contract states Net 31 or longer, but vendor has signed up for E-Payables or ACH payment.

- Vendor will be paid Net (if signed up for E-Payables)
- Vendor will be paid Net 30 (if signed up for ACH)

Scenario # 2: Contract states Net 30 or less, but vendor has not signed up for E-Payables or ACH payment.

- Vendor will be paid in accordance with the contract. If the contract states Net 30 by check, the Accounts Payable Office will change the Net term/time period in IRIS when entering the invoice document (departments are no longer allowed to change the payment terms in IRIS).

What should Contract Offices do?

Please try to negotiate payment with E-Payables or ACH (these types of payments are processed daily, whereas checks are printed only twice per week and then have to be mailed). If the vendor insists on a check, please try to negotiate a 45-day payment period. Under State law, unless a contract says otherwise, the Tennessee government agencies have up to 45 days to pay before they can be charged a late fee. The check will be issued Net 40, and that gives UT a 5-day “buffer.” Remember: if the vendor signs up for ACH or E-Payables, the vendor will get paid faster.

However, if the vendor refuses to agree to 45 days, and the vendor wants a check and the terms of the contract are for a shorter period of time than 40 days (for a check), the A/P Office will comply with the contract and adjust payment accordingly. If the vendor wants ACH payment faster than 30 days and if the contract states this, then the A/P Office will adjust accordingly.

If a vendor wants to sign up for E-Payables, ask them to email Susan Wilson. If the vendor wants to sign up for ACH, the vendor needs to complete the Direct Deposit Authorization Form and either mail or fax to the Office of the Treasurer.

Payment Card Industry Standards

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The Payment Card Industry Data Security Standard is a set of security standards designed to ensure that all companies which accept, process, store, or transmit credit-card information maintain the information securely.

When the following situations arise, be sure to send the contract to the Treasurer's Office (Tim Mapes) and the Controller's Office (Justin Holt) for review:

- Supplier will accept credit cards on behalf of UT; or
- Supplier will accept credit cards as a means of paying UT.

Personal Guarantee

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Information:

Personal guarantee clauses are common in credit applications and must be deleted. A personal guaranty clause might use the words “personal guaranty,” or it might use words along the lines of, “the individual signing this document is personally responsible [or liable] for...”. The university is credit worthy and there is no need for a personal guarantee.

Power of Attorney

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Information:

A power of attorney is a legal document that gives someone, or a party, the power to act in the University's place. So, with power of attorney, a party could obligate the University to things without first obtaining the University's permission.

The University grants power of attorney only in very rare cases. You must consult with your campus business office and the Office of General Counsel before approving a contract with a power-of-attorney clause.

Price Increases

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Information:

Suppliers will often address price increases in one of three ways:

- Set a CPI rate.
 - If a supplier chooses this, please be sure to review the CPI section of this document.
- Set a firm rate, for example 5%.
 - Is this rate reasonable?
 - Have you tried to negotiate the rate lower?
- Pass-through costs.
 - If the supplier wants to pass-through cost increases to the university, be sure to require the supplier to document these price increases before passing them to the university.

Principal Investigators

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Information:

University employees are prohibited from signing a contract that is between the university and a supplier. Sometimes, especially in research contracts, the other party requires that an individual researcher or faculty member sign the contract also. In this situation, the language below might work.

Model language, usually in the signature block:

Note: Principal Investigator, while not a party to this **agreement**, hereby acknowledges that **she/he** has read the **agreement** and understands **her/his** obligations under this agreement as an employee of The University of Tennessee.

Private Use

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Information: when the university will allow a private-sector entity to use university space for trade or business activity, you must consult with the Controller's Office and Office of General Counsel to determine whether the proposed use will raise any tax issues.

The University of Tennessee has a number of facilities financed with tax-exempt bonds. As a result of utilizing tax exempt financing, the university must comply with certain laws and regulations as promulgated by the Internal Revenue Service and Tennessee General Assembly. If a contract permits a third party to conduct business in a building financed with tax-exempt bonds, the contract must be reviewed by the Controller's Office.

See UT policy # FI0335.

Professional Designer Services

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Information: Contracts for professional designer services (Architects, Engineers, surveying, planning services) for the improvements of real property may require SBC approval. You must send such contracts to the Office of Facilities Planning for review to determine whether SBC approval is required.

Publication (restrictions on)

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Information:

Contract language that restricts publication rights can create Export Control problems. Accordingly, delete any restrictions on publication.

Punitive Damages

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Information:

Often, contracts will state that the university will be liable for punitive damages.
This language must be deleted.

Explanation to suppliers:

The Tennessee Claims Commission Act limits the liability of the State of Tennessee to actual damages and provides that the State is not liable for punitive damages (Tenn. Code Ann. § 9-8-307(d)). The university has no authority to contractually agree to be liable for damages beyond the scope provided for expressly in the Tennessee Claims Commission Act. Only the Tennessee General Assembly has the authority to waive or limit the State's sovereign immunity.

Rebates and Incentive Payments

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Rebates:

Rebates are a common feature in high-volume contracts for goods, such as office supplies. Contracts involving rebates require careful thought to ensure that you consider all possible issues that might create problems during the life of the agreement.

Calculating the rebate: Calculating the rebate involves considering two issues: (a) determining which when the supplier will recognize the University's spend; and (b) determining how the supplier will calculate the rebate.

Determining when dollars count: Determine when the supplier will recognize the University's spend for purposes of counting the spend toward the rebate. Will the supplier count the university's spend when:

- the university places an order?
- the supplier ships the item(s)?
- the university issues payment?
- the university's payment clears?

The timing could make a big difference, especially when the rebate is based on tiers of spend. For example, assume the rebate is based on a calendar year and the supplier pays a rebate based on tiers of spend. If the University places a large order on the last working day of December that would put the University's spend in a higher tier, but the supplier doesn't fulfill the order until mid-January, when will the order count? If you fail to address this in the contract, the supplier will have control over when to count the spend.

