

BFGuide

draft

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Responsible Official: Chief Financial Officer

Responsible Office: Procurement and Contract Services

Purpose

The purpose of this guideline is to establish the criteria and processes for University of Memphis (University) contracts. It is not intended to cover all the University policies and guidelines or all possible issues that may arise while reviewing contracts; rather, it is intended to provide a general guideline for how to address contract issues. Departments are responsible for complying with all other relevant policies. This guideline is subject to regular update, revision and improvement.

Procedures

I. General Contract Provisions Applicable to All Contracts

A. The University of Memphis is a public institution of higher education within the State of Tennessee. As such, it possesses certain rights and privileges and is subject to certain limitations and restrictions. 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 the authority to waive sovereign immunity; no official within the University has this authority. The University has limited contracting authority and can agree only to contract terms that are consistent with Tennessee law. A free un-annotated version of the Tennessee Code may be found at <http://www.lexisnexis.com/hottopics/michie>.

1. Purpose of a Written Contract. The purpose of a written contract is to embody the complete agreement in writing. The title of a document is irrelevant. Whether the document is called an agreement, contract, memorandum of agreement, memorandum of understanding, purchase order, or other similar name, it is subject to the requirements of this Guideline. No relevant terms should be left to an unwritten understanding or verbal agreement between the parties. The document should clearly identify all parties and be explicit in setting forth the rights and duties of each party.
2. Approval/Authority. The authority to approve contracts is delineated in [University Policy BF4008, Contracts and Signatory Authority](#).
3. Negotiation. Generally, it is the University's responsibility to negotiate with the other party to bring an agreement into conformity with this Guideline and to determine that the terms are acceptable to the Contractor before the agreement is sent to the appropriate official for approval.

The Department of Procurement and Contract Services and the Office of Legal Counsel are available for assistance in negotiating modifications with the Contractor when the University has been unable to secure agreement of the Contractor.

4. Required Contract Provisions

a. Form Contracts. Whenever possible, one of the form contracts in (<http://www.memphis.edu/bf/forms/busserv.php>) should be utilized in order to assure that an agreement conforms to the requirement of University policy and this Guideline.

b. Vendor Generated Contracts. If necessary to use a vendor generated contract, these provisions should be included when applicable.

c. Purpose/Duties/Scope. Every contract must contain language regarding its purpose and the duties of the parties.

d. Term of Agreement.

(1) A contract shall be entered into for a period of time sufficient to adequately accomplish the University's objectives.

(2) Expenditure contract terms shall not exceed a total term of sixty (60) months. Revenue contract terms shall not exceed a total of one hundred and twenty (120) months. Any exceptions may be submitted to the Chief Business Officer for consideration and approval prior to contracting activities with the contracting party.

(3) Expenditure and revenue agreements must provide a beginning and ending date or must include clear language as to how these dates will be determined.

(4) Contracts executed or proposed to be executed for periods of time of more than twelve (12) months:

(a) should contain a provision giving the University the right of cancellation for convenience; (See T. C. A. § 12-3-305(c)(1))

(b) contains language that allows for cancellation at the end of any fiscal year for lack of funding

(5) A contract may provide for automatic renewal if it:

(a) requires no expenditure of state funds; or

(b) contains language that allows for cancellation at the end of any fiscal year for lack of funding

(6) In the event of automatic renewal, the maximum term of the contract is subject to Section d. above.

e. Payments

(1) Contracts requiring payments for goods or services, or the purchase order/order form/statement of work issued pursuant to such Contracts, must include specific rates and prices for the goods or services being procured as well as any payment conditions.

(2) Payments are to be made only upon the submittal of an invoice by the Contractor after the goods are received or the services performed; however, advance payments may be made under the following types of contracts:

(a) Licensing

(b) Preventive maintenance/service

(c) Subscriptions

(d) Memberships

(3) All contracts shall contain a provision that the Contractor's performance shall be subject to monitoring and evaluation by the University and/or other appropriate parties

(4) If the Contractor is not a US citizen, or Permanent U. S. resident, payment of any portion of the contract from any source will not be made until the Contractor has provided proof of tax status to the University. The payment is contingent upon Contractor's eligibility for payment and tax status and the contract should specify that appropriate withholding may be deducted from the Contractor's payment.

f. Maximum Liability

(1) Contracts requiring payment(s) by the University must specify the maximum dollar amount or must include clear language on how expenditures will be tracked (i.e. purchase orders against master terms, order forms, etc.) that may be paid under the contract.

g. Conflict of Interest

(1) Contracts should contain the following provision:

(a) The Contractor warrants that no part of the total Contract Amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract. The Contractor acknowledges, understands, and agrees that this Contract shall be null and void if the Contractor is, or within the past six months has been, an employee of the State of Tennessee or if the Contractor is an entity in which a controlling interest is held by an individual who is, or within the past six months has been, an employee of the State of Tennessee.

h. Non-Discrimination

(1) Contracts should contain the following provision or a similar provision in which the parties agree not to discriminate.

(a) Non-discrimination. The Contractor shall abide by all applicable Federal and State law pertaining to discrimination and hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or otherwise be subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of classifications protected by Federal or State law.

i. Audit and Documentation

(1) Except as noted in b and c below, the following provision must be included in contracts which require any payment to be made by the University:

(a) "The Contractor shall maintain documentation for all charges against the University under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this Contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the University, the Comptroller of the Treasury, or their duly appointed representatives. Any financial statements required by this Contract shall be prepared in accordance with generally accepted accounting principles." (Reference T.C.A Code 12-3-602(c))

(b) See Section V herein on Grant Contracts for audit language for grants

(c) The audit clause is not required for a one time, fixed payment contract

j. Payment for Travel, Meals, Lodging

(1) If a Contractor is to be paid/reimbursed for travel, meals or lodging, such payment shall be in the amount of actual cost/per diem, and shall be expressly subject to the limits and provisions of state law.

k. Governing Law

(1) Contracts shall contain a provision that the contract is to be governed by and construed in accordance with the laws of the State of Tennessee. The contract may be silent as to the governing law if the other party will not accept the governing law of the State of Tennessee.

l. Sales and Use Tax

(1) The following provision shall be included in all contracts for the acquisition of goods or services:

(a) Sales and Use Tax

(i) "The Contractor shall be registered with or have received an exemption from the Department of Revenue for the collection of Tennessee sales and use tax. This registration requirement is a material requirement of this Contract. 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."

m. Debarment

(1) The following provision shall be included in all contracts for the acquisition of goods or services:

(a) Debarment and Suspension. The Contractor certifies, to the best of its knowledge and belief, that it and its principals:

(i) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal or State department or agency;

(ii) have not within a three (3) year period preceding this Contract been convicted of, or had a civil judgment rendered against them from commission of fraud, or a criminal offense in connection with, obtaining attempting to obtain, or performing a public (Federal, State, or Local) transaction or grant under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property;

(iii) are not presently indicted for or otherwise criminally or civilly charged by a government entity (Federal, State, or Local) with commission of any of the offenses listed in section b. of this certification; and

(iv) have not within a three (3) year period preceding this Contract had one or more public transactions (Federal, State, or Local) terminated for cause or default.

n. Illegal Immigrants

(1) The following provision shall be used in all contracts for the acquisition of goods or services:

(a) “T.C.A. § 12-3-309 prohibits State entities from contracting to acquire goods or services from any person who knowingly utilizes the service of illegal immigrants in the performance of the contract and by signing this Contract, the Contactor attests that the Contractor shall not knowingly utilize the services of illegal immigrants in the performance of the Contract and will not knowingly utilize the services of any subcontractor, if permitted under the Contract, who will utilize the services of illegal immigrants in the performance of the Contract. The Contractor hereby attests, certifies, warrants, and assures that the Contractor shall not knowingly utilize the services of an illegal immigrant in the performance of this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant in the performance of this Contract.” (For contracts that require Fiscal Review Committee approval, the original language with the signed Attestation Form incorporated as an Attachment to the Agreement must be used)

o. Data Privacy and Security

(1) For contracts in which the Contractor will have access to University student or customer data and will be maintaining the University’s data on the Contractor’s computer network or servers, the following clause should be included in the contract:

(a) “Data Privacy. “Personal Information” means information provided to Contractor by or at the direction of University, or to which access was provided to Contractor by or at the direction of University, in the course of Contractor’s performance under this Agreement that:

(i) identifies or can be used to identify an individual (including, without limitation, names, signatures, addresses, telephone numbers, e-mail addresses and other unique identifiers); or

(ii) can be used to authenticate an individual (including, without limitation, employee identification numbers, government-issued identification numbers, passwords or PINs, financial account numbers, credit report information, biometric or health data, answers to security questions and other personal identifiers.

