### LEGAL 101:

Contract Guidance for Purchasing Presented by the Office of Legal Counsel

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# Contracts and Signature Authority



## Contract Approval

AR 8:3 Contract and Financial Transaction Approval Authority:

"All agreements and contracts shall be reviewed by the Office of Legal Counsel prior to execution."

In its discretion, the Office of Legal Counsel may grant blanket approval for certain form contracts (e.g. student housing rental agreements, student loan agreements, and routine procurement contracts).

Specified units have delegated authority and preapproved form agreements.

## Provost's Memo on Signature Delegation

Specifics on prior approval
Specifies what Deans may sign
Further delegation to be in writing



## Who has Contract Templates?

- Procurement
  - Price Contract (Notice, RFP, Response)
  - Personal Service Agreements (BP B-4)
  - Independent Contractor Agreements
  - Memorandum of Agreement
  - ALL written agreements of any type or dollar level
- Office of Sponsored Projects Administration (OSPA)
  - ALL sponsored agreements/\$\$
- Philanthropy





## Who has Contract Templates? Continued...

- Office of Technology Commercialization (OTC)
  - Confidential Disclosure Agreements
  - Material Transfer Agreements/Data Use Agreements
- UK HealthCare' Office of Strategic Contracting
  - Personal Service Agreements for UKHC staff working at other hospitals/clinics





#### **Procurement**



AR 8:3 Contract and Financial Transaction Approval Authority:

"All agreements and contracts involving procurement shall be requisitioned through the Purchasing Division and comply with KRS 45A (Model Procurement Code)."

**PURCHASING TIP:** 

LOOK FOR AN EXISTING AGREEMENT

#### What makes a contract?

Offer and acceptance – in any form

- Letters
- Memoranda of Understanding
- Memoranda of Agreement
- On-line agreements "click" and "no-cli
- Shrink-wrap license agreements
- Purchase orders
- Terms and conditions



## What makes a good contract?

- Clear language
- Clear obligations
- Explains who, what, when, where, why
- Consider most important aspects to both parties
- Consider most likely problems



#### **Problematic Contract Clauses**

Some contract clauses present particular legal or business issues for the University:

- Use of proper name
- Arbitration
- Indemnity
- Choice of law
- Term and Termination
- Insurance
- Right of First Refusal
- Conflict of Interest
- Confidentiality Clauses
- Copyright Clauses



#### A Rose is a Rose?

- University of Kentucky
- A state agency
- A Public Agency, educational agency, and independent body politic of the Commonwealth of Kentucky
- Add descriptive language to identify unit or other user as needed
  - EXAMPLE: "The University of Kentucky, a state agency, for its College of \_\_\_\_\_."

#### Arbitration

- Who gets to decide? Judge or Arbitrator?
- KRS 45A245 waiver of the University's sovereign immunity from breach of contract suit is conditioned on suit being heard in the Franklin Circuit Court
- State agencies cannot change state law
- Can agree to mediation





## Indemnity-What is it?



- Used to expand liability ("I will be liable for anything.")
- Vendors SHOULD indemnify UK
- UK CANNOT indemnify Vendors
- Even if a Vendor does not agree to indemnify us, the University could still sue a Vendor for most types of harm, absent other contractual limitations

(Note – Agreement to pay attorneys or other legal fees is form of indemnification and thus not permitted.)

## Limits on Liability

Vendors seek new and creative ways to limit
their liability

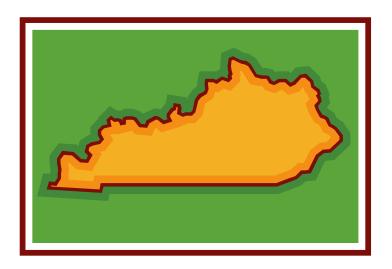
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- Caps on total liability (THE MOST DANGEROUS!)
  - Must evaluate risk if something goes wrong
- Limits on indemnity
- Exclusion of Special Damages and Punitive Damages
  - May be ok, but must use same risk analysis



#### Choice of Law

- State agencies governed by state law
- Specify Kentucky law if possible
- Silence is permissible



#### Term and Termination

- How long?
- What happens if things don't work out?
- What happens if there is no money?



#### Insurance

- Cover appropriate risks
- Risk Management can advise if we have insurance, also can help discuss if we need insurance from the vendor



## Right of First Refusal

- Right to match another offer
- Contrary to Model Procurement Code (if it's the Vendor's right)



#### **Conflict of Interest**

- State law
- University Regulations
- Code of Ethics



## Confidentiality Clauses

- State law (Open Records)
  - As a state agency, the University is subject to the Kentucky Open Records Act. Unless an exception applies, potentially ALL records in the University's possession are subject production pursuant to an Open Records request.

    Confidentiality
- University goals

## **Copyright Clauses**

- I paid for it and you're telling me WHAT??
  - Work for hire (University's default position)
  - Assignment
  - License













## Data, Privacy Clauses FERPA

- Family Educational Rights and Privacy Act of 1974 (FERPA)
- FERPA protects privacy of student's educational records
- If Vendor has access to FERPA protected information, we must have contractual provisions to restrict access and govern usage

Rights and Privacy Act

## Data, Privacy Clauses HIPAA

- Health Insurance Portability and Accountability Act (HIPAA)
- HIPAA protects privacy of individually identifiable health information
- Sets national standards for the security of electronic protected health information
- If Vendor has access to FERPA protected information, we must have contractual provisions to restrict access and govern usage



## Data, Privacy Clauses State Law



Personal Information Security and Breach Investigation Procedures and Practices Act (codified in KRS 61.931 to 61.934)

For all agreements the University executes or amends on or after January 1, 2015, with a third party to whom the University discloses "personal information" (VERY broadly defined), we MUST include a new contractual provision addressing PI, data security, and loss or data breach.

## Data, Privacy Clauses EU - GDPR

- The EU General Data Protection Regulation (GDPR) is a rule passed by the European Union (EU) in 2016 and effective May 25, 2018, setting new rules for how companies manage and share personal data.
- If you receive a contract regarding EU-GDPR, please call the Office of Legal Counsel, Shannan Stamper to discuss.



## Questions