Amount:

Flat percentage: The simplest form of rebate is when the supplier will give the University a firm rebate (for example, 1.5%) on all of the University's spend.

Tiers: If the rebate will be based on tiers, you must specify whether the rebate will go to the first dollar UT spends (often called "dollar one"), or whether the tier structure will govern pay-out. An example will make this point clearer.

Consider the following example: UT spends \$6,000,000.00 with the vendor.

Tiers:	Rebate percentage:
\$.01 to \$1,000,000.00	1%
\$1,000,000.01 to \$5,000,000.00	2%
\$5,000,000.01 and above	3%

From dollar one:

$$\$6,000,000 \times .03 = \$180,000.00$$

Tier structure applies:

$$\$1,000,000 \times .01 = \$10,000$$

$$\$3,999,999.99 \times .02 = \$79,999.99$$

$$\$999,999.99 \times .03 = \$29,999.99$$

$$\text{Total} = \$119,999.98$$

The difference between a “dollar one” approach and the tier structure is \$60,000.02.

Time: What is the time period during which the university’s spend will count toward the rebate? Be sure to define whether the period is based on the calendar year or contract year.

If the supplier will pay the University based on tiers, consider whether it would be better for the University if the supplier paid the rebate annually.

When: Another item to consider is when the supplier will pay the University. Will payment be quarterly, annually, etc.? The best practice would be to set a certain date when the supplier will pay the University. For example, “Supplier will pay the University no later than January 15. If January 15 is not a business day, Supplier will pay the University no later than the first business day after January 15.”

Method of payment: How will the supplier pay the University? The supplier will need to pay the university by check. While the University can accept ACH payment, ACH payment creates a lot of issues for the University.

Incentive Payments:

Incentive payments are flat/firm payments that a supplier makes to the University. Most often, the supplier makes the incentive payment once, at the beginning of an agreement.

The key thing to think about with incentive payments is whether the University has to pay the supplier a prorated portion of the incentive payment back in the event that the University cancels the agreement. Consider whether the University may keep the payment if the University cancels the agreement due to the supplier's material breach.

Also, be sure to specify that:

- the incentive payment is not tied to spend volume
- the supplier will pay the University by check
- when the incentive payment is due

Receivable Contracts

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Information: Receivable contracts must be forwarded to the Controller's Office for review if the revenue stream appears to meet the three basic criteria for unrelated business income, which is taxable to the university and reported on the annual IRS form 990-T. The three basic criteria are as follows: is the activity unrelated to the exempt purpose of the university; is the activity a trade or business with a profit motive; **and** is the activity regularly carried on as opposed to a one-time deal? If the activity generating the revenue meets all three criteria, it is possible it will be subject to unrelated business income tax. For questions about unrelated business income tax as it relates to receivables contracts, contact the Controller's Office.

Recording of artistic performances/lectures

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Information:

Contracts for lecturers/speakers, artists, etc. often are on supplier-supplied forms. These contracts usually forbid UT from filming/recording the performance and it also requires UT to prevent those individuals in attendance from recording it. Usually, these prohibitions are stated in broad, strict terms. These terms impose a sort of “strict liability” on the university, meaning that the university would be liable for recording, even if it was not negligent in any way.

Model language:

The University of Tennessee will not be liable for _____ [recording, etc.] by any attendee provided that the university does not intentionally assist in or encourage such activity.

References to Other Paragraphs/Attachments in the Contract

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Information:

Many times, one clause in a contract will reference another clause by number (e.g., “This agreement will automatically renew pursuant to paragraph 17.”). It’s a good idea to check each reference to make sure that it is correct. Often, these numbers are not correct. If they are incorrect, please fix the reference.

Representations and Warranties

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Information:

A representation is a statement of past or present fact, made as of a moment in time to induce a party to act. The University may agree to representations in a contract, provided those representations are, in fact, factually accurate.

A warranty is a promise that if the statement in the representation is false, the maker of the statement will indemnify the other party for any damages suffered because of the false statement. As explained elsewhere in this Manual, UT is prohibited under Tennessee law from agreeing to indemnify or hold harmless another party. Agreeing to an indemnification/hold harmless provision could be deemed a waiver of the State's sovereign immunity and an uncapped financial liability. Because warranty clauses could be deemed to create indemnity obligations and/or uncapped liabilities for the State, UT has no legal authority to agree to warranty clauses. Accordingly, warranty provisions must be deleted from contracts.

Responsibility for the Acts of Others

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Information:

Sometimes, contracts will contain clauses requiring UT to be responsible for the acts of others individuals or entities, such as its students, guests, invitees, suppliers, contractors, agents, or representatives. The university cannot agree to this type of clause because under Tennessee law the university is responsible only for itself and its employees.

Explanation to supplier:

The university, as an instrumentality of the State of Tennessee, has sovereign immunity and is subject to only those claims allowed by its state legislature under the Tennessee Claims Commission Act. The Claims Commission Act only covers the acts and omissions of State of Tennessee employees, as defined by the statute.

Safety and Environmental Standards

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Information:

The university's chief safety officer has asked that the university include the clause below in all contracts for services performed on UT's property.

Language to add:

Contractor must comply with all applicable laws and regulations, including those related to safety and hazardous waste. Contractor will be responsible for paying any fines that Contractor or University incur as a result of Contractor's performance of this agreement.

Security Interests/Liens

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Information:

First, determine whether the university is financing or leasing equipment. Financing would occur if UT is making payments over a period of time for the purchase of a good, rather than paying in full at the time of purchase. If the purchase is not being financed, then there is likely no reason/justification for granting the supplier a security interest. If the university is financing something, then the university may grant a security interest in the financed item to the supplier until the debt is paid in full. Leasing would occur when the university rents equipment from a vendor. In the case of leases, the vendor may maintain a security interest in the item that the University is leasing. The vendor cannot obtain a security interest in any University-owned property.