Contractor represents and warrants that its collection, access, use, storage, disposal and disclosure of Personal Information complies with all applicable federal and state privacy and data protection laws, including without limitation, the Gramm-Leach-Bliley Act (“GLBA”); the Health Information Portability and Accountability Act (“HIPAA”); the Family Educational Rights and Privacy Act (“FERPA”) of 1974 (20 U.S.C.1232g), the FTC’s Red Flag Rules and any applicable federal or state laws, as amended, together with regulations promulgated thereunder.

Some Personal Information provided by University to Contractor is subject to FERPA. Contractor acknowledges that its improper disclosure or re-disclosure of Personal Information covered by FERPA may, under certain circumstances, result in Contractor’s exclusion from eligibility to contract with Customer for at least five (5) years and agrees to become a “school official” as defined in the applicable Federal Regulations for the purposes of this Agreement.

(b) Data Security. Contractor represents and warrants that Contractor will maintain compliance with the SSAE16 standard, and shall undertake any audits and risk assessments Contractor deems necessary to maintain compliance with SSAE16.

(c) Incident Response. “Security Incident” means any reasonably suspected breach of information security, unauthorized access to any system, server or database, or any other unauthorized access, use, or disclosure of Personal Information or Highly-

Sensitive Personal Information occurring on systems under Contractor's control. Contractor shall: (1) provide University with the name and contact information for an employee of Contractor who shall serve as Customer's primary security contact and shall be available to assist Customer twenty-four (24) hours per day, seven (7) days per week as a contact in resolving obligations associated with a Security Incident; (2) notify University of a Security Incident as soon as practicable, but no later than forty eight (48) hours after Contractor becomes aware of it, except where disclosure is prohibited by law; and (3) notify University of any such Security Incident as follows:

(i) Contact: Robert Jackson

(ii) Contact Email: rjax@memphis.edu

(iii) Contact Phone: 901-678-8324

and

(iv) a copy by e-mail to Contractor's primary business contact at the University.

(d) Contractor shall use best efforts to immediately mitigate or resolve any Security Incident, at Contractor's expense and in accordance with applicable privacy rights, laws, regulations and standards. Contractor shall reimburse University for actual costs incurred by University in responding to, and mitigating damages caused by, any Security Incident, including all costs of notice and/or remediation incurred under all applicable laws as a result of the Security Incident.

(e) Return of Personal Information. At any time during the term of this Agreement, at the University's written request or upon the termination or expiration of this Agreement, Contractor shall return to the University all copies, whether in written, electronic or other form or media, of Confidential, Highly-Sensitive, or Personal Information in its possession, or at Customer's direction, securely dispose of all such copies."

p. Gramm Leach Bliley Act (GLBA) Language

(1) If the contract does not require the Data Privacy and Security Clause found in Section 15 above, a contract in which the Contractor provides a service requiring the Contractor to have access to the University's customers' non-public financial information for the purpose of providing a financial product or service, such as a student loan, must include the following clause:(a) "Throughout the term of this Agreement, Contractor shall implement an Information Security Program ('the Program') and maintain 'appropriate safeguards,' as required by 16 C.F.R. § 314, for all 'customer information,' (as that term is defined in 16 C.F.R § 314.2(b)) obtained by or provided to Contractor pursuant to this Agreement. Contractor shall promptly notify the University, in writing, of each instance of (a) unauthorized access to or use of that nonpublic financial customer information that could result in substantial harm or inconvenience to a customer of the University or (b) unauthorized disclosure, misuse, alteration, destruction or other compromise of that nonpublic financial customer information.

Contractor shall forever defend and hold University harmless from all claims, liabilities, damages, or judgments involving a third party, including Institution's costs and attorney fees, which arise as a result of Contractor's failure to meet any of its obligations under this provision.

Contractor shall further agree to reimburse the University for its direct damages (e.g., costs to reconstruct lost or altered information) resulting from any security breach, loss, or alteration of nonpublic financial customer information caused by the Contractor or its subcontractors or agents.

Contractor grants University the right to conduct on-site audits, as deemed necessary by the University, of the Contractor's Program to ensure the integrity of the Contractor's safeguarding of the University's customers' nonpublic financial information.

University retains the right to unilaterally terminate the Agreement, without prior notice, if Contractor has allowed a material breach of the Program in violation of its obligations under the Gramm-Leach-Bliley Act, if Contractor has lost or materially altered nonpublic financial customer information, or if the University reasonably determines that Contractor's Program is inadequate. Within thirty (30) days of the termination or expiration of this Agreement, Contractor shall, at the election of University, either:

(i) return to the University all records, electronic or otherwise, in its or its agent's possession that contain such nonpublic financial customer information; or

(ii) destroy (and shall cause each of its agents to destroy) all records, electronic or otherwise, in its or its agent's possession that contain such nonpublic financial customer information all such records and shall deliver to the University a written certification of the destruction.

q. Red Flags Language

(1) The Federal Trade Commission rules concerning the prevention of identity theft (16 CFR Part 681 – Identity Theft Rules) require that the University monitor the activities of its contractors performing activities in connection with one or more covered accounts. Covered accounts are those that a creditor offers or maintains, primarily for personal, family or household purposes such as credit card accounts. The activities of the Contractor can include such activities as opening or managing accounts, billing, providing customer service or collecting debts. In these situations, the Contractor must apply the same standards as the University would if the University were performing those tasks.

(2) University must require, by contract, that the Contractor either:

(a) Have policies and procedures in place to comply with the Rule; or

(b) Review the University policy and report any red flags to the Program Administrator.

(3) The following language should be included in contracts as described in subsection a. above wherein the Contractor will be performing any of the listed services:(a) "Red Flags and Identity Theft. The Service Provider shall have policies and procedures in place to detect relevant Red Flags that may arise in the performance of the Service Provider's activities under the Agreement, or review the University's Red Flags identity theft program and report any Red Flags to University."

(4) If the Contractor maintains its own identity theft prevention program consistent with the guidance of the Red Flag Rules and validated by due diligence by the University's Program Administrator (see [University Policy UM1714 Red Flag](#) (Identity Theft Prevention)), the Contractor shall have met the requirements of the first paragraph of this Section.

r. FERPA Language

(1) If the contract will involve sharing student educational records with the Contractor, the contract must contain a clause requiring the Contractor to comply with the Family Educational Rights and Privacy Act (FERPA). If the contract does not require the Data Privacy and Security Clause found in Section 15 above, the following clauses, or one substantially similar to them, should be included in the contract:

(a) The parties acknowledge that students' education records are protected by the Family Educational Rights and Privacy Act (FERPA), and that Contractor will be

considered a "School Official" (as that term is used in FERPA and its implementing regulations) and will comply with FERPA. Student education records will only be used for the purposes of carrying out this agreement. Student permission must be obtained before releasing specific data to anyone other than University and Contractor employees who have a legitimate educational purpose.

OR

(b) Because the Contractor is performing a University service or function that has been outsourced by the University and for which the University would otherwise use its employees and is under the direct control of the University with respect to the use of the education records, as defined by FERPA, the Contractor recognizes it is subject to all FERPA requirements governing the use and re-disclosure of personally identifiable information from education records, including without limitation the requirements of 34 CFR §99.33(a). Furthermore, the Contractor may not disclose or re-disclose personally identifiable information unless the University has first authorized in writing such disclosure or re-disclosure; will not use any personally identifiable information acquired from the University for any purpose other than performing the service or function that is the subject of this Agreement; and agrees to return to the University (or, if not feasible, to destroy) education records in whatever form or medium that the Contractor received such records from or created them on behalf of the University.

s. Click-Wrap Agreements

(1) Contracts which may require individual University users to accept online terms and conditions should contain the following clause:

(a) Click-Wrap Agreements. The Contractor agrees that click-wrap or click-through agreements shall not be binding upon the University. No employee has the actual or apparent authority to enter into click-wrap or click-through agreements on behalf of the University without the approval of the University's Procurement and/or Contracts Office. No employee has the authority to modify, amend, or supplement this Agreement through a click-wrap or click-through agreement. This Agreement can only be modified, amended, or supplemented under these terms through a written amendment in accordance with the University's procedures, policies, and guidelines.

t. Contractor Commitment to Diversity

(1) The Governor's Office of Diversity Business Enterprises requires all contracts contain the following clause:(a) Contractor Commitment to Diversity. The Contractor shall assist the University in monitoring the Contractor's performance of this commitment by providing, as requested, a quarterly report of participation in the performance of this Contract by small business enterprises and businesses owned by minorities, women, and Tennessee service-disabled veterans. Such reports shall be provided to the University in form and substance as required by University.

u. Service and Software Accessibility Standards

(1) If the contract will require either that employees or students of the University access the Contractor's software or website, the contract should contain the following clause:

(a) "The Contractor warrants and represents that the service and software, including any updates, provided to the University will meet the accessibility standards set forth in WCAG 2.0 AA (also known as ISO standard, ISO/IEC 40500:2012), EPub 3 and Section 508 of the Vocational Rehabilitation Act. To the extent that the Products fail to meet the WCAG 2.0 AA, EPub 3 and Section 508 standards, the Contractor will provide University with a fully completed Accessibility Statement and Conformance and Remediation forms (Attachment 6.13 & 6.14). The Contractor shall indemnify and hold the

University harmless in the event of claims arising from inaccessibility related to the Contractor's products/services."

