

Principles of Contracting & Risk Transfer:

A Guide for Auburn University



AUBURN UNIVERSITY

October 6, 2015



TABLE OF CONTENTS

Section I: Introduction.....	2
Contract Signature Authority.....	2
Who is Authorized to negotiate, amend, or terminate a contract at Auburn University?.....	3
Section II: Contract Defined	4
Section III. Contract Management Basics.....	5
When Are Written Contracts Required	5
General Provisions and Execution	8
Contract Clauses	9
Special Considerations & Contracts Requiring Additional Review	19
Section IV: Contract Management Procedure Overview	20
Responsibilities of Department Initiating Contract	20
Section V. Insurance Requirements.....	22
Third Party Insurance Requirements & Limit Recommendations	22
Certificate of Insurance Requirements.....	25
Section VI. Training and Education.....	26
Section VII. Appendices	28
Contract Review Checklist	28
Definitions.....	32
Frequently Asked Questions	34
Auburn University Certificate of Insurance Checklist	35
Useful Contacts & Website Links	36



AUBURN
UNIVERSITY

SECTION I: INTRODUCTION

Auburn University (“AU” or “the university”) has developed the Principles of Contracting & Risk Transfer guide for use by those who may enter into contractual relationships on behalf of Auburn University. The information provided in this guide is meant to provide a general understanding of the complex issues that may arise during general contracting. Well-written contracts clearly describe the agreement between the parties and minimize the risks to the university. This guide defines the parameters through which a university contract might be created, describes the necessary administrative review and approval process and designates who, within the university, is authorized to negotiate and execute university contracts. This guide also provides an overview of the filing and maintenance of contracts, identifies situations that require a contract, and recognizes exceptions to those requirements.

This guide does not serve as legal advice but only to guide those who may enter into contractual relationships on the principles and best practices of university contracting.

Applicability

This guide applies to all agreements between Auburn University and any other party with limited exceptions. The term "University Contract," as defined in this guide, does not include agreements between different units within the university.

Disclaimer:

Principles of Contracting & Risk Transfer: A Guide for Auburn University is a compendium of best practices to be utilized as a reference where practicable. The *Guide* is not intended to encompass all contractual issues encountered by the University, establish governing rules, or abridge the discretionary function of Auburn University employees granted signature authority by the University.

Contract Signature Authority

Auburn University’s Signature Authority Policy intentionally restricts the number of employees who are authorized to enter into agreements on behalf of the University. Outside of this specific delegation, no individual has the authority to contractually commit Auburn University or its individual schools or departments to goods and services, leased space, sponsored projects, or other types of agreements. Entering into an agreement without specifically delegated authority, which includes signing contracts or quotes, exposes Auburn University to significant risks, and may subject the authorizer or signatory to personal liability for the agreement and disciplinary measures. Auburn University’s Signature Authority Policy can be found at:

<https://sites.auburn.edu/admin/universitypolicies/Policies/ContractSignatureAuthorityPolicy.pdf>



Who is Authorized to negotiate, amend, or terminate a contract at Auburn University?

Only campus officials with the specific delegated authority to negotiate and execute contracts on behalf of Auburn University are authorized to create, amend, or terminate an Auburn University contract. Campus faculty, researchers, and staff are responsible for contacting the appropriate responsible contracting office and providing the office's contact with the scope of work, payment terms, and other important information related to the terms of the desired contract. In some cases, the authority lies with the Dean, Director, or Department head. Listed below are a few notable categories of special contracts and the corresponding responsible offices for contract management. For a complete listing, please refer to [Auburn University's Signature Authority Policy](#).

Procurement of Good and Services

Contracts for the procurement of goods and services must be made in accordance with the laws of the State of Alabama and within policies and procedures of Auburn University as managed by the Executive Director of **Procurement and Payment Services (PPS)**. This not only finance agreements pertaining to the purchase of goods but also software licenses, maintenance agreements, and equipment rentals exceeding \$2,500 in value.

http://www.auburn.edu/administration/business_office/pps/

Sponsored Projects

Sponsored projects are externally funded activities in which a formal written agreement, i.e., a memorandum of understanding, grant, contract, cooperative agreement, or sub-agreement, is entered into by Auburn University and the provider of the funding (sponsor). A sponsored project might typically be an exchange transaction in which there is a specified statement of work with a related, reciprocal transfer of something of value, however, certain non-exchange grants may contain conditions that would call for monitoring as a sponsored project. Money provided to support sponsored projects is a significant financial resource for the university and for individual departments. For policies and procedures specific to sponsored research, please refer to the **Office of Sponsored Programs (OSP)** and the **Office of Contracts and Grants Accounting (CGA)** websites.

<https://cws.auburn.edu/OVPR/pm/osp/home>

http://www.auburn.edu/administration/business_office/cga/



AUBURN
UNIVERSITY

Technology Commercialization Agreements

The Office of Innovation Advancement and Commercialization (IAC) serves as the link between the commercial marketplace and Auburn University faculty. IAC offers Auburn researchers expertise and guidance regarding the protection of intellectual property, including patents and copyrights, and in seeking licensing agreements with commercial entities to take Auburn research developments into the marketplace for the public benefit. Activities include negotiation of confidentiality, material transfer, collaboration and licensing agreements.

<https://cws.auburn.edu/ovpr/pm/tt/home>

Affiliation or International Academic Exchange Agreements

Agreements related to academic course completion (internship placement, clinical site rotations, preceptor placement, etc.) regardless of monetary exchange for goods or services, should be first reviewed within the department of academic credit. The department head/chair and dean should indicate their approval of the agreement, while final signature authority has been delegated to the Provost and Vice President for Academic Affairs. Original academic course agreements should be delivered to the Office of the Provost for review and signature.

Real Property Agreements

The Auburn University Board of Trustees policy requires that agreements dealing with [Real Property](#) be approved by the AU Board of Trustees. Any agreement that deals with the acquisition or disposition of land, or leasing of AU property or property from a third party should be handled by the [Auburn University Real Estate Department](#).

If you are unsure as to the appropriate corresponding responsible office, you may consult a [university contract officer](#) (PPS) who can guide you in the right direction.

SECTION II: CONTRACT DEFINED

A "university contract" is defined as a binding agreement between two or more persons or parties, one of which is the university, (including any of its centers, departments, or other subunits) intended to have legal effect. This guide has been created to provide guidance for such written agreements, and advice on when to put an arrangement in writing. A contract need not be reduced to writing to be enforceable. Furthermore, an agreement may be a binding university contract even though the university is receiving something of value at *no charge*. A document need not be called a "contract" to fall within the definition of "university contract." It might be called a "memorandum of understanding," "MOU," "letter of agreement," "letter of understanding," or simply an "agreement." While acting in the scope of your employment, if you are entering into any kind of agreement which places obligations on the university or one of its units, you should presume that you are negotiating a "university contract". Contracts should be put into writing to clarify each party's obligations whenever possible.



AUBURN
UNIVERSITY

A contract should provide a common understanding among the parties as to the essential terms, the mutual obligations, and the existence of valid and sufficient “legal consideration,” meaning that something of value is exchanged between the parties.

University contracts include agreements that fall under a wide variety of responsible offices depending on their nature. Some common contract examples:

- Agreements to buy, sell, or rent goods;
- Agreements to provide, obtain, or rent services, including Professional Service Contracts;
- Volunteer agreements;
- Memorandum of Understanding or Cooperation with government agencies and other organizations for the accomplishment of particular purposes;
- Grants and sub-grants awarded by government agencies and private organizations;
- Affiliation agreements;
- Leases of movable property, such as tools, equipment, vehicles, etc.;
- Leases of university property and university lease of private property, deeds, and other conveyances affecting interests in [real property](#);
- Waivers and releases;
- Nondisclosure agreements (NDA);
- Student or faculty exchange agreements;
- Software license agreements;
- Providing goods or services to others;
- Facility use agreement;
- Click-through agreements;
- Licensing Agreement for Intellectual Property;
- Copyright Agreements;
- Data Use License Agreements;
- Subawards to lower tier recipients;
- Contracts not otherwise defined that impose a financial obligation on the university.

