

**UNIVERSITY OF THE PACIFIC
STANDARD SERVICES AGREEMENT CHECKLIST**

Description of Services

University Standard Provision

1. **Services.** Contractor agrees to perform the Services required under this Agreement and as specifically set forth in the scope of work attached hereto and incorporated herein by reference as **Exhibit A** (“**Scope of Work**”). Use of the term “Agreement” shall include the Scope of Work. Contractor and its employees shall perform all the Services and Contractor may not subcontract to any third party any portion of the Services without University’s prior written consent.

Comments

- The form agreement provides that the services to be provided by Contractor are to be included in a Scope of Work to be attached as an Exhibit A.
- This structure allows the form agreement to be used for many different types of agreements and services without the need to amend the main agreement.
- For all agreements it is critical that the exhibits attached to the agreement are reviewed carefully. Terms of exhibits are often more important than the main agreement and can even amend terms of the main agreement.
- Items to look for in Scope of Work (and any other exhibit attached to the agreement) related to description of Services:
 - Make sure Services to be provided are clearly defined meet the requirements of the program or department and acceptable to the University;
 - Have the program or department requesting the agreement sign-off on the Scope of Work;
 - Does the University require a time-table for delivery of Services or other deliverable; and
 - Are there any other terms in the Scope of Work that amend or are inconsistent with other terms in the Agreement.
- All executed agreements are to be forwarded to the respective campus Purchasing Department in order for a purchase order to be created.
 - For further information on the University’s procurement policies see <http://web.pacific.edu/Administration/Business-and-Finance-Division/Departments-and-Services/Controllers-Office/Policies-and-Procedures/Business-Policies-and-Procedures-Index-page/BPandP-Procurement.html#PO%20Procedure>.

Compensation and Expenses

University Standard Provision

2. **Compensation and Expenses.** University shall pay to Contractor the fees set forth in the Scope of Work (“Fees”). Unless otherwise stated in the Scope of Work, the Fees shall include, and Contractor shall be responsible for, all expenses and taxes incurred by Contractor in connection with providing the Services.

Comments

- The form agreement provides for the compensation to be paid to the Contractor for the Services will also be set forth in Exhibit A.
- Make sure Exhibit A includes the fees and they are accurate.
- Items to look for with respect to compensation are:
 - Does the agreement make clear the exact amount of compensation to be paid to Contractor?
 - Is it clear under the Contract for what exactly what Services the compensation is to be paid to the Contractor?
 - Is it a “time and materials” contract or a “fixed-price” contract?
 - If it is a “time and material” contract:
 - is there a not-to-exceed amount; and
 - is it clear who approves the time and materials (i.e. invoices)?
 - If it is a “fixed price” contract:
 - is there a specific price tied to each deliverable;
 - are there provisions on what is an “acceptable” deliverables; and
 - if not, what are conditions for re-performance?
 - Will the University pay for Contractor’s expenses in performing the Services or is this included in the price?
 - Form agreement provides price includes expenses unless stated otherwise in Scope of Work.
 - If Contractor’s expenses are to be reimbursed by the University, make sure to attach University’s standard reimbursement policy. Any deviation from the standard reimbursement policy must be included in Exhibit A.

Issues Related to Payment

University Standard Provision

3. **Payment Terms.** Contractor shall submit to University on a monthly basis an invoice listing in detail all Services provided to University and Fees incurred by Contractor in the prior month (“**Invoice**”). University shall remit payment to Contractor on undisputed Invoices within forty-five (45) days (excluding holidays) of receiving the Invoice. The provisions of this Section 3 shall apply unless different payment terms are set forth in the Scope of Work.

Comments

- The agreement should clearly establish the time, place, and method of payment.
- It is the University’s position that it have not less than 45 days to pay invoices.
- Monthly invoices are preferred and invoices more frequent than once a month not acceptable without approval of Controller’s Office.
- Beware of any contract that includes an **acceleration clause** that would require the University to immediately pay all amounts due under the contract upon the University’s breach or early termination of the contract.
- The terms of any contract that requires the University to pay late payment penalties or finance charges should be carefully reviewed and approved by the Controller’s Office.
- University does not pay for goods or Services in advance unless there is compelling reason and such provisions are approved by the Controller’s Office.

Term and Termination

University Standard Provision

4. **Term and Termination.**

(a) Term. The term of this Agreement shall commence on the Effective Date and shall expire as set forth in the Scope of Work, provided that this Agreement may be terminated earlier as provided in this Section 4.

(b) Termination Without Cause. University may terminate this Agreement at any time, without cause or penalty, by giving at least thirty (30) days’ advance written notice to Contractor.