5. Impermissible Provisions

a. The provisions listed under this section are not to be included in any contract:

(1) Clauses that are similar to those identified below as an Example may be replaced by the alternative language (*as indicated in italics*) without consulting with University legal counsel, as long as it is used exactly as it is written below. If the Contractor will not accept the proposed alternative, or if the proposed alternative does not suit the University's needs, please consult with University legal counsel regarding other possible alternatives.

(a) Provisions requiring the University to pay taxes. (i) As a state agency, the University is not liable for the payment of Tennessee property tax or sales or use taxes. (TCA §§ 67-5-203 and 67-6-322.) As there are a great many other taxes (federal, foreign, other states) that may come into play, the preferred language would be to limit the school's liability for taxes to those "required by law".

EXAMPLE:

Taxes. It is the Customer's responsibility to pay all taxes or other government charges relating to the Services, transfer, use, ownership, service, or possession of any equipment relating to this Agreement.

ALTERNATIVE:

Taxes. *To the extent required by law*, it is the Customer's responsibility to pay all taxes or other government charges relating to the Services, transfer, use, ownership, service, or possession of any equipment relating to this Agreement.

(b) Provisions requiring the University to pay punitive damages or costs of litigation other than court costs (T.C.A. § 9-8-307(d)). The extent to which the state can be held liable for contract damages is strictly defined by statute. T.C.A. § 9-8-307(d) provides that the state shall be liable for actual damages only. It prohibits the payment of attorneys' fees and litigation expenses, punitive damages and penalties.

EXAMPLE:

University shall promptly reimburse Contractor for any and all of Contractor's costs and expenses including, without limitation, court costs and attorneys' fees in connection with Contractor's collection of University's obligations, including interest thereon at the rate of eighteen percent (18%) per annum.

ALTERNATIVE:

The best alternative is to delete the language, but if the Contractor objects to deleting it, substitute the following:

Any and all monetary claims against the State of Tennessee, its officers, agents, and employees in performing any responsibility specifically required under the terms of this Agreement shall be submitted to the Board of Claims or the Claims Commission of the State of Tennessee and shall be limited as provided in T.C.A. § 9-8-307.

(c) Provisions for the payment of travel/per diem expenses in excess of maximum limitations set forth in [University Policy BF4001, University Travel](#). (i) Contracts must provide that any reimbursable travel expenses be in compliance with University policy and state law.

EXAMPLE:

Reimbursable Expenses. Client agrees to reimburse Contractor for the following travel expenses incurred by Contractor in its performance of services: (a) air travel, not to exceed the coach class rate; (b) auto rentals; (c) lodging and miscellaneous expenses, such as parking, taxi fares, fuel; and (d) a per diem rate for meals, as published and updated by the U.S. General Services Administration. Further, Contractor shall provide itemized receipts for all travel-related expenses. The University will not reimburse Contractor for any travel-related expenses that lack an itemized receipt.

ALTERNATIVE:

Reimbursable Expenses. Client agrees to reimburse Contractor for the following travel expenses incurred by Contractor in its performance of services: (a) air travel, not to exceed the coach class rate; (b) auto rentals; (c) lodging and miscellaneous expenses, such as parking, taxi fares, fuel; and (d) a per diem rate for meals. *Reimbursement for all travel-related expenses will be in accordance with University travel policies and state law.* Further, Contractor shall provide itemized receipts for all travel-related expenses. The University will not reimburse Contractor for any travel-related expenses that lack an itemized receipt.

(d) Provisions designating the governing law of a state other than Tennessee or consenting to jurisdiction in courts outside Tennessee. (i) Such a provision would be considered a waiver of sovereign immunity, which we have no legal authority to do. If the other party won't agree to Tennessee State law, the only alternative is to delete the language entirely and let the contract remain silent as to which law governs.

EXAMPLE:

11.8 Governing Law. This Agreement, and any disputes arising out of or related hereto, shall be governed exclusively by the internal laws of the State of California, without regard to its conflicts of laws rules or the United Nations Convention on the International Sale of Goods.

ALTERNATIVE:

11.8 Governing Law. *Deleted*

(e) Provisions requiring the University to make deposits or payments before goods are received or services are performed; provided, however, for those circumstances specified in Section I. 4. e. (2) above, such provisions may be acceptable.

(f) Provisions requiring the University to purchase or obtain liability, property or other insurance or a performance bond. (i) The State of Tennessee self-insures its exposures in general liability, automobile liability, professional malpractice and workers' compensation. The State's self-insurance program 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.

EXAMPLE:

Insurance: During the term of this Agreement and except as otherwise provided by applicable law, University will maintain a Commercial Liability Insurance policy in such amounts as are customary and reasonable in the jurisdiction. Notwithstanding the foregoing, Operator shall make commercially reasonable efforts to obtain a policy with a combined limit of US \$1,000,000.00 for each occurrence.

ALTERNATIVE:

The State of Tennessee is self-insured and does not carry or maintain commercial general liability insurance or medical, professional or hospital liability insurance. Any and all claims against the State of Tennessee, including the University or its employees, shall be heard and determined by the Tennessee Claims Commission in the manner prescribed by law. Damages recoverable against the University shall be expressly limited to claims paid by the Claims Commission pursuant to T.C.A. Section 9-8-301 et seq.

(g) Provisions requiring the University to insure, guarantee, or indemnify or hold harmless any party from claims which may arise out of the agreement or be brought by third parties. (i) University is subject to the direction of the Tennessee Attorney General pursuant to Article VI, Section 5 of the Tenn. Constitution and T.C.A. §8-6-301. The Attorney General, in Tenn. Op. Atty. Gen. No. 78-71, 1978 WL 27014 (Tenn. A.G.) directed that such clauses be deleted. As such, the only alternative is to delete the language entirely.

ALTERNATIVE:

Neither party shall be responsible for personal injury or property damage or other loss except that resulting from its own negligence or the negligence of its employees or others for whom the party is legally responsible. Any and all claims against the state shall be submitted to the Tennessee Board of Claims or the Tennessee Claims Commission."

(h) Provisions requiring the University to obtain or pay for outside labor of persons not employed by the University (for example, union stage-hands, teamsters, etc.) are prohibited unless such cost is included as part of the total contract price.

(i) Provisions requiring the University to consent to binding arbitration by a third party for claims arising out of or relating to the agreement. (i) Only the Attorney General can enter into a settlement agreement that is binding upon the State. (See TCA §§ 8-6-301 and 20-13-103.) The preferred method of handling such provisions would be to delete them. If the Contractor will not agree to delete the provision entirely, the University may substitute the alternative language provided below.

EXAMPLE:

Conflict Resolution. Except with respect to controversies or claims regarding either party's Confidential Information or proprietary rights under this Agreement, any controversy or claim arises in connection with any provision of this Agreement shall be settled by arbitration administered by the American Arbitration Association. Notwithstanding the foregoing, nothing in this Section 15.3 will be construed to limit either party's rights under Sections 9 and 15.7.

ALTERNATIVE:

Conflict Resolution. Except with respect to controversies or claims regarding either party's Confidential Information or proprietary rights under this Agreement, *in the event any controversy or claim arises in connection with any provision of this Agreement, the parties shall try to settle their differences amicably between themselves by referring the disputed matter to their respective designated representatives for discussion and resolution. Either party may initiate such informal dispute resolution by sending written notice of the dispute to the other party, and if such representatives are unable to resolve such dispute within thirty (30) days of initiating such negotiations, either party may seek the remedies available to such party under law. Notwithstanding the foregoing, nothing in this Section 15.3 will be construed to limit either party's rights under Sections 9 and 15.7. The provisions of this section are subject to the requirements of T.C.A. §8-6-301 and T.C.A. § 20-13-103.*

(j) Provisions passing risk of loss or title to the University before delivery and/or installation of products unless vendor provides shipment protection in the University's interest.