SECTION III. CONTRACT MANAGEMENT BASICS

When Are Written Contracts Required

In general, if the arrangement involves any significant risk or potential liability that needs to be allocated between the parties, or involves a situation where the duties and responsibilities of the parties are potentially ambiguous, then a contract should be used. It is always best to write down the terms of the contract in case there is some dispute between the parties after the contract is formed. In the following subsections, some common types or



categories of business transactions are described, and situations requiring (or not requiring) a written contract are specified.

Purchase of goods: Finished or "off the shelf" goods that are commonly purchased by cash or credit card may not require a contract. Finished goods or equipment that are part of construction projects; however, or which require the vendor to deliver, install and/or service the goods on campus usually require a contract that will set forth basic terms and conditions including insurance and indemnity agreements.

A contract should be used for the procurement of services or deliverable goods when it is prudent to detail specific negotiated terms and conditions, including a Statement of Work within a legally binding document.

A [Purchase Order](#) (P.O.) should be used for purchases of deliverable goods, continuing services (e.g., copy machine maintenance) and software licenses, wherein the P.O. [Terms and Conditions of Orders](#) will govern the procurement. Do not prepare a P.O. and a contract for the same procurement. A purchase order is considered an offer and becomes a contract when the Vendor issues an acknowledgment accepting the P.O.'s terms and conditions without changes or ships the goods or provides services in accordance with the P.O.

Provision of goods (the university sells something to another party): Finished goods that are commonly purchased by cash or credit card by another party do not need a contract (e.g., sales of goods at the university bookstore, on-line product sales). However, an agreement will be required in cases where the university is providing goods (e.g., software or creative works) and the parties need to be clear about issues such as specifications for the goods, the manner and timing of delivery, limitation of warranties, opportunity to cure defects, or payment terms. Agreements dealing with the sale of institutional intellectual property, scholarly, or creative works must go through the [Office of Innovation Advancement and Commercialization \(IAC\)](#).

Purchase of Services: In general, services that the university (including student activities) is procuring and that will be provided on campus should have written contracts. This includes arrangements with independent contractors for facilities work, caterers, speakers, consultants, performers, videographers, etc. Services that are provided off campus for payment upon conclusion of the work (e.g., a person is hired to write an article and receive payment upon receipt of satisfactory product) generally require a written contract. As stated above, contracts should be used whenever the arrangement involves any significant risk or potential liability that needs to be allocated between the parties, or involves a situation where the duties and responsibilities of the parties are potentially ambiguous. A contract should also be used when other specific concerns need to be addressed, such as ownership of the work.

The decision about whether to use a Purchase Order (PO) or Professional Service Contract (PSC) for purchases of services depends on what is being purchased or contracted for. In general the purchase of



trade services (those that require parts and labor) that either exceeds \$3,000 or is < \$3,000 but for which the department desires to have the funds encumbered should be procured using a Purchase Requisition (PR) and Purchase Order (PO). Examples of Trade Services would include: plumbers, electricians, repair & maintenance providers, roofers, tree trimmers, auto mechanics, and security systems.

In contrast, contracting for professional services such as attorneys, auditors, architects, consultants, performing artists, security guards and speakers requires use of a Professional Service Contract (PSC). The majority of professional services require an additional, more comprehensive contract to address the duties of each party, the allocation of risk, and/or the ownership of any work product. In those situations, the PSC is not intended to replace the detailed contract but rather to be used as an approval vehicle accompanying the detailed contract. In addition to the signatures required on the PSC, the more detailed contract must be approved and signed by Procurement & Payment Services.

For more information on the purchase of services, please visit:

<https://sites.auburn.edu/admin/universitypolicies/policies/spendingpoliciesandprocedures.pdf>

For a Professional Services Contract, please visit:

http://www.auburn.edu/administration/business_office/pdf/bo5520.pdf

Provision of services: Contracts are required when the university is providing services, facilities, or other resources to Third Parties. Examples include camps, conferences, persons or companies filming on campus, and other special events on campus such as weddings, receptions, seminars, etc.

Entertainment: Any arrangement that commits the university to hire entertainers or provide entertainment services requires a written contract and should be approved through PPS.

Art / Exhibits: Any agreement to borrow or lend works of art, special collections, archives, or exhibits requires a written contract.

Events: A written agreement is required for all events on campus which are hosted or co-sponsored by non-university affiliated entities. Events must be registered through the [campus event planning system](#).

Miscellaneous: Any agreement with a third party that could create more than a minor liability to the university or that could feasibly result in a dispute if the understandings and obligations of the parties are not clearly specified in advance, should normally be the subject of a written agreement. These arrangements should also be reviewed against these guidelines and against the [contract review checklist](#) to help you determine if a contract is appropriate or necessary.

If the certificate of insurance or endorsement provided by contractor/external user includes a clause stating that additional insured status is granted as per written contract or agreement, then a written



contract or agreement is required and must include the [additional insured clause](#).

Vendors may attempt to provide goods or services without a contract in order to avoid the cost and/or responsibility of negotiating and/or abiding by terms and conditions that would protect the university in a transaction. If there is any question about the need for a contract, you should consult the appropriate responsible office which will depend on the nature of the agreement as outlined in Section I of this guide. If you are unsure as to the appropriate office contact, you may consult a [university contract officer](#) who can guide you in the right direction.

General Provisions and Execution

Identification of the University

Auburn University is a public body corporation created under and pursuant to the Constitution and laws of the State of Alabama and governed by the Auburn University Board of Trustees. The university shall be identified as “Auburn University” in all agreements and contracts. The Agreement is made by and between Auburn University, a constitutionally created public corporation and instrumentality of the State of Alabama (University) and the [Contractor](#). Departments and individuals may not contract in their own name on behalf of the university, but must identify the university as the contracting party. (The department may be identified in the agreement as the office through which the contract is being made.)

Contract Language

Recommended language is stipulated under [contract clauses](#), and may change from time to time. For examples of specific forms or templates, please contact the appropriate responsible office which will depend on the nature of the agreement as outlined in Section I of this guide. If you are unsure as to the appropriate office contact, you may consult a [university contract officer](#) who can guide you in the right direction. If the contract form being used for a transaction does not seem appropriate or if it needs modification, you should also consult the appropriate responsible office as necessary to define the proper language for your particular situation.

Contract Review

Every contract to which the university is a party should receive an appropriate level of review before it is signed (executed). The employee who initiates the contract should perform an initial review in order to evaluate the accuracy of the promises contained in the contract. Certain contracts may require review or approval by a Dean, Director or Department Head. In some cases, before the final contract is drafted and in order for it to be executed, subject matter experts may need to review the draft. For example, any agreement that deals with the acquisition or disposition of land, or leasing of AU property or property from a third party should be handled by the Auburn University Real Estate Department. Other subject matter experts might include General Counsel or Risk Management & Safety. If there are any questions as to the level of review a contract requires, a university contract officer can provide assistance and can be contacted by contacting [Procurement & Payment Services](#). The [checklist](#) provided in Section VII can assist not only in reviewing contracts, but also in ensuring the agreement is reviewed by the most appropriate person(s) before the institution agrees to them.



AUBURN
UNIVERSITY

Authorized Signatures

After the contract has received written approval as applicable, it may ONLY be executed (signed) by an AUTHORIZED representative of the university. A signature indicates the signing parties agree to be bound by the contract's terms and conditions. As a general rule, the President has the authority to sign any and all contracts for the university. The President has selectively delegated his signature authority, as shown at the following link: [Authority for contract signature](#). Anyone who is not authorized, either by this policy or by written delegation, and who enters into a contract that purports to bind the university or its subunits is acting without authority and could be held personally liable for the contract.

Certain policies administered by Procurement and Payment Services may vary these rules for purchases under certain monetary levels. Questions should be directed to the Executive Director of Procurement and Payment Services; or you may visit the [Procurement and Payment Services Department website](#).

Contract Performance

Performance under the contract should not begin until all parties have signed the contract and the responsible university unit has obtained a fully signed copy for storage with its records.

Conflicts of Interest

It is the responsibility of all employees to ensure that the university does not knowingly enter into contracts that present conflicts of interest. If a conflict arises, an official who otherwise has contract negotiation and/or approval and signatory authority must disclose the conflict promptly to his/her supervisor before entering into contract negotiations or before revising, approving or signing a contract, and must excuse him/herself from any involvement in the contract. The supervisor shall assume responsibility for the contract or arrange for the appointment of a substitute responsible administrator.