(c) Termination For Cause. Each party shall have the right to terminate this Agreement in the event of the other party’s material breach of an obligation, representation, or warranty set forth in this Agreement; provided, however, that such termination will not become effective unless and until (i) the party not in default has given the other party written notice of breach, which notice shall state in reasonable detail the nature of said breach, and (ii) the party allegedly in default shall have failed to remedy said default to the reasonable satisfaction of the party not in default within ten (10) business days following the giving of the notice. Material breach shall include, but not be limited to, Contractor’s failure to perform the Services in

accordance with the terms set forth in this Agreement including the Scope of Work (with time being deemed of the essence with respect to adherence to any timetable set forth in the Scope of Work or otherwise agreed to in writing by Contractor).

(d) Effect of Termination. Any early termination of this Agreement, whether for a party's breach or otherwise, shall be without prejudice to any claims or damages or other rights of one party against the other party. In the event of early termination of this Agreement by either party:

(i) University shall pay Contractor all undisputed amounts due for Services rendered and, if applicable, non-refundable expenses incurred, prior to the termination date; provided, however, that University may set off and apply all or any portion of the amount owing by University to Contractor against any and all damages or other amounts owed by Contractor to University.

(ii) If any Fees have been prepaid by University, Contractor shall refund to University the amount of any such prepaid Fees that exceeds the value of Services actually rendered by Contractor prior to the termination date.

(iii) Contractor shall deliver to University, at a time and in a manner acceptable to University, all Confidential Information (as defined below in Section 7) and copies of all finished or unfinished Work Product (as defined below in Section 8), whether in paper, electronic, or any other form.

(iv) The provisions of Sections 4(d) (Effect of Termination), 5 (Independent Contractor Relationship), 6 (Acknowledgment of Ineligibility for Benefits), 7 (Confidentiality), 8 (Ownership of Work Product), 9 (Contractor's Representations and Warranties), 10(b) (Continuous Coverage), 11 (Indemnification), 12 (Limitation on Damages), 13 (Governing Law), 14 (Dispute Resolution), 15 (Use of Names and Logos), 18 (Notices), 21 (No Third Party Beneficiaries), 23 (Captions), 24 (Construction), 26 (Severability of Terms) and 28 (Entire Agreement) shall survive termination of this Agreement.

Comments

- The agreement should clearly state when the term of the agreement begins and ends. Usually, the term of the agreement should not be open-ended. Terms of 1 year or less are preferred. When there is a Term of one year, it would be helpful (though not mandatory) for the annual Term to be consistent with the University's fiscal year (July 1st through June 30th).
- Termination provisions are very much inter-related so changing one of the provisions in this Section will affect the others.
- University's preferred position is to be able to terminate contracts without cause upon 30 days' prior written notice to contractor.
- If the contract provides for automatic renewal, or renewal unless a party takes affirmative action to terminate be careful to check the term of the renewal period.

- Check to see what the renewal “term” is. Is is not always the same as the initial term.
- University should always have ability to terminate on breach of the agreement by the other party.
- The breaching party should be given a time period (“cure period”) to fix or “cure” the breach. Length of cure period depends on type of contract but usually in range of 10 to 30 days.
- Contract should be clear as to what specific provisions survive termination of the agreement. A general survival provision such as, “those terms which by their context are meant to survive the agreement shall survive termination,” are ambiguous and not preferred.
- Survival provisions also are sometimes included within the specific terms meant to survive or separately in the miscellaneous sections.

Independent Contractor Relationship

University Standard Provision

5. **Independent Contractor Relationship.** Contractor enters into this Agreement as, and shall continue to be, an independent contractor. Except as set forth in this Agreement, Contractor shall determine the method, details, and means of performing the Services. Neither Contractor nor Contractor’s employees or subcontractors shall be deemed to be employees or agents of University. Contractor is responsible for direct payment, when and as due, of any taxes incurred as a result of the compensation paid under this Agreement, including estimated taxes, as well as for any such payments with respect to Contractor’s employees or subcontractors, and Contractor shall provide University with proof of payment upon request. Nothing in this Agreement is intended to establish a partnership, joint venture, or agency relationship between the parties, and neither Contractor nor Contractor’s employees or subcontractors are authorized to bind University or make any representations on its behalf in any matter.

Acknowledgement of Ineligibility for Benefits

University Standard Provision

6. **Acknowledgement of Ineligibility for Benefits.** Contractor and Contractor’s employees or subcontractors will not be entitled to, and will not seek, any benefits made available to University employees, including, but not limited to: worker’s compensation, group health insurance, disability insurance, or participation in any employee retirement plan.

Comments

- Sections 5 and 6 are related. Unless it is an employment agreement, the agreement should state that the contractor is an independent contractor of the University and that contractor and employees of contractor are not eligible for any benefits afforded to University employees.

- This form Agreement should only be used **after** completion of the Human Resources Department's Independent Contractor Questionnaire. Section 5 and 6 are confirmation of an independent contractor relationship which is initially determined using the Independent Contractor Questionnaire.