You might run into a security interest where UT orders capital equipment, but does not pay for the item in advance (and especially where payment terms are net 30). In this scenario, the University is, in a sense, financing the capital equipment for a short period. Or, you might see a security interest where the University leases equipment, rather than buying the equipment.

Example:

Customer hereby grants to Philips a purchase money security interest in the products until all payments have been made. In the event Customer is in default under the terms in this quotation, Philips shall have all rights and remedies of a secured creditor under the Uniform Commercial Code.

The only problem with above language is that it references the Uniform Commercial Code. Tennessee has not instituted the full UCC, so an appropriate modification to the language is as follows:

Customer hereby grants to Philips a purchase money security interest in the products until all payments have been made. In the event Customer is in default under the terms in this quotation, Philips shall have all rights and remedies of a secured creditor under Tennessee law.

Occasionally, contracts (for example, maintenance agreements) will attempt to give the supplier a lien or security interest in something that UT owns. The university cannot agree to grant another party a security interest in university-owned property.

Settlement

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Information:

Regarding settlement, the university cannot give another party control over settlement of claims against the university. We can add the following language: “No settlement will be binding against Customer without the consent of the university’s Office of General Counsel and the Tennessee Attorney General.” See Tenn. Code Ann. 20-13-103. See, also, Tenn. Code Ann. 9-8-406. Most often, suppliers seek the ability to settle claims against UT when the supplier agrees to indemnify UT.

Model language:

No settlement will be binding against the **university** without the consent of the **university’s** Office of General Counsel and the Tennessee Attorney General.

Example:

The Licensee shall give prompt notice of an infringement claim to Wiley, shall provide such cooperation and assistance to Wiley as is reasonably necessary to defend the claim, and shall allow Wiley to have the sole control of the defense, provided, however, that the Licensee retains the right to participate in the defense at its own expense and no settlement will be binding against the Licensee without the consent of the university’s Office of General Counsel and the Tennessee Attorney General.

Shipping Terms/INCOTERMS

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Information:

Shipping terms are very important, and often taken for granted. The worldwide standard for shipping terms is the INCOTERMS⁸. The International Chamber of Commerce (ICC) publishes the INCOTERMS. INCOTERMS are **International Commercial Terms**. The ICC publishes updates every 10 years. So, as of the date of this manual, the current version of the INCOTERMS is the INCOTERMS 2010.

The United States has been slow to use the INCOTERMS, but the vast majority of the world uses INCOTERMS for shipping terms. Generally, businesses in the United States still use one shipping term, FOB, as the foundation of their shipping language. In 2004, the American Law Institute, which publishes the Uniform Commercial Code (UCC), removed all shipping terms from the last UCC update.

Shipping can be very complicated, particularly when looking at (a) international shipments, or (b) third-party service will deliver the item. International shipment involve customs, and other complexities. Third-parties delivering items necessarily increases the complexity.

FOB, by itself, is a meaningless term. A prolonged discussion of shipping terms exceeds the scope of this manual. A few highlights are:

- FOB has never included insurance obligations.
- FOB has never accounted for when title transfers to the buyer.

The best practice for shipping terms is to select from the following two choices:

1. Use INCOTERMS 2010; or
2. Use Standard English contract drafting principles to specify the parties' rights and duties when it comes to shipping.

The University prefers that you use option # 2.

Good shipping terms must account for:

⁸ The International Chamber of Commerce owns all intellectual property rights to INCOTERMS.

- Costs;
 - Who is paying for the shipping.
- Risks;
 - Who is responsible for risk of loss.
 - If Fed-Ex, UPS, or another carrier will deliver the items:
 - Who is responsible for loss;
 - Will the shipper declare a value to the carrier;
- Insurance (if needed);
- Tasks;
 - Who will pack the items for shipment;
 - Who will notify a carrier that the item(s) is ready for shipment;
- Title transfer;
 - When does title transfer from seller to buyer.
- Geographic destination;
 - The specific point where the goods will be delivered;
- Time window during which buyer may report damages; and
- Shipping date.

Releases for Use of University Names, Logo, and Marks

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The University of Tennessee's trademarks and service marks include all university names, logos, slogans, insignias, symbols, team names, and other indicia. These indicia or marks are valuable intangible property, protected by federal and state laws, and regulated by the University's Indicia Licensing Program. This program is administered by the [Office of Trademark Licensing](#). Requests by a vendor or contractor to use the University's marks must be referred to the Office of Trademark Licensing and/or the Office of General Counsel.

If UT is agreeing to language in a vendor's contract (rather than a UT form) that allows the vendor to use UT marks, you must include clauses that:

(1) limit the use of UT's marks to those purposes expressly stated in the contract;

(2) terminate the vendor's right to use UT's marks immediately upon termination of the contract;

(3) allow UT to pre-approve specific uses of UT marks by the vendor;

(4) include language stating that the other party promises not to defame the university or engage in unethical conduct;

and

(5) require the vendor to indemnify and hold UT harmless for claims related to the vendor's use of UT marks.

Copyright and patents would be covered by the UT PCIP Policy and patents must be handled through UTRF.

Signature Blocks

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Information:

In agreements, you often see a date in the introductory clause, dates in the term (time length) section, and dates in the signature block. You don't need all of those dates.

Standard signature block:

The parties are signing this agreement on the date listed in the introductory clause.

VENDOR

Signature: _____

Name: _____

Title: _____

The University of Tennessee

Signature: _____

Name: _____

Title: _____

Signed In / Done In / Made In / Location of Signature

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Information:

Sometimes, stating where the agreement is “Made in” or “Done in” can be a sneaky way for a supplier to insert a forum-selection clause. If the contract has a spot for both parties to put where the agreement was signed, then this is acceptable. Example:

The University of Tennessee

Foreign Supplier

(signed in Knoxville, TN USA)

(signed in Paris, France)

If the agreement has only one “signed in,” “made in,” or “done in” line and such line states the supplier’s city, state, and/or country, then such language needs to be deleted. See Venue for more information.