(k) Provisions allowing a Contractor to enter University's premises without notice to remove equipment or product upon alleged default by University.

(l) Provisions requiring the University to pay late charges, finance charges or interest in excess of that provided under the Tennessee Prompt Pay Act (T.C.A. § 12-4-701 et seq.).

(m) Provisions permitting the vendor to take a secured interest in personal property under the agreement.

(n) Provisions providing for a limitation of time in which the University may bring suit. (T.C.A. § 28-1-113). (i) The contractor may try to limit the time within which the state may bring suit under the contract. Limiting the time within which the State may bring suit is an impermissible waiver of sovereignty; only the legislature can say how and when the State shall sue or be sued. Pursuant to T.C.A. § 28-1-113, statutes of limitation, which limit the time in which a party has to file a legal action, do not apply to actions brought by the state of Tennessee. There is no alternative for this clause. It must be deleted.

(o) Provisions requiring confidentiality and nondisclosure that potentially violate the Tennessee law regarding public records. (T.C.A. Title 10, Chapter 7).(i) Records cannot be kept confidential if the University is required by law to disclose them. T.C.A. § 10-7-504(a)(7) provides that all proposals, evaluations and related records pertaining to personal, professional and consultant contracts are open for public inspection once the evaluation by the State is complete. T.C.A. § 12-3-510 provides that procurement records shall be open for inspection by the public during the University's regular office hours.

11.2 Notice. The receiving party will promptly notify the disclosing party in the event the receiving party learns of any unauthorized possession, use or disclosure of the Confidential Information and will provide such cooperation as the disclosing party may reasonably request, at the disclosing party's expense, in any litigation against any third parties to protect the disclosing party's rights with respect to the Confidential Information.

11.3 Terms of Agreement. Except as otherwise provided by law, neither party shall disclose the terms of the Agreement to any third party; provided, however, that either party may disclose the terms of this Agreement to its professional advisers, or to any potential investor or acquirer of a substantial part of such party's business (whether by merger, sale of assets, sale of stock or otherwise), provided that such third party is bound by a written agreement or legal duty on terms at least as strict as those set out in this Section 11 to keep such terms confidential.

11.4 Exceptions to Confidential Treatment. Notwithstanding the foregoing, the preceding provisions of this Section 11 will not apply to information that: (i) is publicly available or in the public domain at the time disclosed; (ii) is or becomes publicly available or enters the public domain through no fault of the recipient; (iii) is rightfully communicated to the recipient by persons not bound by confidentiality obligations with respect thereto; (iv) is already in the recipient's possession free of any confidentiality obligations with respect thereto at the time of disclosure; (v) is independently developed by the recipient; or (vi) is approved for release or disclosure by the disclosing party without restriction. Each party may disclose Confidential Information to the limited extent necessary: (a) to comply with the order of a court of competent jurisdiction or other governmental body having authority over such party, provided that the party making the disclosure pursuant to the order will first have given notice to the other party and made a reasonable effort to obtain a protective order; (b) to comply with applicable law or regulation requiring such disclosure; or (c) to make such court filings as may be required to establish a party's rights under this Agreement. Further, if the Company is required by applicable law, legal process or government action to produce information, files, documents or personnel as witnesses with respect to these TOS or the Services provided to you by the Company, you shall reimburse the Company for any professional time and expenses including reasonable external or

internal legal costs incurred to respond to the request, unless the Company is a party to the proceeding or the subject of the investigation.

ALTERNATIVE:

11. CONFIDENTIALITY

11.1 Nondisclosure and Nonuse. Each party will keep the other party's Confidential Information confidential. Specifically, each party receiving Confidential Information agrees not to disclose such Confidential Information except to those directors, officers, employees and agents of such party (i) whose duties justify their need to know such information and (ii) who have been clearly informed of their obligation to maintain the confidential, proprietary and/or trade secret status of such Confidential Information. Each party acknowledges that it has all requisite authority under applicable laws to provide the other party with access to Confidential Information. Each party receiving Confidential Information further agrees that it will not use such Confidential Information except for the purposes set forth in this Agreement. Each party receiving Confidential Information shall treat such information as strictly confidential, and shall use the same care to prevent disclosure of such information as such party uses with respect to its own confidential and proprietary information, provided that in any case it shall not use less than the care a reasonable person would use under similar circumstances.

11.2 Notice. The receiving party will promptly notify the disclosing party in the event the receiving party learns of any unauthorized possession, use or disclosure of the Confidential Information and will provide such cooperation as the disclosing party may reasonably request in any litigation against any third parties to protect the disclosing party's rights with respect to the Confidential Information. (*Original 11.3 was deleted entirely and 11.4 renumbered*)

11.3 Exceptions to Confidential Treatment. *Notwithstanding the foregoing, the preceding provisions of this Section 11 are subject to the requirements of T.C.A. Title 10, Chapter 7 and any other provisions of law pertaining to disclosure of state records.* Further, the preceding provisions will not apply to information that: (i) is publicly available or in the public domain at the time disclosed; (ii) is or becomes publicly available or enters the public domain through no fault of the recipient; (iii) is rightfully communicated to the recipient by persons not bound by confidentiality obligations with respect thereto; (iv) is already in the recipient's possession free of any confidentiality obligations with respect thereto at the time of disclosure; (v) is independently developed by the recipient; or (vi) is approved for release or disclosure by the disclosing party without restriction. Each party may disclose Confidential Information to the limited extent necessary: (a) to comply with the order of a court of competent jurisdiction or other governmental body having authority over such party

(p) "Belt and suspenders" provision (i) Whenever an agreement includes several uses of the phrase "to the extent permitted by law" or some version thereof, the best practice is to add the following language at the end of the contract, as a separate numbered paragraph.

(University) is a public institution of higher learning. As an entity of the State of Tennessee, under the Constitution and laws of the State of Tennessee it possesses certain rights and privileges, is subject to certain limitations and restrictions, and only has such authority as is granted to it under the Constitution and laws of the State of Tennessee. Notwithstanding any other provision to the contrary, nothing in this Agreement is intended to be, nor shall it be construed to be, a waiver of the sovereign immunity of the State of Tennessee or a prospective waiver or restriction of any of the rights, remedies, claims and privileges of the State of Tennessee. Moreover, notwithstanding the generality or specificity of any provision herein, the provisions of this Agreement as they pertain to (University) are enforceable only to the extent authorized by the Constitution and laws of the State of Tennessee.

(q) Limitation of Liability(i) Except as provided in paragraphs (c) and (d) below, pursuant to T. C. A. §§ 12-3-701 and 12-3-1210 the University shall not agree to limitation the liability of a Contractor for less than two (2) times the maximum liability, estimated liability or maximum revenue of the contract unless the Chair of Board of Trustees, or the Chair's designee, determines and approves, that:(ii) Allowing the limitation of liability is necessary to prevent harm to the University from failing to obtain the goods or services sought, or from obtaining the goods or services at a higher price if the Chair refused to allow a limitation of liability as long as all respondents are offered the same opportunity as provided in the solicitation; (iii) The limitations and any alternative contract language are commercially reasonable in light of the risks to the University created by the type of goods or services purchased and the purposes for which they will be used; (iv) Except as provided in paragraphs (c) and (d) below, pursuant to T. C. A. §§ 12-3-701 and 12-3-1210 the University shall not agree to limit the liability of any Contractor for claims for infringement of intellectual property rights, intentional torts, criminal acts, fraudulent conduct or acts or omissions that result in personal injuries or death; (v) The University may purchase software for use restricted solely to academic teaching or research upon terms that limit the contractor's liability or warranties less than two (2) times the value of the contract; provided, that in no event, shall the liability of the Contractor be limited for intentional torts, criminal acts or fraudulent conduct; and (vi) The University may acquire software or services, materials, supplies and equipment free or at nominal cost upon terms that limit the Contractor's liability or warranties less than two (2) times the value of the contract; provided, that in no event, shall the liability of the Contractor be limited for intentional torts, criminal acts or fraudulent conduct. (vii) Examples of limitation of liability clauses that may be proposed by a vendor and the necessary revisions thereto are shown below:

EXAMPLE:

12.2 Limitations of Liability. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL THE COMPANY OR ITS LICENSORS BE LIABLE TO YOU OR ANY OF YOUR AUTHORIZED USERS FOR ANY OF THE FOLLOWING TYPES OF LOSS OR DAMAGE ARISING IN ANY WAY OUT OF OR IN CONNECTION WITH THIS AGREEMENT, THE SOFTWARE, OR ASP SERVICES, WHETHER OR NOT THE COMPANY WAS ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE: (A) ANY LOSS OF BUSINESS, CONTRACTS, PROFITS, ANTICIPATED SAVINGS, GOODWILL OR REVENUE; (B) ANY LOSS OR CORRUPTION OF DATA; OR (C) ANY INCIDENTAL, INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES). IN NO EVENT SHALL THE COMPANY'S CUMULATIVE LIABILITY FOR ALL CLAIMS ARISING FROM OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE NATURE OF THE CLAIM, EXCEED THE AMOUNT OF FEES PAID BY YOU UNDER THIS AGREEMENT FOR THE PARTICULAR SOFTWARE, AND/OR ASP SERVICE WITH RESPECT TO WHICH THE RELEVANT CLAIM AROSE DURING THE TWELVE (12)-MONTH PERIOD IMMEDIATELY PRIOR TO THE EVENT, ACT OR OMISSION GIVING RISE TO SUCH LIABILITY. THIS LIMITATION OF LIABILITY IS INTENDED TO APPLY WITHOUT REGARD TO WHETHER OTHER PROVISIONS OF THIS AGREEMENT HAVE BEEN BREACHED OR HAVE PROVEN INEFFECTIVE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES THE COMPANY'S LIABILITY IS LIMITED TO THE GREATEST EXTENT PERMITTED BY LAW.

ALTERNATIVE:

12.2 Limitations of Liability. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL THE COMPANY OR ITS LICENSORS BE LIABLE TO YOU OR ANY OF YOUR AUTHORIZED USERS FOR ANY OF THE FOLLOWING TYPES OF LOSS OR DAMAGE ARISING IN ANY WAY OUT OF OR IN CONNECTION WITH

THIS AGREEMENT, THE SOFTWARE, OR ASP SERVICES, WHETHER OR NOT THE COMPANY WAS ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE: (A) ANY LOSS OF BUSINESS, CONTRACTS, PROFITS, ANTICIPATED SAVINGS, GOODWILL OR REVENUE; (B) ANY LOSS OR CORRUPTION OF DATA; OR (C) ANY INCIDENTAL, INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES). IN NO EVENT SHALL THE COMPANY'S CUMULATIVE LIABILITY FOR ALL CLAIMS ARISING FROM OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE NATURE OF THE CLAIM, EXCEED THE AMOUNT OF *TWO (2) TIMES* THE FEES PAYABLE BY YOU UNDER THIS AGREEMENT THIS LIMITATION OF LIABILITY IS INTENDED TO APPLY WITHOUT REGARD TO WHETHER OTHER PROVISIONS OF THIS AGREEMENT HAVE BEEN BREACHED OR HAVE PROVEN INEFFECTIVE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES THE COMPANY'S LIABILITY IS LIMITED TO THE GREATEST EXTENT PERMITTED BY LAW. *IN NO EVENT SHALL THIS LIMITATION OF LIABILITY APPLY TO CLAIMS FOR INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS, INTENTIONAL TORTS, CRIMINAL ACTS, FRAUDULENT CONDUCT OR ACTS OR OMISSIONS THAT RESULT IN PERSONAL INJURIES OR DEATH.*

EXAMPLE:

12. 1 Disclaimer of Warranty. EXCEPT AS EXPRESSLY AND SPECIFICALLY PROVIDED IN ANY ATTACHED ORDER FORM(S): (A) THE SOFTWARE AND ALL PORTIONS THEREOF, AND ANY SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE." TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE COMPANY AND ITS LICENSORS AND SUPPLIERS DISCLAIM ALL OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, SYSTEM INTEGRATION, DATA ACCURACY, MERCHANTABILITY, TITLE, NON-INFRINGEMENT AND/OR QUIET ENJOYMENT; (B) NEITHER THE COMPANY NOR ITS LICENSORS WARRANT THAT THE FUNCTIONS OR INFORMATION CONTAINED IN THE SOFTWARE OR ASP SERVICES WILL MEET ANY REQUIREMENTS OR NEEDS YOU MAY HAVE, OR THAT THE SOFTWARE OR ASP SERVICES WILL OPERATE ERROR FREE OR WITHOUT INTERRUPTION, OR THAT ANY DEFECTS OR ERRORS IN THE SOFTWARE OR ASP SERVICES WILL BE CORRECTED, OR THAT THE SOFTWARE OR ASP SERVICES IS COMPATIBLE WITH ANY PARTICULAR COMPUTER SYSTEM OR SOFTWARE; AND (C) THE COMPANY AND ITS LICENSORS MAKE NO GUARANTEE OF ACCESS TO OR OF ACCURACY OF THE CONTENT CONTAINED IN OR ACCESSED THROUGH THE SOFTWARE OR ASP SERVICES. WITHOUT LIMITING THE FOREGOING, YOU ACKNOWLEDGE THAT THE ASP SERVICES AND/OR THE SOFTWARE ARE NOT DESIGNED OR LICENSED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE CONTROLS (INCLUDING, OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION/COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, SURGICAL OR MEDICAL FACILITIES, LIFE SUPPORT OR WEAPONS SYSTEMS) AND THAT THE COMPANY SPECIFICALLY DISCLAIMS ANY EXPRESS OR IMPLIED REPRESENTATION, WARRANTY OR CONDITION OF FITNESS FOR SUCH PURPOSES.

ALTERNATIVE:

12. 1 Disclaimer of Warranty. EXCEPT AS EXPRESSLY AND SPECIFICALLY PROVIDED IN ANY ATTACHED ORDER FORM(S): (A) THE SOFTWARE AND ALL PORTIONS THEREOF, AND ANY SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE." TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE

COMPANY AND ITS LICENSORS AND SUPPLIERS DISCLAIM ALL OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, SYSTEM INTEGRATION, DATA ACCURACY, MERCHANTABILITY, TITLE, NON-INFRINGEMENT AND/OR QUIET ENJOYMENT; (B) NEITHER THE COMPANY NOR ITS LICENSORS WARRANT THAT THE FUNCTIONS OR INFORMATION CONTAINED IN THE SOFTWARE OR ASP SERVICES WILL MEET ANY REQUIREMENTS OR NEEDS YOU MAY HAVE, OR THAT THE SOFTWARE OR ASP SERVICES WILL OPERATE ERROR FREE OR WITHOUT INTERRUPTION, OR THAT ANY DEFECTS OR ERRORS IN THE SOFTWARE OR ASP SERVICES WILL BE CORRECTED, OR THAT THE SOFTWARE OR ASP SERVICES IS COMPATIBLE WITH ANY PARTICULAR COMPUTER SYSTEM OR SOFTWARE; AND (C) THE COMPANY AND ITS LICENSORS MAKE NO GUARANTEE OF ACCESS TO OR OF ACCURACY OF THE CONTENT CONTAINED IN OR ACCESSED THROUGH THE SOFTWARE OR ASP SERVICES. *HOWEVER, IN NO EVENT SHALL THE COMPANY'S LIABILITY BE LESS THAN TWO (2) TIMES THE FEES PAYABLE BY YOU UNDER THIS AGREEMENT.* WITHOUT LIMITING THE FOREGOING, YOU ACKNOWLEDGE THAT THE ASP SERVICES AND/OR THE SOFTWARE ARE NOT DESIGNED OR LICENSED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE CONTROLS (INCLUDING, OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION/COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, SURGICAL OR MEDICAL FACILITIES, LIFE SUPPORT OR WEAPONS SYSTEMS) AND THAT THE COMPANY SPECIFICALLY DISCLAIMS ANY EXPRESS OR IMPLIED REPRESENTATION, WARRANTY OR CONDITION OF FITNESS FOR SUCH PURPOSES. *IN NO EVENT SHALL THIS LIMITATION OF LIABILITY APPLY TO CLAIMS FOR INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS, INTENTIONAL TORTS, CRIMINAL ACTS, FRAUDULENT CONDUCT OR ACTS OR OMISSIONS THAT RESULT IN PERSONAL INJURIES OR DEATH.*

6. Contract Documents

a. All relevant documents containing information pertinent to the transaction, or additional terms or conditions not included within the body of the contract should be incorporated by reference, with the order of interpretation clearly set forth.

b. If the contract is a result of a competitive process, it should contain a clause in substantially the following form:

(1) Contract Documents. This Contract consists of the following documents:

(a) This Contract document, its attachments and amendments/addenda, the latest of which having priority;

(b) The Request for Quotation/Request for Proposal/Invitation to Bid number and its associated amendments; and

(c) The Contractor's Bid dated (add date), including any clarifications and addenda thereof, the latest of which having priority. (i) In the event of a discrepancy or ambiguity regarding the Contractor's duties, responsibilities, and performance under this Contract, these documents shall govern in the order of precedence detailed above.

c. Amendments and addenda to existing contracts shall clearly state the additions, deletions and/or modifications to the contract including whether the new terms are in substitution of, or in addition to, the terms expressed in the original contract.