Confidentiality

University Standard Provision

7. **Confidentiality.**

(a) **Proprietary Information.** At all times hereafter, Contractor will keep in confidence and trust all Confidential Information (as defined below) that Contractor learns of or receives during the term of this Agreement, and will not use, reproduce, or disclose to others any Confidential Information without University's advance written consent, except (i) as may be directly necessary in the ordinary course of performance of the Services under this Agreement, or (ii) in accordance with a judicial or other governmental order, provided however, that, to the extent reasonably possible, Contractor shall give University reasonable notice prior to making any such disclosure in sufficient time so University may object to such disclosure if it so chooses, and provided further, that Contractor shall disclose only that portion of the Confidential Information that it is legally required to disclose. "Confidential Information" shall mean any and all proprietary information of University, including, without limitation, information on University finances, employees, students, or alumni, and information relating to any current, future, or proposed University program, project, business practice, method of operation, funder, or marketing plan. "Confidential Information" also includes proprietary or confidential information of any third party who may disclose such information to University in the normal course of business. "Confidential Information," however, shall not include any information which Contractor can establish (x) was known to Contractor before disclosure to Contractor under this Agreement as a result of being made generally available in the public domain, or (y) becomes publicly known and made generally available in the public domain after disclosure to Contractor under this Agreement, or is received by Contractor from a source other than University, in both cases other than by a breach of an obligation of confidentiality. Contractor further agrees that it shall not disclose the existence or terms of this Agreement to any third party without the prior written consent of University. Contractor's failure to comply with the provisions of this Section 7(a) shall constitute a material breach of this Agreement.

(b) **Student Records.** If University provides Contractor with access to any "personally identifiable information" from student education records as defined by the Family Educational Rights and Privacy Act and its implementing regulations (collectively, "**FERPA Protected Information**"), Contractor hereby certifies that access to FERPA Protected Information is necessary for the performance of the Services and Contractor's duties and responsibilities under this Agreement, and agrees that Contractor shall be subject to, and shall comply with, the same conditions and restrictions on the use and re-disclosure of FERPA Protected Information as apply to University pursuant to applicable law. Contractor's failure to comply with the provisions of this Section 7(b), or Contractor's failure to abide by legally applicable security measures and disclosure and re-disclosure restrictions with regard to FERPA Protected Information, shall constitute a material breach of this Agreement.

[Insert either sub-section (c) or sub-section (d) immediately below IF Contractor will or may have access to any patient or student health information or records as a result of the Services Contractor is to provide under the Agreement.]

[Insert sub-section (c) if Contractor is a “Business Associate” under HIPAA. See Contract Checklist for definition of “Business Associate.”]

(c) Protected Health Information. Contractor hereby certifies that access to “protected health information” (“**PHI**”) as that term is defined in the Health Insurance Portability and Accountability Act of 1996 and the rules and regulations promulgated thereunder (collectively, “**HIPAA**”) is necessary for the performance of the Services and Contractor’s duties and responsibilities under this Agreement. As a result, Contractor agrees and acknowledges that it is a “Business Associate” of the University as that term is defined under HIPAA. As a Business Associate, Contractor shall be subject to, and shall comply with, the conditions and restrictions regarding the use of PHI as required under HIPAA and as more specifically set forth in Exhibit B attached hereto. Contractor’s failure to comply with the provisions of this Section 7 and Exhibit B shall constitute a material breach of this Agreement.

[Insert following section if Contractor is NOT a “Business Associate” under HIPAA. DO NOT INSERT BOTH SUB-SECTIONS (C) AND (D)]

(d) Protected Health Information. It is possible that in providing the Services, Contractor may have or be provided access to “protected health information” (“**PHI**”) as that term is defined in the Health Insurance Portability and Accountability Act of 1996 and the rules and regulations promulgated thereunder (collectively, “**HIPAA**”). Contractor agrees and acknowledges that all protected health information shall be treated as Confidential Information as defined above in Section 7(a).

Comments

- Good practice to always have a confidentiality provision in agreement.
- If University will be disclosing to contractor confidential or proprietary information of the University, the agreement must include a confidentiality provision.
- Contracts requiring the University to protect Contractor’s confidential information should be carefully reviewed. [Ex: NDA & research]
- The definition of “Confidential Information” should be broad enough to cover any confidential information University may disclose.
- Confidentiality provisions should survive termination of the agreement.
- Rights of contractor to use confidential information should be limited to what is necessary to perform the Services.
- Section 7(b) above should be included in all University contracts unless it has been confirmed that there is absolutely no possibility that Contractor will have access to “personally identifiable information” from student education records as defined by the Family Educational Rights and Privacy Act (FERPA).