Software

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Introduction:

Generally, when assessing software license agreements, you will make some initial determinations:

1. Is the software hosted on the university's servers or on the supplier's servers?
2. How quickly will the software be operational?
3. How important is this software? Is it an Enterprise Resource Planning software, for example?
4. What types of data will be in the software?
 - a. Healthcare?
 - b. Financial?
 - c. Student?
5. When the contract expires, or if either party terminates the contract, what can the university do? Download its data?
6. Who may use the software?
7. How can the supplier use the university's data?

A common complaint from technology staff at the University is that software providers drastically increase their prices after the University's initial contract term ends. Consider adding language to a contract that limits the supplier's ability to raise prices, as long as the University has an agreement with supplier.

Information:

Many companies have click-through, shrink-wrap, or other online terms and conditions. Many times, these types of agreements are referred to as "EULAs," or "End User License agreements."

Generally speaking, there are two broad types of electronic terms and conditions:

3. Browse-wrap (also, browserwrap or browse-wrap license): In a browse-wrap agreement, the terms and conditions of use for a website or other downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, where the user must manifest assent to the terms and conditions by clicking on an "I agree" box, a browse-wrap agreement does not require this type of express manifestation of assent. Rather, a web-site user purportedly gives

his or her assent by simply using the product — such as by entering the website or downloading software.

4. Clickwrap (also, click-wrap, click-through, or click-to-accept): Users are prompted to actively indicate their acceptance of terms and conditions (for example, by checking a box, clicking “I agree,” etc.).

Click-wrap agreements are generally considered legally binding in the U.S. Whether browse-wrap agreements are enforceable is controversial, but let’s assume for our purposes that they are legally binding. Even though click-through, shrink-wrap, or other online terms and conditions are not signed like a traditional contract, they are legally binding.

Note that these types of agreements have lots of different names (a non-exclusive list is below):

- Browse-wrap
- Click-to-accept
- Click-wrap
- Terms of Service
- Terms of Use
- Wrap agreements

These types of agreements are problematic because the online or shrink wrap terms and conditions could contradict any agreement between the university and a supplier. Another problematic issue is that, almost always, the person allegedly agreeing on behalf of the university is a departmental staff member and not someone who has signature authority. Also, terms and conditions that are electronic can be changed at any time (i.e., the other party has a unilateral right to modify the terms and conditions).

There are three general types of terms and conditions:

- Click-through, clickwrap, click-wrap, or click-to-accept: The end user must signify their acceptance of the license terms in some manner, usually by clicking “I Agree.”
- Shrink-wrap: The terms and conditions are included with, and often affixed to, the item that the user is using, such as a seal over a product that says: “By using this product, you agree to the terms and conditions listed on Vendor’s website, located at...”
- Browserwrap, Browsewrap, Browse-wrap, TOS, Terms of Service, Terms of use: Most websites have only a set of terms and conditions located on the site, and use of the website constitutes agreement to the terms and conditions. Often, the link will be labeled: “Legal,” “Legal Notice,” or “Terms of Use.”

Sovereign Immunity

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Information:

As an agency of the State of Tennessee, The University of Tennessee is protected by sovereign immunity. Sovereign immunity is the legal principle that the state and federal governments are immune from lawsuits, unless they give consent to be sued for certain types of claims. The State of Tennessee's limited waiver of sovereign immunity is the Tennessee Claims Commission Act. Under the Act, the state and its agencies may be sued for various listed reasons. The state may not be sued for non-listed reasons. The Claims Commission Act allows certain claims for breach of contract by parties with written contracts with the state, but it does not allow third-party beneficiary claims. Accordingly, state agencies are not allowed to grant third-party beneficiary rights in contracts. Additionally, indemnification is not listed as an allowable lawsuit against the State of Tennessee or its agencies. Accordingly, state agencies are not allowed to indemnify or hold harmless other parties.

In certain situations, it might be advisable to include the language below.

Model language:

Nothing contained in this **agreement** will be deemed or construed to waive or abrogate in any way the sovereign immunity of the State of Tennessee or **UT** or any official, officer, or employee of the State or **UT** or to deprive any official, officer, or employee of the State or **UT** of any other immunity to which the official, officer, or employee is otherwise entitled under state law. **UT's** liability for any claims, damages, losses, or costs to **Vendor** and to any third parties will be subject to the terms, limits, and conditions of the Tennessee claims Commission Act, Tenn. Code Ann. § 9-8-301 *et seq.*

Stamp / Official Seal

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Information:

When contracting with suppliers in international locations, the supplier might ask for the University to place a stamp or seal on the University's signature block. This is a relatively common practice in international locations. If you need to have the contract stamped or sealed, please contact the CFO's assistant for further information.

Riders (for Speakers, Entertainers, Etc.)

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Information:

Practically every artist, speaker, performer, musician, band, etc. has a rider that details the technical, operational, and business terms that they want to be part of the agreement between UT and the artist (or manager).

Caution: You must read these riders carefully!

Prohibited Provisions:

First, contract offices must make appropriate revisions. Frequently, these riders contain clauses to which the university cannot agree. For example, the performer wants the university to provide:

- Alcohol;
- Rare or particularly expensive food items;
- Burning (open flame) candles;
- Expensive bottled water.

Operational/Technical Specifications:

Campus Contract Offices must contact the person in the department responsible for the contract and obtain an email verification that the department has read the contract and can comply with all operational/technical specifications.

