

BAYLOR UNIVERSITY
Policy and Procedure for Contract Review, Execution, and Administration
Substantive Checklist for Divisional Review of Contracts

No contract is valid unless it contains three essential elements: (1) the names of the "parties," (2) the "subject matter," and (3) "consideration." Each of these terms is defined below.

Please review the following areas:

1. **Intent of the Parties:** Because the University will be required to comply strictly with the agreed terms of the contract, it is important to make sure that those terms and conditions as written clearly and accurately express the intent of both parties. It is essential that there be a "meeting of the minds." Only those who negotiated the contract and those who will be responsible for its performance can know this with certainty. As part of the review process within a division, these individuals should indicate in writing that they have reviewed the contract and believe the contract, as presently drafted, "clearly and accurately" expresses the intent of both parties.

2. **Parties:** The "parties" are the persons who enter into a legal arrangement. They may be living persons or "legal persons," such as a corporation. All parties to the contract must be clearly identified. Because schools and departments are not legal entities capable of entering into a contract, the University, as a party to the contract, should always be referred to as "Baylor University" and not as the specific school or department which is obtaining or providing the goods or services that are the subject matter of the contract.

Example: *This agreement is made on October 8, 2005, between Baylor University, One Bear Place #97371, Waco, TX 76798 and XYZ Computer Company, P. O. Box 1234, Waco, TX 76745.*

3. **Consideration:** A contract is not valid without consideration; *i.e., quid pro quo* or something given for something received. The contract must explicitly state what is being exchanged between the parties as consideration, such as a specific purchase price or payment in exchange for specific goods or services. The price or payment cannot be open-ended. If Baylor will be obligated to pay the other party, it will pay only by University check or by ACH, not by cashier's check, certified check, or money order.

Example: *Baylor shall pay the Contractor by University check the Contract Sum of \$95,468.*

Also, a contract should not obligate the University to pay for the goods or services within less than 30 days of the invoice date.

4. **Subject Matter:** The "subject matter" of a contract is the goods or services for which the parties have bargained, one party providing the goods or services in exchange for something else. The goods or services should be described in sufficient detail so that a reasonably prudent person could identify the goods or could understand the types of services that are to be performed. If purchasing goods, the quantity must be stated.

Example: *The Contractor shall remove and replace existing built-up roof and insulation and install new insulation and a built-up, Hyload roof.*

5. **Term:** The "term" is the length of time over which the contract will be valid. If work will be performed, or goods purchased, over an extended period of time by Baylor or the other party, the agreement must specify that period of time. If the agreement is to last more than one year, try to negotiate for the addition of a provision allowing Baylor to terminate the contract for any reason by giving 30 days prior written notice.

Example: The Work to be performed under this contract must begin on October 1, 2005, and, subject to authorized adjustments, Substantial Completion must be achieved not later than November 9, 2006.

Either party may terminate this agreement by giving 30 days prior written notice of termination by registered or certified mail.

6. **Indemnity, Hold Harmless, Exculpatory, and Waiver Clauses:** Indemnity, hold harmless, exculpatory, and waiver clauses attempt to place or transfer liability for certain acts or omissions to one of the parties. Indemnity clauses are used to limit or transfer the possible liability of one of the parties to the agreement that may become liable to third parties arising out of the existence or performance of the agreement. The clause may indemnify against liability or loss. An exculpatory clause relieves one party to a contract from responsibility for injuries caused to the other party.

If the agreement contains an indemnity, hold harmless, exculpatory, or waiver clause, or if the proposed agreement asks Baylor to waive liability or waive a warranty, or if the other party attempts to limit its liability to acts of "gross negligence" or "willful misconduct," the agreement must be forwarded to the Office of General Counsel for review. The contract should also be submitted to the Office of General Counsel if it contains a clause limiting the remedies available to Baylor in the event of a breach or if it specifies a certain remedy, *i.e.*, liquidated damages. If you believe that Baylor should not object to such clauses under the particular circumstances of the agreement you have negotiated, please specify your reasons for this belief in your note forwarding the proposed contract to the Office of General Counsel.

Example: Baylor shall indemnify and hold harmless the Contractor and its officers, agents, and employees from all suits, actions, losses, damages, claims, or liability of any character, type, or description, including -without limiting the generality of the foregoing all expenses of litigation, court costs, and attorney's fees for injury or death to any person, or injury to any property, received or sustained by any person or persons or property, arising out of, or occasioned by the acts of the Contractor or its agents or employees, in the execution of this contract.

Example: XYZ Corporation, its officers, directors, employees, and agents shall not be liable for any acts or omissions in the performance of the duties and responsibilities of XYZ, except when such acts or omissions are due to XYZ's willful conduct or gross negligence.