Auburn University has a policy for financial conflicts of interest for research and related activities as well as a policy for PHS and FCOI agreements. These apply to faculty and others who meet the definitions in those policies which can be found here:

<https://sites.auburn.edu/admin/universitypolicies/Policies/PublicHealthServiceFinancialConflictofInterestPolicy.pdf>

<https://sites.auburn.edu/admin/universitypolicies/Policies/FinancialConflictofInterestPolicyforResearchandRelatedActivities.pdf>

Contract Clauses

Standard Contract Clauses

The clauses below are standard contract clauses and in most cases should be included.



AUBURN
UNIVERSITY

Contracting Party

Auburn University should be identified as the party to a contract as follows: “*The Agreement is made by and between Auburn University, a constitutionally created public corporation and instrumentality of the State of Alabama (University) and the [Contractor](#).*” It is acceptable to list the particular campus, institute, or department, provided that the campus, institute, or department is named as follows:

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

Entire Agreement

This Agreement contains the entire understanding of the parties with respect to the matters contained herein, and supersedes all other written and oral agreements between the parties with respect to such matters. It is acknowledged that other contracts may be executed. Such other agreements are not intended to change or alter this Agreement unless expressly stated in writing.

FERPA

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

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

Force Majeure

Although no fiscal policy or law requires that Auburn University contracts contain a force majeure clause, you might consider adding such clauses to hotel contracts, catering contracts, study abroad contracts, etc.

In the event that either party is unable to perform its obligations under this Agreement as a result of a force majeure, neither party shall be liable to the other for direct or consequential damages resulting from lack of performance. "Force Majeure" shall mean fire, earthquake, flood, act of God, strikes, work stoppages, or other labor disturbances, riots or civil commotions, litigation, war, or other act of any foreign nation, power of government, or governmental agency or authority, or any other cause like or unlike any cause above mentioned which is beyond the control of either party.

Governing Law / Venue

Auburn University, as an instrumentality of the State of Alabama, has sovereign immunity under Ala. Const., art I, § 14 and therefore is prohibited from agreeing to the law or courts of another state, as this could be a waiver of



AUBURN
UNIVERSITY

that immunity. No representative of the university is authorized to waive its sovereign immunity; this can be done only by the State Legislature. Please include the following language in the contract:

All disputes regarding the construction, interpretation and the parties' obligations under this Agreement will be governed by the laws of the State of Alabama, notwithstanding any of that state's laws to the contrary, regardless of the location of the Engagement. The University does not waive and specifically reserves all immunities to which it is entitled by the laws of the State of Alabama and the United States, including Article I, Section 14 of the Constitution of Alabama, and the Eleventh Amendment to the United States Constitution. Exclusive jurisdiction and venue of any claims not barred by immunity, nor required to be filed before the Alabama State Board of Adjustment shall be in the Circuit Court of Lee County, Alabama.

Non -Discrimination Clause

Contractor agrees to abide by the requirements of the following as applicable: Title VI of the Civil Rights Act of 1964 and Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Federal Executive Order 11246 as amended, the Rehabilitation Act of 1973, as amended, the Vietnam Era Veteran's Readjustment Assistance Act of 1974, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, the Fair Housing Act of 1968 as amended, and Contractor agrees to abide by the requirements of the Americans with Disabilities Act of 1990.

Contractor agrees not to discriminate in its employment practices, and will render services under this Agreement without regard to race, color, religion, sex, national origin, veteran status, political affiliation, disabilities, or because of an individual's sexual orientation. Any act of discrimination committed by Contractor, or failure to comply with these obligations when applicable shall be grounds for termination of this contract.

Notice

Any notices required by this agreement shall be delivered to the following address:_____.

Relationship of the Parties

It is agreed that vendor, its agents and/or employees are solely responsible for their own actions and have no relationship to Auburn University as partners, joint ventures, employees or agents.

Severability

The terms of this Agreement are severable such that if any term or provision is declared by a court of competent jurisdiction to be illegal, void, or unenforceable, the remainder of the provisions shall continue to be valid and enforceable.

Signature Authority

The individual signing below hereby represents and warrants that he/she is duly authorized to execute and deliver this Agreement on behalf of Vendor and that this Agreement is binding upon Vendor in accordance with its terms.



AUBURN
UNIVERSITY

Names and Trademarks

No party to this Agreement shall, without express written consent in each case, use any name, trade name, trademark, or other designation of any other party hereto (including contraction, abbreviation or simulation) in advertising, publicity, promotional, or any other activities or context. Auburn University Office of Trademarks and Licensing must pre approve any use of Auburn University marks.

Non-waiver

The failure or delay of either party to exercise any of its rights under this Agreement for a breach thereof shall not be deemed to be a waiver of such rights, and no waiver by either party, whether written or oral, express or implied, of any rights under or arising from this Agreement shall be binding on any subsequent occasion; and no concession by either party shall be treated as an implied modification of the Agreement unless specifically agreed in writing.

Compliance with Laws

Contractor shall comply, in all material respects, with all applicable laws and rules and regulations, in performing its obligations hereunder.

Insurance, Indemnification and Hold Harmless Clauses

Most contracts with limited exceptions should include a paragraph on indemnity and a paragraph on insurance. Some exceptions might include invited speakers, or requisition of instruments or equipment. If you have any doubt as to whether these clauses can be omitted, a university contract officer should be contacted.

While these elements are related (the insurance guarantees that the named party will have the resources to meet its indemnity agreements) they are legally distinct, and must not be linked in the contract, or placed in the same paragraph. Within a contract, risk transfer is accomplished through a combination of [insurance](#), [indemnification](#), [hold-harmless](#), and [waiver of subrogation](#) clauses. For low risk activities, only General Liability coverage is needed (see [Third Party Insurance Recommendations & Limit Requirements](#) for added clarification). Actual limits required will vary depending on the activity, and any questions should be directed to Risk Management and Safety.

Insurance Requirements should read as follows:

Throughout the term of this Agreement, Other Party will maintain in force Comprehensive General Liability including Product Liability insurance, with minimum limits of \$1,000,000. All insurers must be licensed to do business in the State of Alabama, and possess a minimum A.M. Best Rating of A-, size VII. Prior to commencing work, other Party must provide proof of insurance through the issuance of a certificate of insurance showing the above coverages and limits specified. If the Other Party carries higher limits (including Excess Liability Coverage), such limits must be shown on the certificate.

The Institution has the right to demand a certified copy of any insurance policy. Current Certificates must be filed with the university before Other Party is permitted on campus. In addition, Other Party is required to add the Institution to its General Liability insurance policies by endorsement with the following wording "Auburn University, its Board of Trustees, Administrators, Faculty, Staff and Agents, are hereby added to



this policy as [additional insured](#)". An official endorsement and [certificate of insurance](#) shall be provided showing the coverage above is in place. This insurance requirement shall not be construed as limiting in any way the extent to which Other Party may be held responsible for the payment of damages to any persons resulting from its operations or the activities of any person or persons for whom it is liable.

All workers' compensation and property insurance policies must include a [Waiver of Subrogation Clause](#) in favor of Auburn University, its Board of Trustees, Administrators, Faculty, Staff and Agents. Otherwise, the entity's insurance company can come after Auburn University for reimbursement in the case of contributory negligence. **NOTE:** The waiver of subrogation is not needed on liability policies IF we are listed as [additional insured](#) by endorsement. It is against public policy for an insurer to subrogate against its own insured, including an additional insured.

Auburn University requires that all policies of insurance for general liability related to this project/activity/agreement be on a primary basis, as respects any other insurance coverages and/or self-insurance carried by the university. Any insurance and/or self-insurance maintained by Auburn University shall be excess and non-contributory. The primary coverage must be noted on the [certificate of insurance](#).

Auburn University requires the contractor provide a renewal certificate no later than 10 days after expiration. Contractor should also provide a minimum of 30 days' advance written notice of cancellation, material change, or non-renewal of policies required under the contract to Auburn University. **NOTE:** Most insurance companies will not provide notice. However, in those situations where the insurance carrier refuses to provide notice, the Contractor shall notify Auburn University of any cancellation or reduction in coverage or limits of any insurance within seven days or receipt of insurer's notification to that effect.