Interesting History:

The rock and roll band Van Halen was the first band to take a large production to tertiary markets. To ensure that smaller venues in those markets could safely hold the weight of the band's gear and provide all operational needs (e.g., electricity), the band inserted a clause buried in their rider calling for a large bowl of M&M candies with all of the brown M&Ms removed. The band included this language to ensure that the venue owner/operator read the rider carefully. If the M&Ms were not removed, then Van Halen wouldn't play at the venue. Source:

<http://www.thisamericanlife.org/radio-archives/episode/386/fine-print>

Tax Designation

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Information:

The university is a 170(c) organization. The university is **not** a 501(c)(3). Many people assume that the university is a 501(c)(3) because the university is non-profit. However, certain organizations maintain tax exempt status, but are not 501(c)(3) organizations. Again, the university is a 170(c).

Taxes/Tax Exemption

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Information:

The university is exempt from most Tennessee taxes (except for certain county or city taxes) and is also exempt from certain (or all) taxes in the other jurisdictions:
<http://controller.tennessee.edu/>

Be very careful when contracting with foreign suppliers. Most types of U.S. source income paid to a foreign person are subject to a withholding tax of 30%; however, a reduced rate or exemption may apply if stipulated in the applicable tax treaty. If a foreign person asks us to gross-up the payment to cover the withholding tax, you must consult with the department, the applicable CBO, and the payroll office.

Note: Up-to-date tax exemption information is available at the university's Controller's Office website: <http://controller.tennessee.edu/>

Explanation to supplier:

State of Tennessee

The university is exempt from most taxes in the State of Tennessee. The university can only agree to be responsible for paying applicable taxes. Please let me know if you need a copy of the university's tax exemption certificate.

Other jurisdictions: [Note to contracts offices: please check the Controller's Office website to see if the university is exempt from taxes in the particular jurisdiction. If the university is not exempt from taxes in that jurisdiction, then you might want to email Megan Talley to confirm that the university is subject to taxes in that jurisdiction. If the university is subject to taxes, then please modify the contract's language to specify that the university will pay all applicable taxes].

Tax Registration (Legal Requirement for Vendors)

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Information:

Tenn. Code Ann. § 12-3-306 provides that the State cannot contract to acquire goods or services, and no person or entity may contract to supply goods or services to the State, unless the person or entity has, prior to or contemporaneously with entering into the contract, registered with the Tennessee Department of Revenue to collect and remit the sales and use tax levied by the Retailers' Sales Tax Act, compiled in title 67, chapter 6 of the Tennessee Code.

The university is not authorized to grant exceptions to this registration requirement. If a supplier believes it must not be required to register and/or remit these taxes to the State, then the supplier must send an email to the Tennessee Department of Revenue requesting written acknowledgement that registration is not required. The supplier must then provide such confirmation to the university.

When contracting with the State of Tennessee or other State of Tennessee instrumentalities, the university may be asked to attest that it has registered to collect sales taxes. Such language is acceptable because the university does collect sales taxes on certain transactions.

Model language:

The **Contractor** must register with, or receive an exemption from, the Tennessee Department of Revenue for the collection of Tennessee sales and use tax. This registration requirement is a material requirement of this **agreement**. The **Contractor** shall comply, and shall require any subcontractor to comply, with all laws and regulations governing the remittance of sales and use taxes on the sale of goods and services made by the **Contractor**, or the **Contractor's** subcontractor.

Tennessee Claims Commission

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Information:

The forum designated by the Tennessee General Assembly for claims against the State and its agencies is the Tennessee Claims Commission. Generally, only the Tennessee Claims Commission has jurisdiction to hear state law claims against the State.

Model language:

Any liability of **the university** to **Contractor** and third parties for any claims, damages, losses, or costs arising out of or related to acts performed by **the university** under this **agreement** will be governed by the Tennessee Claims Commission Act, Tenn. Code Ann. §§ 9-8-301, et. seq.

Tennessee Code Annotated (T.C.A. or Tenn. Code Ann.)

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Information:

As of the date of this Manual, you can access a free un-annotated version of the T.C.A. here: <http://www.lexisnexis.com/hottopics/michie/>

Note that this website performs best when viewed via Microsoft's Internet Explorer web browser.

Third-Party Beneficiary

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Information:

As an agency of the State of Tennessee, The University of Tennessee is protected by sovereign immunity. The State of Tennessee's limited waiver of sovereign immunity is the Tennessee Claims Commission Act. Under the Act, the state and its agencies are subject to certain types of claims. The state may not be sued for non-listed reasons. The Claims Commission Act allows certain claims for breach of contract by parties with written contracts with the state, but it does not allow third-party beneficiary claims, T.C.A. § 9-8-307(a)(1)(L). Accordingly, state agencies are not allowed to grant third-party beneficiary rights in contracts.

Model language:

No person or entity, other than **the university** and **Contractor** and their successors and permitted assigns has any rights, remedies, claims, benefits, or powers under this **agreement**, and this **agreement** will not be construed or interpreted to confer any rights, remedies, claims, benefits, or powers upon any third party. There are no third-party beneficiaries of this **agreement**.

Fix:

Any reference to a third-party beneficiary must be deleted.

Explanation to supplier:

The university, as an instrumentality of the State of Tennessee, has sovereign immunity and is subject to only those claims allowed by its state legislature under the Tennessee Claims Commission Act. Tenn. Code Ann. § 9-8-307(a)(1)(L) allows for actions for breach of a written contract between the claimant and the state which was executed by a state officer or employee with authority to execute the contract. Third parties, without privity of contract with the state, are not allowed to bring a suit against the university. Since the Claims Commission Act does not recognize third-party claims, the university cannot agree to contract language that could be construed as granting third parties rights under the agreement.

Time for payment

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Information:

See: FI0505 – Processing and Paying Invoices. If you have any questions about accounts payment issues, please contact the accounts payable office.

Under Tennessee law (T.C.A. § 12-4-703), when a contract is silent as to when payment will be made, state agencies have 45 days to pay the invoice. ***The 45-day rule only applies when the contract is silent.*** Legally, UT can agree to pay an invoice during any specified time period. Historically, the university preferred to have at least 30 days to pay. FI0505, Section 8, states, in relevant part: “When specific terms are not provided, to avoid interest charges payment must be made within 45 days of receipt of the invoice or date the goods or services were received, whichever is later.”