- If Contractor is going to or could have access to any individual’s “protected health information” held by the University as a result of Contractor’s providing of the Services, sub-section (c) **OR** subsection (d) must be included in the Agreement (**BUT NOT BOTH**).
- Under HIPAA “protected health information” is information that relates to:
 - the individual’s past, present or future physical or mental health or condition,
 - the provision of health care to the individual, or
 - the past, present, or future payment for the provision of health care to the individual,

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. Protected health information includes many common identifiers (e.g., name, address, birth date, Social Security Number).
- Sub-section (c) is to be used when Contractor’s Services for the University under the Agreement include activities or functions that will involve the use or disclosure of the individually identifiable health information. An example of this type of relationship is the University contracting with a third party provider to process student health claims.
- When sub-section (c) is included, be sure to complete and attach Exhibit B (Business Associate Agreement) to the Agreement.
- Sub-section (d) is to be used when Contractor’s Services for the University do not involve the direct disclosure or access to any individually identifiable health information but where the Services could possible lead to inadvertent disclosure or access to such information. An example of this type of relationship is the University contracting with a company to provide janitorial services in a University facility where individually identifiable health information is stored.

Ownership of Data/Information

University Standard Provision

8. **Ownership of Work Product.** Contractor acknowledges and agrees that all work product or deliverables prepared for, arising from, related to, or incorporated in the Services including, without limitation, all ideas, concepts, inventions, expressions, information, material, works of authorship, plans, programs, programming code, systems, work notes, drafts, specifications, design documents, flow charts, software programs, reports, analyses, data, surveys, print copy, artwork, plates, photo negatives and positives, boards, preliminary outlines, sketches, letters, invoices, proposals, databases, and reports (collectively, “**Work Product**”) shall be owned solely and exclusively by University, including without limitation, all corrections, modifications, and derivative works to such Work Product. The Work Product shall be considered University’s Confidential Information for purposes of Section 7.

Comments

- California law provides that independent contractor owns any work product unless agreement provides otherwise.
- As a result, all agreements must include a provision that all right, title, and interest in all work product, results of services, and/or intellectual property produced or prepared by contractor is transferred to the University.
- The issue with contractor on this provision is usually deciding what is work product and what is contractor's own property that may be included in work product.
- Any questions on the granting of University owned intellectual property (*i.e.* work product) including any limitations or exceptions to the general grant of ownership to the University of all Contractor's work product should be directed to the Provost or Associate Provost for Research and Collaborative Programs. For further guidance in on this issue see Contracts & Grants Signature Authority Policy: Intellectual Property/Technology Transfer Agreements or Addenda at <http://pacific.edu/Administration/Business-and-Finance-Division/Departments-and-Services/Controllers-Office/Policies-and-Procedures/Contracts-and-Grants-Signature-Authority/Research-Grants-and-Sponsored-Programs/Intellectual-PropertyTechnology-Transfer-Agreements-or-Addenda.html>.

Warranties, Representations, or Guarantees

University Standard Provision

9. Contractor's Representations and Warranties

(a) Authorization. Contractor represents and warrants that Contractor has full power and authority to enter into this Agreement and to carry out the Services contemplated by this Agreement, and that the execution, delivery, and performance of this Agreement have been duly authorized by all requisite corporate action on the part of Contractor.

(b) Compliance with Laws. Contractor represents and warrants that Contractor will comply with all laws applicable to the performance of its obligations under this Agreement and to the provision of the Services.

(c) No Violations. Contractor represents and warrants that Contractor's execution, delivery, and performance of this Agreement will not constitute: (i) a violation of any judgment, order, or decree binding on Contractor; (ii) a breach under any contract by which Contractor is bound; or (iii) an event that would, with notice or lapse of time, or both, constitute such a breach.

(d) Performance Warranty. Contractor represents and warrants that the Services will be performed with the degree of skill and care that is required by current, good, and sound professional procedures and practices, and in conformance with generally accepted professional procedures and industry standards prevailing at the time the Services are performed, and that all Services meet the specifications set forth in the Scope of Work. Contractor further represents and warrants that Contractor and all personnel used to perform the Services, including permitted subcontractors, possess the knowledge, skill, and experience necessary to perform the Services.

(e) Licenses and Permits. Contractor represents and warrants that Contractor has, and shall maintain in effect for the duration of this Agreement, all licenses, permits,

qualifications, and approvals of whatsoever nature which are legally required for Contractor to render the Services. Contractor shall also ensure that all permitted subcontractors are similarly licensed and qualified.

(f) Intellectual Property. Contractor represents and warrants that no Work Product prepared or produced by Contractor pursuant to this Agreement, nor the use of any such Work Product by University, will infringe or constitute an infringement of any intellectual property right of any third party, that no third party shall have any proprietary rights in any Work Product, and that Contractor has the authority to deliver title free and clear of all liens or encumbrances to all such Work Product to University. Contractor also represents and warrants that unless otherwise specifically stated in the Scope of Work, no proprietary information of Contractor or any permitted subcontractor will be included in any Work Product and that to the extent Work Product includes any permitted third party proprietary information, including that of Contractor, delivery of the Services shall include a perpetual, non-exclusive, world-wide, royalty free license to use such proprietary information for the purposes for which it was provided.