If applicable, Auburn University may also require auto liability, professional liability and pollution liability coverages. If required, pollution and professionally liability coverage will need to be provided for up to three years after the completion of a project.

Hold Harmless/Indemnification

To the fullest extent permitted by Law, the (named party) will defend, indemnify and [hold harmless](#) Auburn University, including its Board of Trustees, Administrators, Faculty, Staff and Agents against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of, or from the performance of its operations or services, or any act, omission, claim or loss of any of its employees, agents, volunteers, participants, guests or any other party they are responsible for, regardless of whether or not such claim, damage, loss or expense is caused in part by a party [indemnified](#) hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity that would otherwise exist in the absence of this agreement.

The contract CANNOT include language requiring Auburn University to indemnify or hold-harmless a third party, or waiver its rights of sovereign immunity. Such provisions must be deleted from proposed contracts.



AUBURN
UNIVERSITY

Deductibles

The (named party) may elect to secure an insurance program with a deductible or self-insured retention (SIR) of up to \$25,000 without prior approval from the university. All deductibles shall be disclosed on the certificate of insurance and any deductible or SIR larger than \$25,000 must be approved by Auburn University.

Notice of Incident

The (named party) shall inform Auburn University Risk Management and Safety of all incidents and/or accidents that occur on Auburn University premises, involving the fulfillment of this contract or that might otherwise give rise to a claim against Auburn University and shall be responsible for providing appropriate written notification. Such notification shall be provided as soon as reasonably possible.

Other Contract Clauses for Consideration

The following clauses should be considered depending on the particular circumstances of the agreement.

Execution and modification

This Agreement is binding only when signed by both parties. Any modifications or amendments must be in writing and signed by both parties.

Provisions

If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

Billing & Payment

Contract language should address issues such as when payment is due, the penalties for late payment (e.g., interest, collection costs) and your rights in the event of non-payment (e.g., suspension or termination of services). Auburn University payment terms should be "NET 30 after receipt of goods/services". Auburn University [Spending Policies and Procedures](#) prohibit the payment of late fees (e.g. Interest, collection costs).

The Electronic and Information Technology (EIT) Clause

The Electronic and Information Technology (EIT) Clause ensuring compliance to accessibility standards and regulations must be included in any contract or RFP involving the purchase or procurement of EITs.

The [vendor/bidder] warrants that the products or services provided are fully compliant with the accessibility standards of [WCAG 2.0 Level AA](#) for web-based technology and [Section 508](#) of the Rehabilitation Act and the Americans with Disabilities Act for other EITs and any applicable current federal and state disability laws.

Payment Card Industry (PCI) Data Security Standard (DSS)

If services sought involve the storage, processing or transmittal of payment card account numbers PCI DSS requirements are applicable. Existing contracts should be amended to include PCI DSS responsibilities. Include the following terms:



AUBURN
UNIVERSITY

Vendor agrees to establish security procedures to protect cardholder data and comply with the Payment Card Industry Data Security Standard. Vendor can find details of the PCI DSS at:

https://www.pcisecuritystandards.org/security_standards/pci_dss.shtml

Vendor agrees to comply with all applicable laws that require the notification of individuals in the event of unauthorized release of cardholder data. In the event of a breach of any of Vendor's security obligations or other event requiring notification under applicable law, Vendor agrees to assume responsibility for informing all such individuals in accordance with applicable law and to indemnify, hold harmless and defend Auburn University and its Board of Trustees, faculty, staff and administrators from and against any claims, damages, or other harm related to such a breach.

Data Security Clause

If service involves the use, storage or other processing of personal information by the service provider, additional language will need to be included addressing network security and compliance with industry standards. Vendor may be subject to a Security Provider Security Assessment Questionnaire and special insurance requirements. Please contact [the Office of Risk Management & Safety](#) for assistance.

Jobsite Safety

If applicable, your contract should include a Jobsite Safety provision that makes clear that responsibility for site safety and construction means and methods remains with the contractor.

Contract Clauses That Should be Removed

Acceleration Clause

An acceleration clause is commonly found in mortgages and other purchases that are made using multiple installment payments. The clause allows for a party to demand the full amount due in the event that the other party fails to live up to the terms of the contract, such as failure to make payments. Acceleration clauses implicate the State's obligation to operate within a fixed budget, forcing the University, as a State agency, to make payments for which no money has been appropriated or budgeted and are not due in a particular fiscal year.

Arbitration

All arbitration clauses must be deleted. (See Ala. Const., art I. § 14). Auburn University is an instrumentality of the State of Alabama, has sovereign immunity under Ala. Const., art I. § 14 and therefore is prohibited from agreeing to the law or courts of another state or arbitration. No representative of the university is authorized to waive its sovereign immunity; this can be done only by the State Legislature

Automatic Renewal

The university does not allow contracts to contain an automatic renewal clause unless they have a provision permitting the agreement to be cancelled at will, which could include a specified number of days' notice prior to



AUBURN
UNIVERSITY

cancellation. Contracts should all have a start date and end date. Contracts may renew for specific periods, but beware of contracts that renew automatically unless they have an open cancellation clause.

Certifications, Guarantees, and Warranties

If Auburn University is providing goods or services, the contract should never promise to assure the total accuracy of something or confirm absolute compliance with a standard .

Exclusivity

The university cannot agree to exclusivity clauses, unless the service related to the agreement has been competitively bid under ALA.CODE § 41-16-20.

Indemnity/Hold Harmless – For Third Party

The contract CANNOT include language requiring Auburn University to indemnify or hold-harmless a third party, or waiver its rights of sovereign immunity. Such provisions should be deleted from proposed contracts.

Liability Limitation

A third party may not limit their liability to the value of the contract, to their insurance coverage limit, or other amount. Limiting this recovery could adversely impact the university's insurance coverage in the case where insurance applies and rights of recovery are automatically transferred.

Sample of Unacceptable Limitation of Liability Clauses:

In no event whether in contract, tort or otherwise shall either party be liable to the other for any special, indirect, consequential, incidental, or punitive damages.

The contractor shall not be liable for any loss, damage, claim or expense greater than the value of the contract.

In situations where a limitation of liability is being requested due to special circumstances, please contact PPS or Risk Management and Safety for review.

Liquidated Damages

The university does not want to be in the position of promising liquidated damages if it cancels the contract for any reason or no reason. Very often the contract will not use the term "liquidated damages", but the defining language may be found under "Remedies", "Breach of Contract", "Termination" or untitled. Usually the university will be permitted to terminate the contract for cause only, and be required to let the other party "cure" the breach giving rise to the request for termination. In general, there are no acceptable liquidated damages clauses. We would seek to negotiate any such clause down to provide payment only for actual costs or incurred expenses, plus any amount actually due for services or goods rendered.



Right of First Refusal

This clause most often found in service contracts gives the vendor the right to stay in place as the contracted vendor as long as it can match any competitor's price and terms. This can cause problems when the university wishes to end a service relationship and can also complicate bidding situations. If encountered, this clause should be amended to only agree to negotiate exclusively with the vendor for a limited period prior to the expiry of the contract, and/or to permit vendor the right to participate in subsequent re-bid/RFP of the contract as any other vendor, as long as the contract has not been terminated for cause.

State Immunity

Any waiver of the university's sovereign immunity should be removed from the contract. This would include a requirement for the university to hold harmless or indemnify a 3rd party or assume responsibility for paying 3rd party liability obligations.

Common Issues found with Contract Clauses

Advance Payment

Generally, Auburn University is not to pay for an item before it is received. Prepayment of purchases is made only with the approval of the Executive Director of Procurement and Payment Services. Exceptions are:

- (1) Subscriptions, as required;
- (2) Institutional memberships;
- (3) Registration fees for conferences and official meetings;
- (4) State Surplus Property (requires a PO);

If advance payment is made, consider including a force majeure clause in the contract. The force majeure clause should specify that AU would receive a refund if the event or order were cancelled due to a force majeure event.

Apparent Authority

Under Auburn University's signature authority, only certain individuals have authority to sign on behalf of the university. Accordingly, the university cannot agree to an "apparent authority" clause.