Time Zones

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Information:

In most places in the U.S., there are two different times for each time zone: standard time and daylight savings time. Many people will use the initials PST, MST, CST, and EST without realizing that the “ST” stands for “standard time,” and, strictly speaking, will cause issues when daylight savings time is in effect. When specifying a time zone, please ensure that you state only “Eastern time”; “Central time,” etc. Hyper-specificity could cause technical problems: March – November is daylight savings time; November – March is standard time. So, if you were to say that an event would be held on July 4 at 2:00 PM Eastern standard time, this would be incorrect. The technical problem is that 2:00 PM Eastern standard time would actually be 3:00 PM Eastern daylight time.

A few places inside the U.S. do not observe daylight savings time, such as most of the state of Arizona; Hawaii; one county in eastern Nevada; and parts of Indiana.

Note that many suppliers assume that all of Tennessee is on Central Time, perhaps because Tennessee’s capital is on Central Time.

Also, note that, if you need to know what the time is in a city, you can go to Google and search “time in [name of city],” and Google will show you the current time in the city you searched.

Travel

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Information:

Some contracts (for example, maintenance agreements) provide that UT will reimburse the contractor's travel-related expenses. Ultimately, it is acceptable under UT fiscal policy to allow the university to reimburse the contractor's expenses at the rate that the contractor wants (usually, contractors want their actual expenses paid).

The usual practice is for UT to provide that travel reimbursement will be in accordance with UT's rules and regulations. However, when we use UT travel policy for suppliers, we create extra costs and delays on UT's side because suppliers cannot, generally speaking, use UT's rates. This results in a lot of travel exceptions, and slows down the travel queue. The travel exceptions result in UT paying for the suppliers' actual travel costs (excluding first-class airfare, alcohol, etc.)

Regardless of whether the university's travel rates will govern reimbursement, all clauses regarding reimbursement of travel expenses must contain the following language: "The University of Tennessee will not reimburse for any travel-related expenses that lack an itemized receipt."

Travel Expenses: Travel expenses can be handled in one of four ways:

5. Best Option: Included as part of the total amount owed to supplier (common with maintenance agreements; i.e., UT does not reimburse for travel expenses). When this is done, the contract must state that the university will not reimburse the supplier for travel expenses (this is especially important when using the Standard university Contract!);
6. Gross-up/Lump-Sum/Daily Flat Rate: A certain amount paid to the supplier and the supplier is responsible for paying their own travel expenses with the lump sum. When this is done, the contract must state that the university will not reimburse the supplier for travel expenses (this is especially important when using the Standard university Contract!).
7. Reimbursement under UT's policy (cannot be a guaranteed or lump sum).
8. Reimbursement under supplier's travel policy, but under no circumstances can UT pay for first class airfare. A copy of the supplier's travel policy must be attached to reimbursement request.

Travel must have a standard, it cannot simply be worded as, “university will reimburse Vendor’s travel expenses.”

Model language:

Reimbursement of all travel-related expenses will be in accordance with The University of Tennessee's travel policies. Further, Contractor shall provide itemized receipts for all travel-related expenses. university will not reimburse Contractor for any travel-related expenses that lack an itemized receipt.

Travel Agency

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Information: UT Policy FI0705 prohibits the University from paying any fees to a travel agent, except World Travel. If a contract calls for UT to reimburse a company or individual for travel expenses that include a travel agency, you must strike the language related to reimbursement for the travel agency.

Treasurer's Office Review

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Information: We send certain types of contracts to the Treasurer's Office for review. The following types of issues must be reviewed by the Treasurer's Office:

- Payment systems;
- Credit-card processing;
- Banking;
- ATMs;
- Payment gateways;
- 3rd party payment processes;
- Any agreement that provides that a supplier will accept money on behalf of UT (e.g. conference registration).

Uncapped Costs

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Information: Because the State’s constitution prevents the State from extending its credit, the University cannot agree by contract to uncapped costs. Please note that you do not have to include a “maximum financial obligation” clause. You do have to ensure that all payable obligations are clearly stated. Please see the Payable Agreements section for more information.

University's Federal ID Number

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Information: The University has only one federal I.D. number, and it's the same number for all campuses, units, departments, etc.: 62-6001636.

University's W-9

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Information:

Sometimes, a supplier will request a copy of the university's W-9. This form is located on the Controller's Office Website (<http://controller.tennessee.edu/>), under "Tax." <https://controller.tennessee.edu/tax/>

United Nations Convention on the Sale of Goods

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Information:

The United Nations Convention on Contracts for the International Sale of Goods is an international treaty that establishes uniform international sales law. Many types of contracts, including software contracts, explicitly state that the parties agree that this treaty does not apply. Such language is acceptable to the university, and such language must not be deleted.

University's Standard Terms and Conditions

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Information:

Think carefully before merely attaching the university's Standard Terms and Conditions to a supplier's contract. Attaching the standard terms and conditions may be okay. However, merely attaching them might also cause the Standard Terms and Conditions to be duplicative or inconsistent with the supplier's contract.