7. Fiscal Review.

a. Agreements must be processed in compliance with applicable legislative fiscal review requirements, as may be amended from time to time.

8. Electronic Signatures

a. For contracts not requiring President's approval and for which the other party is agreeable to the use of electronic signatures, University may use electronic signatures as permitted under the University's rules and procedures which have been adopted pursuant to [University Policy IT6006, Authorization for Use of Electronic Signatures](#).

9. Contract Procedures and Routing Requirements

a. All necessary signature approval lines, including that for the President or authorized signatory official (See BF4007, [Procurement and Contract Services](#)), should be prepared by the University. (1) If the party with whom the University is contracting is a corporation, its name must be stated in the contract exactly as it appears in its charter or as listed with the Tennessee Secretary of State's office. The person signing on behalf of the corporation must have legal authority to do so, and his/her title/position should be shown on the signature page. (2) If the other party is a state agency, the contract must include appropriate signature line(s) for the agency's authorized official(s) of equivalent rank, or designee. (3) The President or authorized signatory authority must sign all University contracts, in accordance with BF4007, [Procurement and Contract Services](#).

b. A completed [Contract Routing Form](#) as well as all relevant attachments must accompany all agreements or amendments submitted to the Procurement and Contract Services Office for review. The [Contract Routing Form](#) must be signed by a University official verifying compliance with all applicable policies and guidelines. If applicable, a [Justification for Sole Source Form](#) must be completed and submitted along with the [Contract Routing Form](#).

c. For Contracts that require President or authorized signatory authority approval, University should prepare the contract as desired/required by the parties, the [Contract Routing Form](#) and transmit to the Procurement and Contract Services Office, along with all required supporting documentation. The Procurement and Contract Services Office shall initiate all contract approvals/signatures via DocuSign or other electronic delivery system.

d. Agreements containing blank spaces or omitting required contract provisions will be returned to the ordering department official for correction and must be resubmitted to the Procurement and Contract Services Office for review.

e. All contracts required to be submitted to the Procurement and Contract Services Office should be submitted prior to the beginning of the contract's original term or renewal. A contract cannot be extended or amended after the original term has expired.

f. Amendments forwarded to the Procurement and Contract Services Office for review must be accompanied by a copy of the original agreement and any prior amendment or addendum.

g. The University authorized official is responsible for monitoring the Title VI compliance of sub-recipients of federal funds.

h. Sufficient documentation (may be in electronic format) must be maintained as evidence of compliance with all University policies, guidelines and procedures applicable to the actions taken. Such documentation shall be retained for the time period specified in [University Policy BF4005, University Records Management Program](#).

10. Contract Monitoring

a. Monitoring. All service contracts shall contain a provision that states that the Contractor's activities shall be subject to monitoring by the University and/or state

officials. These contract types include, but are not limited to:

- (1) Personal Service
- (2) Professional Service
- (3) Software Related Agreements
- (4) Grants, including subcontracts
- (5) Memorandums of Understanding

b. Monitoring Plan. University shall maintain a monitoring plan (See [Contract Monitoring Plan Form](#)) for all service contracts to ensure the following:

- (1) Contract performance in terms of progress and compliance with contract provisions;
- (2) Communication with Contractor to ensure maximum performance and intended results;
- (3) Financial obligations of the University do not exceed the contract pricing;
- (4) Deliverables are received;
- (5) Appropriate approval and remittance of payments for acceptable work are in accordance with contract provisions and applicable law;
- (6) Maintenance of records for each contract that documents activities such as procurement, management, and sub-recipient monitoring, if applicable; and
- (7) Evaluation of contract results in terms of the achievement of organizational objectives

11. Contract Manual

a. The University shall maintain a written contracts manual, which may be in electronic format, setting forth any procedures of the University in addition to or necessary to comply with the procedures outlined in this Guideline. These procedures shall outline the University's process for routing and execution of agreements not requiring President's approval.

12. Conflicts of Interest

a. Pursuant to T.C.A. § 12-4-103 it is unlawful for any state official or employee to "bid on, sell, or offer for sale, any merchandise, equipment or material, or similar commodity, to the state of Tennessee" or "to have any interest in the selling of the same to the state" during that person's term of employment and for six months thereafter. The University is not allowed to contract with an individual who is, or within the past six months has been, a state employee in violation of the statute.

b. An individual shall be deemed a state employee until such time as all compensation and terminal leave has been paid.

c. The University shall not knowingly enter into contracts with a company or corporation which would constitute a violation of [University Policy GE2021, Conflict of Interest](#)

II. Contracts of Adhesion

A. In order for a contract to be considered an adhesion contract all the following criteria must be met:

1. The proposed contract must be a standard form contract or license;
2. It is offered to the University on a ‘take it or leave it’ basis;
3. The University has no realistic opportunity to negotiate different terms; and
4. The desired product or service cannot be obtained except by agreeing to the form contract.

B. The procedures necessary to enter into a contract of adhesion are:

1. The initiating department must route the contract through the University Procurement and Contract Services Office. The University must document the following:

a. The University’s attempts to negotiate needed changes in the contract and the vendor’s refusal to agree to any changes (i.e., despite the fact they were given statutory language that governs certain situations or that contradicts contract language);

b. The need for the item or service(s);

c. The fact that the vendor is the sole source (or that all vendors require the impermissible language).

2. Approval for contracts of adhesion shall be as follows:

a. The University Chief Procurement Officer may, after consultation with University Legal Counsel as appropriate, approve contracts of adhesion up to not greater than \$5,000 annually but less than \$25,000 in total if an appropriate software risk assessment has been performed. (See Sample Risk Assessment Form.)

b. The President or President’s designee may, after consultation with University Legal Counsel as appropriate, approve contracts of adhesion which has a value of \$25,000 or more annually.

3. A letter stating that the University regards the agreement as a contract of adhesion shall be sent with the executed contract when it is sent to the Contractor. A copy of the letter shall be maintained in the University’s records.

4. The purchasing officer, contract officer, or other designated official at the University must maintain a record of all software and other acquisitions over \$5,000, and those under \$5,000 requiring signature, contracts of adhesion entered into pursuant to this Guideline and supply the record, upon request, to the President.

5. In appropriate instances, the President or designee, as applicable, may approve a contract as a contract of adhesion when the vendor has agreed to some change(s), but the contract still contains impermissible language; documentation as required above must be maintained.

III. Form Contracts

[Clinical Affiliation](#)

Pro Forma Contract (Personal, Professional and Consultant Services)

[Dual Services Agreement](#)

Facilities Use Agreement (Contact [Conference & Events Services](#))

[Performance Agreement](#)

[Revenue Agreement](#)

[Software License Agreement](#)

[Transient Use Agreement](#)

[Invention Disclosure Form](#)

[Copyrightable Work Disclosure Form](#)

[Intellectual Property Agreement](#)

Employee Work for Hire Agreement

Copyright License Agreement

Partial Assignment of Copyright Ownership Agreement

Joint Ownership of Copyright Agreement

Intellectual Property/Research Agreement

Banking Agreement

Non-Credit Instruction Agreement (up to \$50,000)

Non-Credit Instruction Agreement (\$50,000 and over)

IV. Clinical Affiliation Agreements

[Clinical affiliation agreement](#) is an agreement between the University and another entity (Affiliate) for the provision of practical clinical experience to the University's students.

A. General Rules

1. Generally, these agreements do not provide for monetary compensation to either the University, Affiliate or student.

2. Health Records and Insurance

a. The University may provide health records of students and faculty upon request by the Affiliate. The University must give students/faculty prior written notice when they will be required by the Affiliate to obtain and provide health records in order to participate in clinical experience. Each student will be required to execute proper release forms for FERPA purposes.

b. The Affiliate may require written evidence of professional liability insurance coverage for students and faculty participating in the experience.

c. The University shall notify students of Affiliate's requirement(s) regarding professional liability insurance, the minimum amount of coverage that is required by the Affiliate. The University may notify the student of available options to obtain such coverage.