Assignment

An assignment is when one party to a contract transfers its duties and rights to another party. It may be desirable to prohibit assignment of certain contracts (for example, contracts for personal, professional, and consulting services). If the contract allows the other party to assign its right to payment to a third party without subjecting the third party to all the defenses and claims the University would have against the original contracting party, modify the Contract by removing the assignment language. In the event that you want to prohibit assignment of a contract, consider using the language below:

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



AUBURN
UNIVERSITY

Audit

Many contracts will give the vendor the right to audit Auburn University. These types of clauses are common in software contracts and library database subscription contracts. The vendor wants the ability to see if AU is complying with the agreement. Sometimes a vendor's contract will require Auburn University to pay for the costs of an audit of Auburn University. However, Auburn University cannot agree to pay for the costs of the audit. Agreeing to a clause requiring Auburn University to pay for the costs of an audit would be obligating the university to pay for unknown/unlimited costs, which is an extension of credit.

Availability of Funds

For multi-year payable contracts, a funding "out clause" should be inserted in the contract to allow the university to cancel the contract for convenience (which includes insufficiency of funds).

Agreement may be terminated without further obligation on the part of university in the event that the university determines, in its subjective discretion, that sufficient appropriated funding is unavailable to university to assure full performance of its terms. It is agreed that the terms and commitments contained herein shall not be constituted as a debt of the State of Alabama in violation of Article II, Section 213 of the Constitution of Alabama of 1901, as amended by Amendment Number 26. It is further agreed that if any provision of this contract shall contravene any statute or Constitutional provision or amendment, either now in effect or which may, during the course of this contract, be enacted, then that conflicting provision in the contract shall be deemed null and void. The Contractor's sole remedy for the settlement of any and all disputes arising during the terms of this agreement shall be limited to the filing of a claim with the Board of Adjustment of the State of Alabama.

Confidentiality and Non-Disclosure

As a state agency, the university is subject to a very broad freedom of information act known as the Alabama Open Records Act § 36-12-40. Under Alabama Open Records Act, simply labeling a document "confidential" or including a confidentiality clause does not make the document confidential as a matter of law under the Act. There are several statutory and case law exceptions to the Alabama Open Records Act, but the terms and conditions of a contract are commonly subject to inspection under a public records request.

The university cannot agree to be contractually obligated to take legal action or cooperate with a vendor in seeking to limit disclosure or stop disclosure altogether. When a contract contains a confidentiality provision, the clause must be modified to include a reference to the Alabama Open Records Act.

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

Due to the complex nature of confidentiality provisions, seek guidance from the appropriate responsible office to ensure the proper terminology is used.



AUBURN
UNIVERSITY

Indemnification / Hold Harmless

Hold harmless and indemnification clauses are clauses whereby Auburn University agrees to assume the risk of liability which might otherwise fall on another party. These clauses are void as both are unauthorized attempts to abrogate Alabama's sovereign immunity and an unauthorized attempt to lend the State's credit. Strike all clauses that would require the university to indemnify, defend, or hold harmless other parties.

Please read indemnification clauses carefully. Sometimes, vendors will agree to indemnify the university. These types of clauses should not be deleted. Note, however, if these clauses require AU to give "total" or "sole" control over litigation and/or settlement to another party we should try to revise the language to say that they should consult with us first, but in no event can any resolution create obligations for AU without our express consent.

Special Considerations & Contracts Requiring Additional Review

Legal Counsel/Other Review

If a contract/agreement includes provisions that pose a substantial risk to the university, are unusually complex, or uses non-standardized clauses which the department representative is not familiar and/or comfortable with, legal advice may be sought and initiated through contacting a university contract officer. Risk transfer or insurance related provisions may require a review with [Risk Management and Safety](#). Real property issues may require review by the [Director of Real Estate](#). The responsible contracting office will determine whether additional parties should be consulted to ensure the contract/agreement protects the university and is consistent with all applicable laws. Legal counsel review should only be made through the appropriate reporting line and to the appropriate Vice President or Provost.

http://www.auburn.edu/administration/general_counsel/missionRole.html

Free Software

So-called "free" software (and any other product or service) offered "free" to the university constitutes a "University contract" if the university must agree to any current or future obligation as a condition of receiving the "free" product or service."

Use of online material or signing contracts

A current list of approved on-line 'clickable' agreements and the procedure for entering into non-approved clickable agreements is available at <http://www.auburn.edu/img/support/legal.html>

Contracts under Seal

Unless dictated by law or by the nature of the contract, any reference to "[written under seal](#)" such as inclusion of the phrase *locus sigilli* or "L.S." should be removed. This classification increases the statute of limitations in Alabama from six (6) to ten (10) years and can have other legal implications.

SECTION IV: CONTRACT MANAGEMENT PROCEDURE OVERVIEW

Responsibilities of Department Initiating Contract

Contract Initiation

A contract should be executed prior to exchange of goods and services or beginning work. The department initiating the contract for the university is responsible for obtaining a Certificate of Insurance from the vendor and for reading the entire contract and determining that:



- the contract language accurately reflects the current state of negotiations;
- the contract meets programmatic and university mission requirements;
- the contract is in the best interests of the university and in accordance with university policies;
- the originator can ensure compliance with the obligations it places on the university or (in the case of services provided centrally) will make a best effort to see that end users comply;
- the contract is sufficiently clear and consistent so that the university's obligations are easily understood;
- the contract does not constitute a conflict of interest for the parties affected by the contract;
- the contract is in accordance with state and federal laws as maybe applicable.

The contract should be reviewed with an understanding that the university will be bound by all terms and conditions contained in the contract. The reviewer should assess the institutional risk of a contract. If a contract initiator is concerned about risks being assumed by the university under the terms of the contract, the contact initiator should contact the university contracts officer or other appropriate staff.

A [Contract Review Checklist](#) is provided in Section III to assist with this process.

After being satisfied that the above requirements are met, the initiating employee must submit the contract to a Dean, Director or Department Head for final review and approval. Any contracts requiring special review should be submitted to a [university contract officer](#) who can then request the assistance of any subject matter experts as applicable.

Procurement and Payment Services Contracts (PPS)

Those contracts requiring PPS signatory or requiring special review should be submitted directly to Procurement and Payment Services (PPS). Methods to submit contract package to PPS include:

1. E-Mail: contract package including certificate of insurance should be e-mailed to: contracts@auburn.edu
2. Campus Mail: contract package should be mailed to: [311 Ingram Hall, Auburn AL 36849-5101](#)



AUBURN
UNIVERSITY

Prior to execution (signing), all university contracts requiring PPS signatory authority shall be reviewed and approved in writing as to legal form and validity. PPS will review each contract to ensure that: it does not contain any prohibited clauses; it is consistent with federal and/or state laws; it is consistent with university rules and regulations; risk management concerns have been reasonably addressed; and it is consistent with any known predecessor documents. PPS may withhold approval pending other appropriate institutional reviews and will coordinate obtaining those reviews.

Once all appropriate reviews and internal approvals have been completed, the contract will be forwarded to the vendor for acceptance of the requested changes. For those contracts submitted to PPS, PPS will manage these negotiations with vendor until acceptance of required language and final contract execution.

Maintenance & Closure

The department that initiated the contract is responsible for keeping the original contract and its accompanying file for a period of seven (7) years from the end of the contract period. Waiver or releases should be kept on file for a period of two (2) years.

The department responsible for the contracts should maintain a contract log documenting the vendor's name, type of contract, period of contract, amount, signatory, and date signed. The department is responsible for ensuring that the department retains the file of the signed contract and fulfills all terms and conditions.

If the university is involved in a dispute with the other party at the end of these stated periods, the contract must be retained until its destruction is approved by the Office of the General Counsel.

Amending or Updating a Contract

After the contract is implemented, department must notify the responsible contracting office immediately of any factors affecting the contract language. Contracts should be reviewed regularly to determine if an amendment is needed. Such changes may be required if there has been a change that affects the contract, or the contract no longer meets business or policy compliance requirements.

Terminating a Contract

Terminating a contract may be required for various reasons ranging from failure to perform the requirements of the contract (a breach) to mutual agreement. Breach of contract might stem from payment issues, lack of insurance, or failure to perform services set forth. Those wishing to terminate a contract should immediately seek guidance from the responsible contracting office.