United States of America (Locations Considered Legally Part of)

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Information:

Obviously, the 50 U.S. states and the District of Columbia are part of the United States. There are a few other locations that are considered part of the United States. The Central Intelligence Agency's World Factbook is a great resource if you have any geography questions. Locations outside of the 50 states that are considered part of the United States for purposes of delegated/non-delegated designation:

- American Samoa (Pacific Ocean)
- Baja Nuevo Bank (Caribbean)
- Baker Island (Pacific Ocean)
- Guam (Pacific Ocean)
- Howland Island (Pacific Ocean)
- Jarvis Island (Pacific Ocean)
- Johnston Atoll (Pacific Ocean)
- Kingman Reef (Pacific Ocean)
- Midway Islands (Pacific Ocean)
- Navassa Island (Caribbean)
- Northern Mariana Islands (Pacific Ocean)
- Puerto Rico (Caribbean)
- Serranilla Bank (Caribbean)
- U.S. Virgin Islands (Caribbean)

Source: <https://www.cia.gov/library/publications/the-world-factbook/>

Waiver of Sovereign Immunity

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Information:

Although not very common, sometimes a supplier's contract will contain language stating that the university waives its sovereign immunity. This may be phrased in slightly different ways, but the language will refer to the university's sovereign immunity. Such language is problematic because no one at the university has authority to waive the State's sovereign immunity. Such language must be deleted. Note that language such as, "to the extent allowed by law..." will not make such language acceptable.

Waiver of Trial by Jury

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Information:

Claims brought against UT would be in the Claims Commission, which is an administrative forum with a hearing officer, but no jury. Accordingly, it is acceptable to agree to clauses that prohibit jury trials.

Wire Transfers

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Information:

Note: in almost all cases, payment by wire not allowed. Please see FI0500.

In general, it is not acceptable for the university to agree to pay by wire transfer. The only exceptions are: 1) international vendors; and 2) domestic vendors where the vendor is a performer, such as a singer, who demands payment before performing.

If payment will be made by wire transfer, then the contract must contain language stating that payment will be made by wire transfer. If wiring instructions are attached, then the wiring instructions need to reference an ABA number and a SWIFT code. If you have questions, please contact the university System Administration Office of Procurement Services.

Wire transfers cost a department money, so please be sure to work with the Office of the Treasurer to ensure that you inform the department of all applicable costs.

Examples:

Insufficient wiring instructions:

(NCB)	Name of Banking Institution:	National Commercial Bank
	Branch Location:	The university of the West Indies, Mona
	Name of Account Owner:	[Name]
	Account Number:	9-digit ABA #

Sufficient wiring instructions:

(NCB)	Name of Banking Institution:	National Commercial Bank
-------	------------------------------	--------------------------

Branch Location:	National Commercial Bank, Mona P.O. Box 190 Kingston 7
SWIFT Code:	8 or 11-character SWIFT code (example: NEDSZAJJ)
Name of Account Owner:	[Name]
Account Number:	9-digit ABA#

Taxes

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Please remember to check the Controller's Office website when reviewing hotel contracts: <http://controller.tennessee.edu/>. As of the date of the Manual, the university maintains tax exemption in the following locations (note that some of the exemptions may not apply to hotel/motel taxes):

- Colorado
- Florida
- Idaho
- Illinois
- Indiana
- Kansas
- Kentucky
- Maine
- Michigan
- Minnesota
- Mississippi
- Missouri
- New Jersey
- New Mexico
- North Dakota
- Ohio
- Rhode Island
- Tennessee
- Texas
- West Virginia

World Travel

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Information: World Travel is the University's travel agency, and travel broker. Under the University's PO with World Travel, World Travel may book any travel-related services for the University. The PO with World Travel includes group room blocks and other group events, but please note that most UT departments will not utilize World Travel for group events due to the fact that World Travel would add a commission fee, which would increase the costs. If a department uses World Travel for a group event, the booking is considered bid/competitive.

Exception Memo

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Items for which you must seek advice from the office of general counsel before seeking an exception:

- Confidentiality
- Insurance (requirement for UT to buy certain insurance)
- Iran Divestment Act
- Illegal Immigrants
- Sovereign immunity waiver

Template:

Exception Request

To: Click or tap here to enter text.

From: Click or tap here to enter text.

Date: Click or tap to enter a date.

RE: Click or tap here to enter text.

[Describe the nature of the contract, the attempts you made in negotiating the unacceptable provisions, and how risky you believe this agreement to be. Describe how UT will mitigate the risks. Also, be sure to provide a brief review of the unacceptable provisions that remain in the agreement].

Approved:

CBO:

CFO:

Side-Letter

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When a supplier refuses to revise indemnity language, and when the appropriate CBO and the CFO have approved an exception memo, you will send the supplier a “side-letter” with the signed contract. A sample side-letter is below. If the supplier returns or rejects a side-letter, you should contact the Office of General to discuss alternate options for moving forward with the contract.

Sample Side-Letter

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Dear [_____]:

Attached is a copy of the *[insert name of contract]* executed by The University of Tennessee and dated _____, 201[]. The University attempted to negotiate various contract terms, but *[insert name of other contracting party]* was unwilling to alter certain language in the contract. The University has agreed to these contract terms because *[insert name of other contracting party]* is the only vendor that supplies the particular material covered by the contract and that material is necessary for the mission of the University *[or insert other explanation of the necessity of the contract]*.

[If applicable: As our respective attorneys discussed by phone, the] The University, as an instrumentality of the State of Tennessee, has sovereign immunity under Article I, Section 17 of the Tennessee Constitution and the Eleventh Amendment to the Constitution of the United States. Only the Tennessee General Assembly has authority to waive sovereign immunity; no officials at the University have this authority. In no event shall the University's execution of the contract be construed as a waiver of any aspects of sovereign immunity afforded to the University under the laws of the State of Tennessee or any other jurisdiction. Any liability of the University to *[insert name of other contracting party]* and third parties for any claims, damages, losses, or costs arising out of or related to acts performed by the University or its employees under the contract shall be governed by the Tennessee Claims Commission Act, Tenn. Code Ann. §§ 9-8-301 et seq.

Additionally, the University has limited contracting authority and can agree only to contract terms that are consistent with Tennessee law. For example, the University is not allowed to indemnify another party, agree to the laws, jurisdiction, or venue of another state, or agree to assume responsibility or liability for the acts and omissions of parties other than University employees *[add other prohibited provisions, as applicable]*. Notwithstanding anything in the contract to the contrary, no provision will

apply to the extent it is finally determined by a court of competent jurisdiction, including appellate review, if pursued, to violate the laws or Constitution of the State of Tennessee.