3. Criminal Background Checks and/or Drug Screening

a. If criminal background checks and/or drug screening of students are required by the Affiliate, the University shall notify students of this requirement prior to enrollment in the program or as soon as the requirement is known.

b. The University shall inform students that the check and/or screen must be completed prior to the student's initial clinical placement.

c. Each student is responsible for making timely arrangements for a background check and/or drug screening and paying all costs associated with such checks/screens.

d. If criminal background checks and/or drug screenings are required for University faculty or staff, the University shall arrange for the background check/drug screens, pay all costs associated with such checks, and provide the results to the Affiliate.

e. At a minimum, the Affiliate shall be responsible for setting the eligibility standards for clinical participation at its facility, and if there is any question as to whether the standard has been met, to evaluate the results of the background check/drug screen to determine if the student or faculty /staff member shall be allowed to participate at its facility. The University shall take steps to ensure that any individual not clearly meeting the Affiliate's eligibility standards does not participate in the clinical program at the Affiliate's facility.

f. A [Clinical Affiliation Agreement](#) which requires background checks should also include a provision that if the University faculty/staff member or student is also an employee of Affiliate, the Affiliate will allow the faculty/staff member or student to participate in its clinical program without undergoing an additional background check.

g. Recognizing that students enrolled in certain programs at the University will potentially participate in multiple clinical placements at multiple facilities, clinical agreements should include a provision that the Affiliate will accept the results of the background check done prior to the student's initial clinical placement if the student maintains continuous enrollment in the University's program and the background check agency maintains the results of the background check.

h. University shall inform students or faculty/staff members excluded from clinical placement on the basis of a criminal background check/drug screen of any review or appeal process available pursuant to the Fair Credit Reporting Act or any other law or policy.

4. Health Insurance Portability and Accountability Act of 1996 (HIPAA) Compliance

a. Although HIPAA language is included in the form contract, this language may be omitted upon the request of the Affiliate.

b. For purposes of HIPAA, students are trainees and are, by definition, considered to be the "workforce" of the Affiliate (at the same time, it should be noted that students are employees of neither the University nor the Affiliate). Therefore, entering into business associate agreements is not permitted.

5. Agreements which comply with this guideline and do not deviate substantially from the form template or which have been reviewed and approved by the University's Procurement and Contract Services Office and Office of Legal Counsel, do not require further Office of Legal Counsel review. Agreements previously reviewed by the Office of Legal Counsel review may be renewed without Office of Legal Counsel review if no changes are made.

6. University departments are encouraged to seek terms of longer than one year for clinical affiliation agreements.

B. Clinical Affiliation Forms

1. [Clinical Affiliation Agreement](#)

2. Student Records Release Form

V. Pro Forma Contract

This Section details the instructions on how to complete the Pro Forma Contract where the Contractor is providing a good/service to the University which will usually continue for

some specified length of time.

A. General Rules

1. The description of the goods/services should be detailed enough to enable a party unfamiliar with the subject matter to determine exactly what good(s)/service(s) the Contractor will be providing/performing for the University.

2. In most cases, the description of services should provide qualitative and quantitative measures. For example, a custodial services contract might provide for the Contractor to provide the cleaning solutions, that a facility's floors to be mopped on a nightly basis and stripped and waxed on a biannual basis.

3. This type of Agreement must not create an employer/employee relationship. An individual must meet all of the following conditions to be classified as an independent contractor:

a. The University controls only the results of the work, not how it gets done.

b. The individual assumes a business risk (assumes all expenses for personnel, equipment and materials) as a result of this association with the University.

c. The individual is responsible for paying and reporting applicable self-employment tax.

d. The individual is free to complete the assigned task without control or direction from the University.

e. The individual's association with the University normally ceases upon completion of a specified project.

f. The individual is free to work for other entities.

g. The individual has declared himself/herself to be an independent contractor when providing similar services to the general public.

4. In appropriate cases, the University should require the Contractor to demonstrate proof of appropriate forms of insurance, and/or to provide a performance bond.

5. When appropriate, language regarding intellectual property rights should be included in a contract.

6. All contracts for legal services which are subject to T.C.A. §§ 8-6-106 and 8-6-301 must originate in the Office of Legal Counsel prior to any action being taken to retain any legal or legally related services;

7. Contracts for services required to be approved by the State Building Commission must be coordinated with the Office of Campus Planning and Design;

8. State law prohibits the University from either establishing a vending or food services operations contract for new or existing facilities or from performing such services itself, without first notifying the Division of Blind Services for the State of Tennessee. (T.C.A. §§ 49-8-118 & 71-4-503) Review later

9. Pro Forma Contract (Insert hyperlink)- This contract may be used to procure goods or services as the need dictates. It is included in the approved RFP format as the pro forma contract and should be used in the following instances:

a. For personal service contracts that result from an RFP process;

b. For personal service contracts which require President or designee approval, in accordance with BF4008, [Contracts and Signatory Authority](#);

c. For personal service contracts which require Fiscal Review approval; and

d. For all other contracts, in which the University's Procurement and Contracts Office determines this form is appropriate.

10. A Purchase Order may be used to procure goods or services, in limited circumstances.

VI. Grant Agreements

A. General Rules

1. The President or designee of the University is authorized to approve applications for grants from agencies or organizations; provided that, when matching funds or services in lieu of funds are required by the University, no application shall be made unless the operating budget provides the funds and/or resources necessary for the project.

2. The President is further authorized to accept the award of a grant and enter into agreements confirming grants, provided that agreements confirming the award of grants shall be subject to the requirements of this guideline.

3. The following procedures shall govern expenditures for personal, professional or consulting services pursuant to grant contracts:

a. Procedures

(1) The University shall negotiate when possible to ensure that payments are appropriate to support the activity contemplated.

(2) A written budget and work program shall be prepared and included in the grant agreement.

b. Contracts Representing Grants

(1) Grant contracts not involving federal money must include the following provision:(a) "The Contractor shall cause to be performed, in accordance with auditing standards prescribed by the Comptroller of the Treasury of the State of Tennessee, an audit of all its program(s) funded by this contract; provided, however, that any contract for such audit shall be subject to prior approval of the Comptroller of the Treasury of the State of Tennessee, and must be submitted on the standard contract to audit accounts' form published by the Comptroller of the Treasury. The audit may include and be combined with an audit of other programs of the Contractor, and the existence of more than one contract between the Contractor and any agency of the State of Tennessee shall not necessitate more than one (1) audit of the Contractor's programs to be performed every two years."

(2) Grant contracts involving Federal money must include the following provision:(a) "The Grantee shall prepare and submit, within nine (9) months after the close of the reporting period, an annual report of its activities funded under this grant to the commissioner or head of the granting agency, the Tennessee Comptroller of the Treasury, and the Commissioner of Finance and Administration. The annual report for any Grantee that receives \$300,000.00 or more in aggregate federal and/or state funding for all its programs shall include audited financial statements. All books of account and financial records shall be subject to annual audit by the Tennessee Comptroller of the Treasury or the Comptroller's duly appointed representative. When an audit is required, the Grantee may, with the prior approval of the Comptroller, engage a licensed independent public accountant to perform the audit. The audit contract between the Grantee and the licensed independent public accountant shall be on a contract form prescribed by the Tennessee Comptroller of the Treasury. Any such audit shall be performed in accordance with generally accepted auditing standards, the provisions of OMB Circular A-133, if applicable, and the Audit

Manual for Governmental Units and Recipients of Grant Funds published by the Tennessee Comptroller of the Treasury. The Grantee shall be responsible for reimbursement of the cost of the audit prepared by the Tennessee Comptroller of the Treasury, and payment of fees for the audit prepared by the licensed independent public accountant. Payment of the audit fees of the licensed independent public accountant by the Grantee shall be subject to the provisions relating to such fees contained in the prescribed contract form noted above. Copies of such audits shall be provided to the State Granting Department, the Tennessee Comptroller of the Treasury, the Department of Finance and Administration, and shall be made available to the public.”

c. Grant Contracts (1) Procurement by grantee--grant contracts which provide for reimbursement for the cost of procuring goods, materials, supplies, equipment or services shall contain the following provision:(a) “If the terms of this contract allow reimbursement for the cost of procuring goods, materials, supplies, equipment or services, such procurement shall be made on a competitive basis (including the use of competitive bidding procedures), when practicable.”

d. Federally Funded Grant Contracts (1) Procurement by Contractor--when a grant contract provides that the Contractor may make purchases and be reimbursed for its cost with funds derived wholly or partially from federal sources, the following clause or one of substantially the same effect should be included:(a) "Reimbursement for the cost of procuring goods, materials or services shall be subject to the Contractor's compliance with applicable federal procurement requirements."

e. Federally Funded Contracts(1) Compliance with federal regulations--if federal funds are used to support the contract, the following clause must be included:(a) "The Contractor shall comply with all applicable federal regulations in the performance of duties under this contract."