Comments

- “Representation” is a statement of presently existing facts that is intended to induce reliance and action by a party, such as entering into a contract.
- “Warranty” is a statement made about certain facts whereby the person giving the warranty promises to ensure that those facts are as stated.
- The form contract provides for basic representations and warranties to be provided by Contractor.
- Other representations and warranties may be needed from Contractor depending on type of contract. For example, if University is purchasing goods from Contractor, we want Contractor to represent and warrant the Contractor has sole and exclusive title to the goods free and clear of all liens or encumbrances.
- If Contractor’s form is used, contracting officer should consider adding or making sure representations and warranties that are at least as comprehensive as these.
- The only disclaimer of warranty acceptable to University by Contractor is the disclaiming of implied warranties for merchantability and fitness for particular purpose. For any other disclaimer of warranty, University counsel should be consulted.
- If contract includes warranties or representations by the University, contracting officer must make sure all warranties and representations are accurate this may require checking with program or department requesting agreement. Technical wording of representations and warranties are very important.
- If the contract requires the University to “certify” to anything certification language can have significant implications, especially in contracts with government agencies.

University counsel should be consulted if there are any questions regarding certifications. For example, if an agreement with a local municipality requires University to certify that it is in compliance with all labor and employment laws of that municipality, this needs to be run by University counsel.

- If the agreement requires the University to use “best efforts,” best efforts should always be changed to “commercially reasonable efforts.” If Contractor’s form documents are used and it requires Contractor to use “best efforts” to perform so requirement under the Agreement, it is recommended that this provision be changed to require Contractor to perform the obligation to an objectively measureable performance criteria.

Insurance

University Standard Provision

10. Contractor’s Insurance.

(a) **Required Insurance Coverage.** Contractor shall, at Contractor’s sole cost and expense, procure and maintain for the duration of this Agreement the insurance coverage set forth below for claims arising from Contractor’s performance under this Agreement and for which Contractor may be legally liable, whether such liability results from any actions or omissions of Contractor, Contractor’s subcontractors, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable:

(i) Commercial General Liability insurance coverage to include premises and operations, personal/advertising injury, products/completed operations, and liability assumed under an insured contract (including defense costs assumed under contract), with limits of not less than One Million Dollars (\$1,000,000) per occurrence, Two Million Dollars (\$2,000,000) general aggregate, and Two Million Dollars (\$2,000,000) products/completed operations aggregate. Such insurance shall provide, or be endorsed to provide, that University and its officers, directors, employees, and volunteers are to be covered as additional insureds with respect to liability arising out of Contractor’s performance under this Agreement.

(ii) Workers’ Compensation insurance covering Contractor’s own employees as required by law, to include Employer’s Liability coverage with a limit of not less than One Million Dollars (\$1,000,000) per accident for bodily injury or disease.

(iii) Errors and Omissions Liability insurance appropriate to Contractor’s profession with limits of not less than One Million Dollars (\$1,000,000) per occurrence/claim and One Million Dollars (\$1,000,000) aggregate.

(iv) If an automobile is to be used by Contractor in performing the Services, a policy of comprehensive automobile liability insurance covering the operation of all automobiles used in connection with the performance of this Agreement (whether owned, non-owned, or hired) with such policy to afford protection to the limit of One Million Dollars (\$1,000,000) with respect to bodily injury or death of any one person, One Million Dollars (\$1,000,000) with respect to bodily injury or death of any number of persons in any one occurrence, and One Million Dollars (\$1,000,000) with respect to damage to property of any one owner from one occurrence. Such insurance shall provide, or be endorsed to provide, that University and its

officers, directors, employees, and volunteers are to be covered as additional insureds with respect to liability arising out of Contractor's performance under this Agreement.

(b) Continuous Coverage. Should any of the insurance required of Contractor under this Agreement be provided under a claims-made form, Contractor shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three (3) years beyond the expiration or earlier termination of this Agreement, such that, should occurrences during the term of this Agreement give rise to claims made after the expiration or termination of this Agreement, such claims shall be covered by such claims-made policy (or an equivalent policy affording prior acts coverage).

(c) Insurance Carriers. All insurance required of Contractor hereunder shall be through insurance carriers licensed to do business in the State of California and otherwise reasonably acceptable to University.

(d) Certificates and Endorsements. Contractor shall furnish University with original certificates and amendatory endorsements affecting the insurance coverage required of Contractor under this Agreement. All certificates and endorsements are to be received and approved by University before performance under the Agreement commences, and on an annual basis thereafter for the duration of the term of this Agreement. University reserves the right to require complete, certified copies of all required insurance policies, including endorsements affecting the coverage required by these specifications, at any time.

(e) Waiver of Subrogation; Cancellation or Modification. Each insurance policy required of Contractor under this Agreement shall include a waiver of subrogation clause and shall be endorsed to state that Contractor's coverage shall not be canceled, modified, or materially changed except after thirty (30) days' prior written notice by certified mail, return receipt requested, to the person set forth in Section 18 below has been given to University.