SECTION V. INSURANCE REQUIREMENTS

Third Party Insurance Requirements & Limit Recommendations

All Contractors and External Users entering into a contract with the university must have insurance that will protect Auburn University should a claim arise related to the goods or services they provide. For contracts requiring PPS signature authority, evidence of such insurance should be submitted to PPS for review prior to final approval and signature of the contract. The type of insurance and limits required vary depending on nature of the contract. The limits listed below are the minimum limits acceptable. Please refer to [Appendix C](#) Insurance Requirement Checklist for a printable summary of when each type of coverage should be requested.

Note: Verification of insurance is not required for educational speakers/instructors for academic presentations.

TYPE OF COVERAGE		REQUIRED IF VENDOR/CONTRACTOR.....	Minimum Limits*
Commercial General Liability		Always require; standard in all contracts	\$1M per Occurrence/\$2M Aggregate
	Liquor Liability	Will be distributing/selling/serving alcohol.	\$1M per Occurrence/\$2M Aggregate
	Products Liability	Will provide a tangible, physical product that could cause bodily injury or property damage	\$2M per Occurrence/\$2M Aggregate
	Fire Damage Legal Liability	Will rent/lease a portion of a university building	\$300,000 Sublimit or the \$value of the premises under the control of the lessee if substantially higher.
	Completed Operations	If providing a service, after completion could fail from faulty workmanship and cause bodily injury/property damage	\$1M per Occurrence/\$2M Aggregate
	Personal Injury	Will have access to confidential info, provide security guard service, or create a publication	\$1M per Occurrence/\$2M Aggregate
	Independent Contractors	Uses independent contractors. Should include coverage for negligent work/actions of independent contractors.	Included within limits
	Liability assumed under contract	Always require. This is broad form contractual liability as an exception to the contractual liability exclusion. In other words, contractual liability is provided for situations that qualify as an "insured contract."	Included within limits
	Medical Payments	All vendors/consultants	\$5,000



Automobile Liability	Performance will involve operation of a motor vehicle.	\$1M each accident for bodily injury including owned, leased, hired, non-owned, and personal injury protection where applicable. \$5M for Bus Charters
Pollution & MCS90 Endorsements	Will be transporting and disposing of hazardous material	Limits vary. Provided by broadened coverage endorsement to the policy.
Workers Compensation Coverage A & Employers Liability Coverage B	Has employees that will be working on our premise or will be doing work on our behalf	A. In compliance with laws of State of AL. B. \$1,000,000 Employers Liability
Umbrella Liability	Contract requires limits higher than \$1M	\$1M each occurrence, \$1M Aggregate, \$1M Products & Completed operations. May require higher limits on certain contracts.
Professional Liability (Errors & Omission)	Will provide professional, technical service (medical, legal, accountants, appraisers, teachers, social workers, consultants, engineering, architecture, project management, etc.)	\$1M per claim, per policy year/\$2M in the Aggregate. Recommend an increase to \$5M for projects over \$500,000. Extended reporting period required.
Professional Liability for Technology including Cyber Risk	Will be completing operations on an IT technology related product	\$1M per claim, per policy/\$2M in the Aggregate. Extended reporting period required.
Environmental/Pollution Liability	Is performing work that involves handling of hazardous material/pollutants or could create an environmental hazard	\$1M per loss, \$1M Aggregate. Extended reporting period required.
Builders Risk	Is constructing/renovating building or structure	Varies: actual construction value of the project
Installation Floaters	Is performing a specialized job on an existing building or <u>installing equipment or materials that are not included in a construction project contract (ex: plumbing fixtures)</u>	Varies by project.
Property	Is renting or leasing university property – coverage applies to the lessee’s property, fixtures, equipment	Varies: depends on the property values.



Bid/Performance/Payment Bond	Involves construction projects where the university is exposed to risk of financial loss due to the contractor declining to enter the contract after bid acceptance, non-performance per the contract, or non-payment of materials purchased from a supplier (lien free)	Varies by project.
Aviation/Aircraft Liability	Is providing Charter flights	Combined single limit (bodily injury/property damage) per occurrence with no per seat limitation. Light Turboprop: \$25,000,000 Light Jet Aircraft: \$50,000,000 Commercial Airline: \$5,000,000 per seat
Commercial Crime/Fidelity Bonding	Is handling money, securities, or other valuable property or has access to computer networks or computer data belonging to Auburn University	\$1,000,000 Per Loss. Limits may vary depending on the controls in place and amount of cash being handled. Lower limits for small vendors may be approved by contacting RMS.

***Minimum Levels of Required General Liability (GL) Limits may increase for Different Types of Vendors as follows:**

Type One Vendor – High Risk: \$5M per Occurrence/Aggregate

These services involve activities that require the use of dangerous equipment or processes.

- Asbestos Abatement
- Elevator Maintenance
- Underground Utility Work (drilling, trenching, tunneling)
- Ground or Air Transportation
- Hazardous Waste Services
- Large Public Works
- Pyrotechnical Displays
- Small Public Works (might also be Level Two or Three)
- Tree Cutting/Trimming
- Industrial Food Service Vendor

Type Two Vendor – Mid Risk: \$2M per Occurrence/Aggregate

- Alcohol Manufacturer or Distributor
- Security Service



AUBURN UNIVERSITY

- Equipment Maintenance Service/Onsite Installation Work
- Equipment Lease
- Professional Services (Physician, Veterinarian, Architect, Engineer, Electrician, Attorney)
- Outdoor Concerts
- Inflatable Attraction & Amusement Rental
(i.e. carnival attractions, bounce house)

Type Three Vendor – Low Risk: \$1M per Occurrence/Aggregate

- Catering Services
- Computer Maintenance Providers, Hardware & Software Providers
- Lease of Space
- Grant writers
- Tour/Travel Agent
- Entertainment (professional singer, band, artist)
- Actor/Artist/Musician/Photographer/Videographer
- Independent Consultant or Coach

Type Four Vendor – Exempt from Insurance Requirement

- Educational speakers/instructors for academic presentations
- Small gatherings of private citizens, or student organizations
- Other low risk vendors as approved by PPS or RMS

Certificate of Insurance Requirements

All [Vendors](#) and [External Users](#) must provide proof of insurance through the issuance of a certificate of insurance showing the above coverages and limits specified. If the vendor carries higher limits, such limits must be shown on the certificate. The university has the right to demand a certified copy of any insurance policy. Certificates must be filed with the university before the (named party) is permitted on campus. Certificates may be emailed to Risk Management & Safety for review at AURMI@auburn.edu.

If the certificate or endorsement includes a clause stating that *additional insured status is granted as per written contract or agreement*, then a written contract or agreement is required which includes the [additional insured clause](#).

The Certificate of Insurance must:

- Demonstrate that insurance policies are underwritten by a carrier rated at least “A-” in A.M Best Key Rating Guide.
- Contain a provision that a thirty (30) day prior written notice of cancellation shall be sent to the university (or else obtain in writing from the broker/insured that they will notify you within 7 days after any notice from the insurer).



- List Auburn University, its Board of Trustees, Administrators, Faculty, Staff and Agents as certificate holder, and have current policy period dates.
- Indicate what types of coverages are being provided, and specify limits which confirm to the contract.

The following specific language must be included on the Certificate of Insurance:

- "Auburn University, its Board of Trustees, Administrators, Faculty, Staff and Agents, are hereby added to this policy as additional insured". An endorsement must accompany the certificate.
- This Insurance is primary as to any other valid and collectible insurance or self-insurance in force, or have the "primary" insurance box checked off.

For any athletic or sporting event, the following language is also required:

- This Insurance does not exclude coverage for bodily injury to any person while observing, practicing, or participating in any sports or athletic contest or exhibition sponsored by the Name Insured.

For events involving minor participants:

- This insurance does not exclude coverage for sexual assault and/or sexual molestation.

A summary of insurance requirements for contractors/vendors/facility users can also be found on the Risk Management & Safety website at <https://cws.auburn.edu/rms/VendorCompliance.aspx>

SECTION VI. TRAINING AND EDUCATION

Auburn University's general liability insurance company specializes in providing loss control services for institutions of higher education and offers two free learning programs which can be viewed directly from their website. Each course lasts about an hour and is offered completely online by video.