VII. Dual Services Agreements

A. Scope

1. This section applies to agreements whereby the University is procuring the services of a full-time employee of another state Institution/state agency.

B. General Rules

1. Job priorities/Rate of Compensation

a. University policy requires that full-time employees of the University must devote their full working time to their position; therefore, any agreement which diminishes an employee's availability for the performance of his/her duties will not be approved, except as provided herein.

b. In general, the services performed pursuant to a dual services agreement are to be of an infrequent or short term nature. (See [University Policy HR5011, Extra Compensation and Outside Employment](#))

c. The rate of payment under a dual services agreement must not exceed the rate the procuring institution/agency normally pays for such services, shall conform to the Fair Labor Standards Act and be coordinated with the employee’s primary Human Resource and/or Payroll Department.

d. Dual service agreements must avoid conflicts of interest.

2. Payment

a. Any payment for employee services shall be between the University and the state agency or other Institution. The University may not pay an employee of another Institution or State Agency directly for services of any nature.

b. Payment shall only be made after performance of services is completed and upon receipt of invoice from the vendor institution.

3. Approvals. Dual services agreements require the written approval of:

a. An authorized official of the state agency/Institution procuring the services (Procuring Party) and the Institution whose employee is to provide the service (Vendor Party).

b. If compensation exceeds \$1,500 to any state agency employee (not including state or UT institutions), the Department of Finance and Administration must approve the agreement.

4. Blanket Dual Services Agreements

a. If a Procuring Party contracts for the services of multiple employees of a Vendor Party, one blanket dual service agreement may be processed that includes the names and rates of compensation for each employee.

C. Form Agreement

1. The form agreement below contains all required elements; however, as a minimum, every agreement must contain the following:

a. A brief description of the services being provided;

b. The name of the employee providing the services;

c. The rate and means of compensation, including when payment will be made and to what address invoices are to be sent; and

d. A provision that an invoice from the vendor party is required prior to payment to the University for services rendered by its employee.

(1) [Dual Services Agreement](#)

(a) Source and Authority: University Policy HR5011, Extra Compensation and Outside Employment; Section 36 of Chapter 732 of the Public Acts of 1976, and the rules of the Department of Finance and Administration.

VIII. Agreements for Short-term Access to and Use of Campus Property and Facilities

A. Scope

1. This section deals with agreements for short-term use of campus facilities for activities which include, but are not limited to, those for musical performances, speakers, conventions, exhibits, etc. where control of the University space is being retained by the University.

2. This Section does not apply to leases of property for residential use and/or commercial leases of property. Real property and lease agreements are covered by separate procedures found in University Policy UM , Acquisition & Disposal of Real Property and UM , Lease Procedures and Guidelines.

B. General Rules

1. All use of campus facilities and agreements providing for such use must comply fully with [University Policy BF4022, Access to and Use of Campus Property and Facilities](#).

2. Agreements which deviate from the standard agreement included as links to this guideline must be submitted to the University's Legal Office for approval.

3. In the event that an affiliated or non-affiliated group wishes to perform or sponsor a performance of copyrighted musical compositions, the following provisions must be included in the contract:

a. The Contractor certifies that Contractor has obtained all necessary copyright and royalty licenses from ASCAP, BMI, SESAC, any other performing rights organization or the copyright owner for the performance(s) presented under the terms of this agreement.

b. The Contractor agrees to indemnify, hold harmless, and defend the University and the State of Tennessee from and against any and all claims, demands or suits which may be brought for copyright infringement allegedly arising in the course of the performance(s) presented under the terms of this agreement. Such indemnification shall extend to both criminal and civil actions and shall include any loss, damage, penalty, court costs or attorneys' fees incurred by the University.

c. The University shall promptly notify the Contractor of any such claim brought against the state. The settlement or compromise of any claim brought against the state shall be subject to the approval of the appropriate state officials, as required by T.C.A. § 20-13-103.

C. Form Use of Facilities Contracts

1. Typical form contracts for use of University or non-University facilities include:

a. Transient Use Agreements

b. Provides short-term, continuing, non-exclusive use of facilities, such as evening use of high school space as a teaching extension site for a semester.

c. Can be for University use of non-University facilities, or non-University use of University facilities.

2. Mutual Use Agreements

a. Provides short-term, continuing, non-exclusive mutual use of both parties' facilities

b. Between two state universities or University and a non-state entity

c. Mutual use of each other's facilities may be substituted for financial compensation

(1) Facilities Use Agreement ([See Conference & Events Services](#))

(2) Mutual Use Agreement - Involving a state Institution

(3) [Transient Use Agreement](#) - Involving a state Institution

(4) Tenant Use Agreement - Between Two state Institutions

(5) Mutual or Transient Use - Terms and Conditions for an Agreement Involving a state Institution

(6) Tenant Use - Terms and Conditions for an Agreement between Two state Institutions

(7) Instructions - for filling out Use Agreements

IX. Contracts for Hardware, Software and Related Services

A. Scope

1. This section applies to contracts for hardware, software and related services.

B. General Rules

1. The legal right to use software is typically obtained in the form of a license agreement, which is usually provided by the vendor during the procurement process.

2. It is the responsibility of the University to negotiate changes in all vendor provided agreements, or incorporate vendor terms in a University template agreement, so that such agreements comply with this Guideline.

3. If vendor does not provide an agreement, the attached standard [Software License Agreement](#) may be used for software licenses and, with appropriate adaptation, for related equipment purchases.

4. Piloting/Testing of Hardware, Software or Related services

a. Agreements authorizing the University to conduct experimentation or testing of hardware, software or related services should follow the appropriate approval process.

b. Although the initial cost to the University may be minimal, full consideration of the cost to continue use such product/service shall be evaluated up front with no guarantee for the University to continue to license. Use of the product/service, beyond the initial pilot period, must follow the appropriate policies and guidelines, and the execution of a pilot process does not warrant a non-competitive justification for continued use of the product/service.

c. These agreements shall not contain a renewal option and must contain a provision that at the end of the pilot term the appropriate procurement process shall be followed.

C. Form Contracts

1. [Software License Agreement](#)

X. Intellectual Property Agreements

A. Scope

1. [University Policy RE7004, Intellectual Property](#), sets out the approved procedures governing University intellectual property issues.

B. Form Research Agreement

1. [University Policy RE7004, Intellectual Property](#)

XI. Banking and Related Financial Services Agreement

A. Scope

1. This section deals with agreements for the deposit and investment of all funds, regardless of source, which are received by the University. Agreements of this nature shall be in conformance with [University Policy BF4011, Bank Accounts](#).

B. Form Contract

1. Sample Banking Agreement

XII. Non-credit Instruction Agreement

A. Scope

1. This section is applicable to revenue-generating agreement whereby the University provides non-credit instruction/training for business and industry.

B. General Rules

1. The University is responsible for the administration of fees, charges and refunds in accordance with [University Policy BF4020, University Fees and Charges](#).

C. Essential Contents of the Agreement

1. The form agreements at the end of this section contain all required elements; however, a few elements are described below:

a. The program title name, a brief description of the program, Continuing Education Units (CEUs) awarded, if applicable, the name of the instructor, if applicable, conducting the course, and the dates, times, and location of the course.

b. The minimum and maximum number of participants and the program fee that will be invoiced to company.

c. Other provisions should be specific to include such elements as deliverables by the University including textbooks, instructional materials, CEU records/transcripts for participants, and/or certificates awarded, etc.

d. Specific requirements of the company should be included such as safety and security of University equipment, additional fee assessments outside of the instructional costs, documents/information necessary for instruction, etc.

D. Form Contracts

1. Sample [Non-Credit Instruction Agreement up to \\$50,000](#)

2. Sample [Non-Credit Instruction Agreement above \\$50,000](#)

XIII. Academic Agreements A. Articulation/transfer, dual credit and dual enrollment agreements should be developed in compliance with instructions or guidance from the University, Office of Academic Affairs.

XIV. Exceptions A. Any exceptions to the procedures outlined in this Guideline shall be subject to the approval of the President or designee and shall be requested in writing by the President or his/her designee. Exceptions shall be made on a case-by-case basis. If an exception is made, a written determination signed by the President or designee shall be included in the contract file.

Revision Dates

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(Working Guideline Number: 10953)

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