(f) Contractor's Insurance Primary. For any claims arising out of this Agreement, Contractor's insurance coverage, whether or not required under this Agreement, shall be primary insurance as respects University, its regents, officers, directors, employees, and volunteers. Any insurance or self-insurance maintained by University, its regents, officers, directors, employees, or volunteers shall be excess of Contractor's insurance and shall not contribute with it. Contractor agrees that it shall obtain any necessary endorsements to its insurance policies to effect the requirements of this paragraph.

Comments

- All vendors/contractors that want to do business with the University must have insurance protection. The above insurance requirements are for University "vendors." This Agreement is not intended to be used for construction contractors which have higher minimum insurance requirements. For further details on the University's insurance requirements for vendors and contractors see the Office of Risk Management web page at <http://pacific.edu/Administration/Business-and-Finance-Division/Departments-and-Services/Budget-and-Risk-Management-Office/University-Risk-Management.html>.
- The insurance requirements set out in paragraph 11, Contractor's Insurance, may, on occasion and for good cause, be adjusted or modified but cannot be waived.

Generally, the provisions of each subparagraph of paragraph 11 do need to be included in the contract.

- Frequently a vendor will claim that their insurance is “adequate” or is “the equivalent of the coverage the University requires.” If a vendor does not have in place the required coverage and wants the University to accept an alternative program, the proposed alternative must be reviewed by the University’s Office of Risk Management.
- Often a vendor will ask to see the coverage the University has in place that would protect the vendor. A summary of the University’s insurance program can be obtained from the Office of Risk Management.
- If Contractor is required to provide a performance bond under the Agreement, this requirement should be included in the Scope of Work.

Indemnification

University Standard Provision

11. **Indemnification.**

(a) **Indemnification by Contractor.** Contractor agrees to hold harmless, defend (with counsel acceptable to University), and indemnify University and its regents, officers, directors, employees and agents (each an “**Indemnified Party**” and collectively, “**Indemnified Parties**”) from and against all claims, damages, losses, and expenses (including without limitation attorneys’ fees and costs of litigation) arising out of (i) the performance of the Services, except to the extent that such claims, damages, losses, or expenses are caused by the active negligence, sole negligence, or willful misconduct of University, or (ii) any breach or default in the performance of any of Contractor’s obligations hereunder including, without limitation, any breach of any warranty or representation.

(b) **Defense of Claims.** In the event an Indemnified Party is made a party to any action or proceeding by reason of any matter for which Contractor has hereby agreed to indemnify the Indemnified Party, then Contractor, upon notice from the University, shall defend such action or proceeding on behalf of the Indemnified Party at Contractor’s sole cost and expense. If Contractor or its attorney is not vigorously or adequately defending any such claim, the Indemnified Party shall have the right, but not the obligation, to join and participate in, as a party if it so elects, any proceedings or actions related to such claims and to have its attorneys’ fees and costs in connection therewith paid by Contractor. Notwithstanding the foregoing, the University may participate at any time in proceedings with counsel of its own choosing at its own cost.

(c) **Judgment or Settlement of Claims.** Contractor shall not consent to the entry of any judgment or enter into any settlement with respect to any third-party claim without the prior written consent of the Indemnified Party (not to be unreasonably withheld) unless the judgment or proposed settlement involves only the payment of money damages to be paid solely by

Contractor or its insurance carrier and does not impose an injunction or other equitable relief upon the Indemnified Party.

(d) Survival. This indemnity shall not be limited by reason of any insurance coverage required under this Agreement and shall survive termination of this Agreement.

Comments

- Indemnification simply means that one party (the party with whom Pacific is contracting) shall be responsible for protecting Pacific from any claims for damages made against Pacific by third parties.
- The standard contract provisions provide the protection that the University needs so that the other contracting party will bear the burden of claims being made against Pacific by third parties.
- There are occasions when it may be appropriate to have mutual indemnification provisions, i.e., Pacific indemnifies the other contracting party in a very similar manner to the proposed indemnity provisions that are included in this contract. If the provision is proposed, and it is truly mutual and the provision is not broader and does not provide greater indemnification protection to the contracting party than is provided to Pacific by our contract provisions, then providing some level of indemnity to the contracting party may be acceptable. However, counsel should be consulted before any agreement is made to provide indemnity to a party contracting with Pacific.
- In addition to indemnity provisions, there are other related concepts that should be avoided:
 - Contracts with language suggesting the University is “waiving” any of its rights (for example, a waiver of any right, defense or warranty).
 - Contracts with language that do not use the word “indemnity” but use a similar concept such as “hold harmless” and “defend”.