The *Contracting Fundamentals* course explains how to avoid negative outcomes associated with weak contracting practices. It touches on topics such as what makes a good contract and why they need to be approved.

The second course offered, *Risk Allocation in Contracts*, focuses on losses and liabilities that can arise from contracts. It touches upon the power of insurance and indemnification clauses, and ways to use risk transfer mechanisms to protect the university. The course is meant for anyone who proposes, negotiates, or reviews contracts.

Follow these instructions to enroll in UE's courses:

1. Obtain the UE institution registration code by requesting it from aurmi@auburn.edu.
2. Go to <https://www.edurisklearning.org>.
 2. Look for the heading "Is this your first time here?" First-time users should select the option to create a new account on the right side of the screen. a. Create a username and provide

- information for a user profile
- b. Be sure to enter a valid email address and your current role at Auburn University
 - c. Select the department and position that is most applicable to you
 - d. Please include your banner id number if you are a current AU student or employee
 - e. Enter this institution registration code.
 - f. After clicking Register, you should receive an email with a temporary password
 - g. Follow the link in the email to sign on
 - h. You will be prompted to enter a new password
3. Once you are on the eLearning homepage, look for the heading *Contracting Fundamentals* or *Risk Allocation in Contracts* then select the "Launch Learning Program." Under the heading "Take a Course" select the applicable course. You must complete all modules and the assessment in order to receive a certificate.
 5. If you revisit <https://www.edurisklearning.org>, log in using the username and password you created in step 2.
 6. If you have any issues with the course please feel free to contact the 24hr help desk. a. Email: uehelpdesk@perceptis.com
 - a. Phone: 301.830.4587
 - b. Chat: <https://chat.perceptis.com/c/ue>
 7. System Requirements: Updated internet browser with pop-up blocker turned off, speakers or headphones for audio segments, current Adobe Flash Player and current Adobe Reader.



SECTION VII. APPENDICES

Contract Review Checklist

	Yes	No
University Information		
University address should reference the originating department's address.		
The contracting party for the university is, "Auburn University". Reference may include a specific department as well. Individuals may not contract in their own name on behalf of the university.		
3rd Party Information		
Contract should reflect the full legal name of the vendor and their legal status (partnership, corporation, governmental entity)		
Term of the contract, including renewal and termination provisions and assignment		
The period of time covered by the contract; including a start date and end date.		
Terms for early termination, including any applicable penalties should be clearly stated.		
Terms for renewal of the contract. The university does not permit automatic renewal.		
Contract states the contract cannot be assigned to another party without the written consent of Auburn University		
Responsibilities and Scope of Work of all contracting parties		
The contract should clearly state the rights, obligations and duties of all parties entering into the agreement.		
Areas that may seem ambiguous or do not reflect the intent of the contracting entities should be re-worded to provide clarity.		
Clear description of the exchange of goods or services.		
Warranty and Representation		
If a warranty is needed for the work performed or services provided, the contract should clearly state. The university should never promise to assure total accuracy of or confirm absolute compliance.		
Dispute Resolution:		
Binding arbitration is not an acceptable form of dispute resolution. Non-binding mediation may be an acceptable form of dispute resolution.		



Confidentiality	Yes	No
AU cannot agree to keep information confidential if it is subject to public disclosure under the Alabama Open Records Laws.		
Terms of Payment	Yes	No
The contract should reflect the correct amount agreed upon for the exchange of goods and/or services and the means, timing and method of payment.		
Dates and timing of payments should be clearly described and acceptable.		
Contract should not obligate AU to pay late fees or interest.		
All payment terms should be in U.S. dollars.		
Has department budget been checked to ensure funds are available?		
Insurance Requirements	Yes	No
The contract should contain insurance requirements that obligate a third party to provide the university with evidence of insurance in amounts, terms and conditions acceptable to AU.		
See Section V for Insurance Requirements & Limit Recommendations.		
Contract provisions requiring Auburn University to carry specific types and amounts of insurance should be referred to Risk Management & Safety .		
Indemnification Provisions	Yes	No
Contract should include language that requires the vendor to indemnify and hold harmless Auburn University, its Board of Trustees, Employees, and Agents for contractor negligent acts or omissions. See Section V for recommended Indemnification Provisions.		
Auburn University cannot indemnify or hold harmless a third party. Contract language requiring the university to indemnify or hold harmless another party must be deleted from the contract. If you are unable to exclude this provision, please contact Procurement & Payment services .		
Compliance with Antidiscrimination Laws	Yes	No
Contract should prohibit unlawful discrimination against anyone on the basis of race, sex, age, religion, color, national origin, disability or veteran status.		
The parties agree to comply with all applicable state and federal laws, rules, regulations and executive orders governing equal employment opportunity, immigration, nondiscrimination, including the Americans with Disabilities Act, and affirmative action.		
Choice of Jurisdiction or Governing Laws	Yes	No
Choice of jurisdiction should be Alabama. If this is not possible, the jurisdiction should remain silent.		



Jurisdiction (also referred to as "forum" or "venue") for suits should be Lee County, Alabama, or the county where the AU unit is located.	
Signature Page	Yes No N/A
Contract should be signed by someone who has been delegated signature authority by the President to execute a contract.	
Other Required Provisions	Yes No
Conflicts of Interest Compliance with Law	
Regulatory Compliance	Yes No N/A
Payment Card Industry Compliance (PCI/DSS) clause (contact PPS)	
Data Security – service involves personal information (contact PPS)	

TERMS AND CONDITIONS THAT SHOULD BE DELETED FROM A CONTRACT

State Immunity	Yes No N/A
Waiver of the university's Sovereign Immunity.	
Requirement for the university to hold harmless or indemnify a 3 rd party or assume responsibility for paying 3 rd party liability obligations.	
Arbitration	Yes No N/A
Binding arbitration for dispute resolution.	
Liability Limitation	Yes No N/A
A third party may not limit their liability to the value of the contract, to their insurance coverage limit, or other amount. Exceptions must be submitted for review by PPS .	
Exclusivity	Yes No N/A
The university should not award contracts that promise the vendor that they will be the exclusive vendor for the goods and services to be provided under contract. This may conflict with a contract already entered in a different department or division, or with other operation needs.	
Liquidated Damages	Yes No N/A
The university does not want to promise liquidated damages should it cancel the contract for any reason or no reason.	
Automatic Renewal	Yes No N/A
Contracts should all have a start date and end date. Contracts may renew for specific periods, but beware of contracts that renew automatically unless they have an open cancellation clause	
Right of First Refusal	Yes No N/A



AUBURN
UNIVERSITY

This clause most often found in service contract gives the vendor the right to remain as the contracted vendor as long as it can match any competitor's price and terms.	
Certification, Guarantees, Warranties	Yes No N/A
Your contract should never promise to assure the total accuracy of something or confirm absolute compliance with a standard.	
Indemnity/Hold Harmless for Third Party	Yes No N/A
The contract CANNOT include language requiring Auburn University to indemnify or hold-harmless a third party, or waiver its rights of sovereign immunity. Such provisions should be deleted.	
Contract Involving Real Property	Yes No N/A
Send to Auburn University Real Estate Department	



Definitions

Additional Insured Clause - this status will require the other party's insurance company to defend the University if the other party is negligent and litigation is brought against the university.

Other Party is required to add the university to its General Liability insurance policies by endorsement with the following wording "Auburn University, its Board of Trustees, Administrators, Faculty, Staff and Agents, are hereby added to this policy as additional insured".

Agreement - a negotiated and typically legally binding arrangement between parties as to a course of action. It can refer to Contracts, Memorandums of Understanding or other negotiated arrangements.

Amendment – written agreement to change terms and/or conditions of a contract.

Binding Arbitration - an arbitration proceeding with a final and binding award, that is often enforceable in courts. Arbitration is a form of alternative dispute resolution .

Certificate of Insurance – document prepared by an insurance company or insurance broker evidencing insurance coverage purchased.