7. **Insurance:** The subject matter of the contract may create a risk for Baylor, the other party to the contract, or to third parties. The nature of the activities must be evaluated to insure that the parties to the contract adequately address the risk, obtain appropriate insurance, and provide the other party certificates of such insurance.
- If there is any doubt as to the need for insurance by either Baylor or the other party to the contract, contact the Director of Insurance & Contract Services at extension 8985.
 - If the contract requires Baylor to obtain insurance or provide proof of insurance, the contract must be forwarded to the Director of Insurance & Contract Services (One Bear Place #97371) for review before execution
 - If the subject matter of the contract creates a risk by the other party to the contract, the contract must be forwarded to the Director of Insurance & Contract Services (One Bear Place #97371) for review before execution. Where Baylor requires the other party to provide it with a Certificate of Insurance, add language that requires the certificate to be mailed to:

Baylor University
Director of Insurance & Contract Services
One Bear Place #97371
Waco, TX 76798

The Department of Risk Management has established Third Party Contract Insurance Guidelines. The Guidelines are found at <http://www3.baylor.edu/Safetv/ThirdPartv.pdf>

8. **Antidiscrimination Clause:** If the University is asked to agree not to discriminate on the basis of religion (which includes discrimination on the basis of sexual orientation), strike through the word "religion" and, if it is also present, the term "sexual orientation." The corporate officer who executes the contract must initial each strike through.

As a religiously-controlled institution of higher education, Baylor is entitled to discriminate on the basis of religion under the First Amendment of the United States Constitution in general, and specifically under §703(e)(2) of Title VII of the Civil Rights Act of 1964. In addition, the U.S. Department of Education has granted Baylor a religious exemption from certain provisions of Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of gender.

9. **Governing Law:** If possible, add the following venue provision to all contracts:

Example: *This agreement shall be governed by and construed and enforced in accordance with the laws of the State of Texas. Venue for any action to enforce the terms and conditions of this agreement shall be McLennan County, Texas.*

If the contract names another state as the governing law, cross out the name of that state and substitute "Texas". Also, add the venue clause above. The appropriate corporate officer should be requested to initial this change also.

- 10. Merger Clause:** The agreement should contain a "merger" or an "entire agreement" clause. This clause incorporates all prior written and oral agreements into the current agreement and states that the current agreement is the only agreement which legally binds the parties. The current agreement should state all of the benefits sought to be obtained from the other party.

Example: *The Contractor and Baylor acknowledge that no representations, inducements, promises, or agreements, orally or otherwise, have been made by either party, or by anyone acting on behalf of either party, -which are not embodied herein, and that no other agreement, statement, or promise not contained in this contract is valid or binding.*

- 11. Severability Clause:** If possible, the agreement should contain a "severability" clause. This clause allows the contract to remain enforceable if one or more of its provisions are found to be invalid.

Example: *If any provision of this contract is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this contract, such provision is fully severable, and this contract must be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part of this contract; and the remaining provisions of this contract remain in full force and effect and may not be affected by the illegal, invalid, or unenforceable provision or its severance from this contract.*

- 12. Arbitration Clauses:** Arbitration is a mechanism, provided for in a contract, by which the parties to the contract agree to submit disputes to the determination of a third party other than a court, and also agree on a method of selecting arbitrators. It is the declared public policy of Texas to encourage the peaceable resolution of disputes through alternative dispute resolution mechanisms.

Example: *If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through direct discussions, Baylor and _____ agree to first endeavor to settle the dispute in an amicable manner by mediation using a process agreed upon by the parties to this contract. Thereafter, any unresolved controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by binding arbitration in accordance with the Texas General Arbitration Act, Chapter 171 of the Texas Civil Practice and Remedies Code. The arbitrator selected shall be a member of the National Academy of Arbitrators.*

- 13. General:** If there is something in the agreement that you do not understand or to which you do not feel comfortable in agreeing, then you should consult with the Office of General Counsel.

DO NOT UNDER ANY CIRCUMSTANCES AGREE TO SUBMIT BAYLOR UNIVERSITY TO PERSONAL JURISDICTION IN ANY STATE OTHER THAN TEXAS.

14. Signature Block: The signature block must be set up as

follows:

Attest:

Baylor University

By: _____
Name
Assistant Secretary or Secretary

By: _____
Name
Title (VP or President)

It is important to remember that only certain corporate officers specifically named by the Board of Regents are authorized to execute contracts on behalf of the University. These officers are the president, whose signature does not have to be attested, and vice presidents, when the corporate secretary or an assistant corporate secretary attests their signatures. For more information on the individuals authorized to sign contracts for the University, please request a copy of the *Baylor University Board of Regents Recurring Signature Authorization Resolution* from the Office of General Counsel.