Limitations on Liability/Remedies or Time to File Claims

University Standard Provision

12. **Limitation on Damages.** In no event shall either party be liable to the other party for any special, consequential, indirect, exemplary, punitive, incidental, or similar damages (including, without limitation, loss of profits), even if such party has been apprised of the possibility thereof; provided, however, that the foregoing limitation shall not apply in the event that Contractor breaches any of the provisions of Sections 7 (Confidentiality) or 10(f) (Intellectual Property) of this Agreement.

Comments

- Consequential, Special or Indirect Damages: Damage or injury that does not directly and immediately result from a wrongful act, but instead indirectly and/or after elapse of some time. Consequential, special or indirect damage usually cannot be foreseen and is

often unrecoverable through litigation, unless the offending party was notified in advance that the aggrieved party would suffer such damage. Also called indirect damage or special damage.

- Exemplary or Punitive Damages: Damages requested and/or awarded in a lawsuit when the defendant's willful acts were malicious, violent, oppressive, fraudulent, wanton, or grossly reckless.
- Incidental Damages: Incidental damages are sometimes awarded in a lawsuit for a breach of contract as compensation for commercially reasonable expenses incurred as a result of the other party's breach, such as costs of inspecting and returning goods that do not conform to contract specifications. Incidental damages are added to compensatory damages. For transactions governed by the Uniform Commercial Code (UCC), the UCC provides: "Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach."
- The purpose of this provision is to limit certain types of damages a party may claim in the event of a breach of the agreement by the other party.
- Any provisions in an agreement limited contractor's damages or amount of liability should be carefully reviewed and referred to counsel if there are any questions.
- Any provision that (a) limits the amount of time (also referred to as "statute of limitations") the University may file a legal claim, or (b) requires the University to pay liquidated damages or cancellation fees in the event of breach/early termination, should be deleted. If these provision cannot be deleted then advice of counsel should be sought.

Choice-of-Law

University Standard Provision

13. **Governing Law.** This Agreement, and any dispute between the parties arising out of this Agreement, shall be governed by and construed in accordance with the laws of the State of California, excluding its conflict of laws rules.

Comments

- In absence of a choice-of-law clause, a contract is interpreted according to the law of the place where it is to be performed or, if the place of performance is not indicated, the law of the place where the contract is made. A choice of law clause is normally controlling. Courts will uphold the clause if the parties or transaction have a "substantial relationship" to the state whose law has been chosen, unless application of the other state's law will conflict with a "fundamental" public policy in California and the other state has a "materially greater" interest in enforcing its policy.
- It is the University's position that all agreements should be governed by California. If contractor demands choice of another state's law, University's options are: (a) reject the

request and insist on California's law; (b) obtain review of the contract from counsel licensed to practice in that state. (c) or decide to accept risk that other state's law is substantially the same as California's laws. Obviously, option (a) is the University's preferred position.

- If agreement involves the international sale of goods the following sentence should be added to the standard provision. "The parties hereby agree to exclude from application or consideration the United Nations Convention on Contracts for the International Sale of Goods from this Agreement and any agreement that may be executed or performed to implement this Agreement."
- For international agreements, another option is to choose the law of a third country instead of the law of one of the parties to the agreement. Advice of counsel should be sought in making this determination.

Dispute Resolution; Legal Fees; Choice of Forum

University Standard Provision

14. Dispute Resolution; Legal Fees and Costs; Forum for Legal Action.

(a) Meet and Confer. In the event of any dispute, controversy, claim, or disagreement arising out of or related to this Agreement or the acts or omissions of the parties with respect to this Agreement (each, a "**Dispute**"), the parties shall, as soon as reasonably practicable after one party gives written notice of a Dispute to the other party (the "**Dispute Notice**"), meet and confer in good faith regarding such Dispute at such time and place as mutually agreed upon by the parties. If any Dispute is not resolved to the mutual satisfaction of the parties within ten (10) business days after delivery of the Dispute Notice (or such other period as may be mutually agreed upon by the parties in writing), the parties shall settle such Dispute as otherwise set forth in this Section 14.

(b) Other Proceedings. In the event a Dispute is not resolved by the meet and confer provisions under Section 14(a) above, the parties may choose any other available legal means to settle the Dispute. Each party agrees that a violation or threatened violation of this Agreement may cause irreparable injury to the other party, entitling the other party to seek injunctive relief in addition to all legal remedies.

(c) Legal Fees and Costs. Each party shall be entitled to recover the cost of enforcing the understanding and agreements as reflected herein, including, without limitation, any attorney's fees and costs incurred.

(d) Forum for Legal Action. Any and all legal action that is initiated to enforce any provision of this Agreement or arising out of or related to this Agreement must be brought or filed in either the state or federal court of California.