Please let us know if you have any questions.

Sincerely,

[Signed by contract signatory]

Explanations for suppliers

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The Explanation Letter for Vendors is intended to make the negotiation process more efficient and assist the university's contract review staff when dealing with suppliers. In my experience, this document is most effective when doing the following two things:

- 1) Including all of the relevant explanations in the document when you make changes to a supplier's contract (it's very important that you explain each change); and
- 2) When the campus contract office returns the marked-up contract and explanations directly to the supplier via email.

When negotiating with suppliers over problematic terms and conditions, it is recommended that you ask the supplier whether the supplier has a separate set of terms and conditions for government agencies and remind the supplier that UT is an agency of the State of Tennessee. Unfortunately, most suppliers do not have separate terms and conditions for government agencies. So, the next recommended step is that you ask the supplier for a copy of the supplier's contract in editable Microsoft Word format (please be sure to specify to the supplier that you need the Word document to be editable; it is OK if the supplier locks the track changes feature). When making changes to the supplier's contract, please explain each change using the "comment" feature. If the supplier has not done so, please be sure to turn on the "Track Changes" feature.

Sample Email/Letter/Fax:

Dear Mr./Ms. _____ or To whom it may concern:

Good [morning/afternoon/evening]. My name is [fill in your name], and I am [title] at the [campus/institute/unit]. I am contacting you because I was asked to review the attached contract. Please find attached a copy of [the red-lined agreement/agreement with changes requested by the university, etc.].

Please note that the university made several modifications to the agreement. The University of Tennessee is a state-created public institution of higher education. As an instrumentality of the State of Tennessee, the university has sovereign immunity under Article I, Section 17 of the Tennessee Constitution and the Eleventh Amendment to the Constitution of the United States. Only the Tennessee General Assembly has authority to waive sovereign immunity; no officials at the university have this authority. Additionally, the university has limited contracting authority and can agree only to contract terms that are consistent with Tennessee law.

[Below, In the attached, etc.], I have provided explanations for certain of the university's changes. These explanations are offered solely to provide you a brief explanation of the legal, fiscal, or policy basis underlying certain contract changes. They are not intended as, and must not be relied upon as, legal advice. Please let me know if you have questions or need additional information.

Section [#]:

Next Section [#]

I look forward to hearing from you.

Kind Regards,

[Name of contract office employee]
[title]
[email, phone #, etc.]

Special Explanations to supplier:

When an agency of the State of Tennessee has agreed to a contract that contains unacceptable terms and conditions: The decision of another state agency to agree to certain contractual terms is not binding on The University of Tennessee. The university must conduct its own review of all contracts for compliance with applicable state and federal laws and its own internal fiscal policies, which may differ from the policies of other state entities.

When the Tennessee Board of Regents or one of campuses/colleges has agreed to a contract that contains unacceptable terms and conditions: The decision of a school in the Tennessee Board of Regents to agree to certain contractual terms is not binding on The University of Tennessee. The university must conduct its own review of all contracts for compliance with applicable state and federal laws and its own internal fiscal policies, which may differ from the policies of other state entities.

When another UT campus/institute/unit has signed a contract containing unacceptable terms and conditions (and the person who signed it was authorized) [When the issue appears to have been missed]: The University of Tennessee's previous agreement to certain contractual terms is not binding on the university in future contracts. The university must conduct a comprehensive review of each new contract for compliance with applicable state and federal laws and its own internal fiscal policies. The laws applicable to state contracts, the university's interpretation of those laws, and the requirements of fiscal policies with which the university must comply, may change from time to time.

When UT has previously signed a contract containing prohibited terms and conditions, but the contract was signed before the AG changed their opinions: The University of Tennessee's previous agreement to certain contractual terms is not binding on the university in future contracts. The university must conduct a comprehensive review of each new contract for compliance with applicable state and federal laws and its own internal fiscal policies. The laws applicable to state contracts, the university's interpretation of those laws, and the requirements of fiscal policies with which the university must comply, may change from time to time.

When an unauthorized person at one of the UT campuses/institutes/units signed a contract that contains unacceptable terms and conditions. Contracts for The University of Tennessee may be executed only by a limited number of university officials who have actual authority to bind the university. A list of those authorized officials is available online at <http://treasurer.tennessee.edu/contracts/contractsignature.html>. Contracts signed by unauthorized university employees are not binding on the university.

Sample Termination Letter

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Information:

The best practice for terminating a contract is:

- 1) Campus contract office uses the sample below to draft a termination letter.
- 2) Campus contract office sends the letter to the Chief Business Officer for signature.
- 3) Campus contract office sends the letter to the vendor following the notices clause.

Sample letter:

[vendor address] [be sure to send the letter exactly as stated in the contract's notice provision; if the contract lacks a notice provision, send via certified mail with return receipt requested, and also send via email].

[date]

To [vendor name]:

The University of Tennessee hereby exercises its right to [terminate or non-renew] the following [contract or contracts]: [list contract(s) and include the effective date for each contract].

[Describe the section of each contract that allows the University to [terminate or non-renew]]. [Describe the effective date of termination]. [Describe UT's obligations after delivering termination notice].

[If UT owes the other party money, discuss with the UT department whether UT wants to pay its obligations in full, or continue to make monthly payments. If UT is terminating, rather than non-renewing, then the best practice is to pay in full].

[If the other party owes UT money or a deliverable, state this in the letter and also provide a deadline. Consider also stating that UT will turn the matter over to its Office of General Counsel if the other party fails to meet the deadline].

[If termination is for cause, list the steps that UT followed to notify the other party of the other party's breach, and describe the opportunities UT gave the other party to cure].

Please let me know if you have any questions.

Thank you,

[signature of authorized official]

[name of authorized official]