Choice of Law Clause - A provision in a contract in which the parties stipulate that any dispute between them arising from the contract shall be determined in accordance with the law of a particular jurisdiction. If the dispute is litigated, the choice is not binding, but is normally honored, by the court hearing the lawsuit. The choice is binding if the dispute is arbitrated.

Contract – legally enforceable agreement between two or more parties.

Contract under Seal - Formal contract which does not require any consideration and has the seal of the signer attached. The only requirements are that the deed should be intended and should be signed, sealed, and delivered. Some states allow longer statute of limitations for contracts under seal.

Exclusivity - an agreement between two or more parties to purchase goods exclusively from the specified seller in the agreement. The prime ingredient of an exclusivity agreement is the understanding that the buyer will not obtain or solicit the goods provided by seller from anybody else for the time period of the agreement.

External users – Non-university individuals or groups using university facilities, such as support groups, registered student organizations, or commercial tenants.

Hold Harmless – a contractual provision that obligates one party to hold another party harmless from responsibility for a loss.



Indemnification – to restore a party who has suffered a loss to the same financial position that party held before the loss occurred.

Insurance - Insurance provides the financial backing to provide for the payment of expenses that arise from an indemnification obligation or other legal obligation.

Memorandum of Understanding (MOU) means a document that is intended to formalize the terms of a relationship, arrangement or understanding between the university and another party. A MOU is generally a formal, mutually agreed but diplomatic document, setting out principles, strategies and mechanisms for dealing with the common issues of the relationship.

Purchase Order - a commercial document and first official offer issued by a buyer to a seller, indicating types, quantities, and agreed prices for products or services the seller will provide to the buyer. Only considered an offer to purchase something when issued; it becomes a contract when the Vendor :

- ✓ issues an acknowledgement accepting the PO's T's & C's without changes; or,
- ✓ ships the goods or provides services in accordance with the PO.

Real Property - Any property that is attached directly to land, as well as the land itself. Real property not only includes buildings and other structures, but also anything growing on the land as well as rights and interests. Real property can be either rental or residential.

Signature Authority - The authority of representatives to sign contracts on behalf of the university.

Vendors – Independent contractors, consultants, or other third part entities providing good or services under a contract, purchase order, or other written agreement with the university.

Waiver of Subrogation - language that clearly states that the insurer paying any claim arising by reason of any operations under the contract will not seek reimbursement from the university. This can be accomplished by the use of ISO endorsement CG 29 88 Waiver of Transfer of Rights of Recovery Against Others to Us or its equivalent.

Frequently Asked Questions

1. Who approves PSCs (Professional Services Contract)?

The Assistant Director of Payment Services, within the office of Procurement and Payment Services approves professional services contracts.

2. What is consideration in a contract?

Consideration is the benefit that each party gets or expects to get from the contractual arrangement.

3. What is a certificate of insurance?

It's an evidence of insurance – proof of another party's financial ability to pay for a loss caused by that party's negligence. No actual benefits are afforded to the certificate holder.

4. When is a certificate of insurance needed?

They are needed when another party performs services on our behalf, has our property in their care, custody and control, and/or controls or directs our employees. The dollar amount of a contract may not reflect the actual risk. Some small dollar contracts are high-risk exposures.

5. Why do we need an indemnity clause when we are added as an additional insured on the liability policy? Insurance is only one way the contractor can protect the university. An indemnity provision in the contract requires the other part to indemnify the university whether or not insurance covers the loss. This puts the burden on the other party to confirm they have the adequate coverage. The standard Commercial General Liability form requires that the insured entity have a written agreement containing indemnity language prior to a loss in order to trigger coverage for "insured contracts."

6. Does a contractor need professional liability coverage?

A contractor needs professional liability coverage if the contract requires them to provide "professional" services. The simplest way to decide if professional liability is needed is to determine whether the nature of the services provided entail "brain work" or "physical work". If only physical work is required, then a liability policy (general and/or automobile) will most likely cover all loss exposures. However, if the work or a portion of the work is expected to involve the use of professional knowledge, professional liability insurance is required. Examples include architects, engineers, and attorneys.

7. Why can't we accept a certificate of insurance as proof of the Entity being named as an additional insured? The ACORD certificate form states "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policy below." Furthermore, the actual endorsement will specify the terms and conditions applying to the granted additional insured status which must be reviewed.

8. How do we discover the A.M. Best Rating of an insurer?

Go to www.ambest.com and register for free access to the ratings. You can also go to [Standard & Poor's](#) website to obtain the rating after registering for free access.

9. Should we ask for a Waiver of Subrogation endorsement? This should be in the contract language, and requested whenever property insurance is required. In General Liability and Auto Liability policies, if the waiver clause is in the contract and additional insured status is granted, an endorsement is not needed.



Auburn University Certificate of Insurance Checklist

<input type="checkbox"/> <u>Policy Number, Effective Dates Included</u>	All certificates must include a policy number and current effective date.
<input type="checkbox"/> <u>Certificate Holder</u>	Listed as Auburn University, its Administrators, Board of Trustees, Faculty, Staff, Employees, and Agents.
<input type="checkbox"/> <u>Additional Insured Status</u>	Auburn University, its Administrators, Board of Trustees, Faculty, Staff, Employees, and Agents is named as additional insured on the General Liability and Auto Liability insurance.
<input type="checkbox"/> <u>Additional Insured Endorsement</u>	Included with the Certificate of Insurance. Make sure there is a written agreement including an Additional Insured requirement. Many insurers grant of additional insured status but only if an underlying written agreement requires this.
<input type="checkbox"/> <u>Primary Coverage Wording</u>	Make sure the additional insured status granted on the attaching endorsement includes a provision stating that the contractor's coverage is primary to the university's insurance or self-insured retention.
<input type="checkbox"/> <u>Hold harmless/indemnity</u>	Requested, with all applicable documents. This should be required in an underlying agreement, or by endorsement.
<input type="checkbox"/> <u>Commercial General Liability</u>	Always require. Exception: educational speakers/instructors for academic presentations
<input type="checkbox"/> <u>Automobile Liability</u>	Performance will involve operation of a motor vehicle.
<input type="checkbox"/> <u>Workers Compensation</u>	3 rd party employees will be working on our premise or will be doing work on our behalf. Include Waiver of Subrogation by endorsement.
<input type="checkbox"/> <u>Umbrella Liability</u>	If excess coverage over \$1M insurance limits are required.
<input type="checkbox"/> <u>Professional Liability</u>	If providing professional, technical service (medical, legal, engineering, architecture etc.) Should certify this includes contractual liability coverage for liability that would exist in the absence of the contract.
<input type="checkbox"/> <u>Professional Liability for Technology including Cyber Risk</u>	If IT Technology Product/Operations.
<input type="checkbox"/> <u>Environmental/Pollution Liability</u>	If performing work that involves handling of hazardous material/pollutants or could create an environmental hazard.
<input type="checkbox"/> <u>Builders Risk</u>	If constructing/renovating building or structure. (name AU as additional insured/loss payee as interest may appear).
<input type="checkbox"/> <u>Property</u>	Renting or leasing university property – coverage applies to the lessee's property, fixtures, equipment, fixtures and betterments. Includes a Waiver of Subrogation, name AU as additional loss payee as interest may appear.
<input type="checkbox"/> <u>Fidelity Bond/Commercial Crime</u>	If accepting/handling university funds, money.
<input type="checkbox"/> <u>Sexual assault and/or sexual molestation.</u>	If involving minors. Third parties on campus hosting events with minors must agree by contract to adhere to meet or exceed the minimum requirements of Auburn University's Minors on Campus Policy.



Useful Contacts & Website Links

Risk Management & Safety (RMS)

Phone: 334-844-4533

Email: aurmi@auburn.edu

<https://cws.auburn.edu/rms/riskManagement.aspx>

Real Estate

Phone: (334) 844-5874

Contracts & Grants

http://www.auburn.edu/administration/business_office/cga/

Procurement & Payment Services (PPS)

Phone: 334-844-7771

Email: contracts@auburn.edu

http://www.auburn.edu/administration/business_office/pps/

Auburn University Signature Authority

<https://sites.auburn.edu/admin/universitypolicies/Policies/ContractSignatureAuthorityPolicy.pdf>

Sponsored Projects

<https://cws.auburn.edu/OVPR/pm/osp/home>