Comments

- University prefers to “meet and confer” to try and settle any disputes amicably before resorting to a more formal dispute settlement procedure.
- Actions that are filed in court must be filed in California in either state or federal court as appropriate. This is a critical component of the contract and any attempt to delete the forum choice clause should be resisted.
- Commonly vendors want to include an arbitration clause as the dispute mechanism rather than have disputes go to filed litigation. For many reasons, the position of the University is that if matters cannot be resolved by agreement, they will have to go to court. If agreement cannot be reached to omit an arbitration clause, counsel should be consulted. Questions that will impact the success of any arbitration provision include:
 - Which arbitration rules are used;
 - How (and how many) arbitrators are selected and paid, and
 - What discovery will be allowed prior to arbitration. In some cases, a mediation clause, (calling for mediation rather than arbitration) can be an acceptable substitute for an arbitration provision.

Use of University’s Name

University Standard Provision

15. **Use of Names and Logos.** Contractor agrees that it shall not use the University’s name, or the name of any school or division thereof, or any logo or insignia of the University or any school or division thereof, or otherwise identify the University or any of its schools or divisions in any form of publicity or disclosure without the prior written permission of the University, which permission may be given or withheld in the University’s sole discretion.

Comments

- Contract should never allow use of University’s name or log without prior written approval of the University with respect to that specific use.
- Often this provision appears as a general endorsement of Contractor or ability of Contractor to list University as a client. Even in these circumstances, University wants to see how the name and logo will be portrayed, who else might be on the list and impose any conditions to use it may want.
- Even if University would be amenable to the use of its name and logo by Contractor, it is better to not agree to this up front. A better practice is to tell Contractor if all goes well on under the Agreement, you may allow Contractor to use name at end of agreement.
- Approval of the University’s Director of Marketing and Communication must be obtained prior to entering into any agreement that includes granting the right to a vendor or other third party to use the University’s name or trademarks.

Exclusivity/Most Favored Clauses

- Rarely is it favorable to the University to include in the Agreement a provision that provides an exclusive relationship between the University and Contractor. Any such provisions should be carefully considered.
- “Most Favored Clauses” are those that say the University will ensure that Contractor is getting at least as good a deal as University is providing to everyone else in this same area. For example, if the University is providing a service to another party, the Agreement would provide that the University’s customer is getting a price for that service that is no greater than what the University is charging to any other party for the same or similar service.

Force Majeure Clause

- A force majeure clause allows a party to suspend performance under an agreement in the event certain events (“force majeure events”) occur that are beyond a party’s control. Example of common force majeure events are floods, war, earthquakes and fire.
- The University’s form Agreement does not include a force majeure clause. The reason is that force majeure clauses usually favor the Contractor. The University’s main obligation is to pay the Contractor. It is highly unlikely that an event would occur that would prohibit the University from paying. However, a Contractor may try and claim a force majeure event if it is unable to perform.
- If the Contractor requests a force majeure clause the University would consider including such a provision in the Agreement if it is reasonable. Any questions on what is reasonable should be directed to University counsel.

Identity of the Parties

- The agreement must properly identify the University as a party to the contract. The University, as the contracting party, should always be referred to as “University of the Pacific” or “University of the Pacific, a California nonprofit public benefit corporation,” and not as the specific school or department which is obtaining or providing the goods and services that are the subject matter of the contract.
- It is very important you make sure the correct name of the Contractor is list as the party to the agreement in the first paragraph and that same “person” or “entity” is the one signing the contract. If you have the wrong party, the agreement may not be enforceable against Contractor.

- The contract must be signed by authorized representatives of both parties.
 - If the other party is a legal entity, the signature block should look similar to this:

University of the Pacific

ABC Company

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

- If the other party is a natural person, the signature block should look similar to this:

University of the Pacific

By: _____
Name: _____
Title: _____

John Smith

Exhibits/Attachments

- Make sure that any exhibit, attachment or schedule referenced in the Agreement is actually attached to the final version of the Agreement.
- Read all exhibits, attachments and schedules carefully.
- Make sure that the exhibits, attachments and schedules do not amend any of the terms of the Agreement unless that is what you are intending.

General or Miscellaneous Provisions

- These can be very important provisions in a contract and should be read carefully.
- Don't assume all general or miscellaneous provisions are the same.
- Don't assume that the title of a provision matches the contents of the provision.
- Other Common Miscellaneous Provisions:
 - **No Assignment.** The Services to be rendered pursuant to this Agreement are personal in nature, and Contractor may not, voluntarily or by operation of law, assign or transfer any of its rights or obligations under this Agreement without the prior written consent of the University.

- **Waiver.** No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.
- **Captions.** All paragraph and section captions and headings in this Agreement are for convenience of reference only and shall not be considered in construing this Agreement.
- **Construction.** This Agreement shall be interpreted in an even-handed manner and without regard to any presumption against the party that was responsible for its drafting.
- **Time of Essence.** Time is of the essence with respect to every provision of this Agreement.
- **Severability of Terms.** If any provision of this Agreement is held invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions will not in any way be affected or impaired thereby.
- **Modifications.** This Agreement including, without limitation, the Scope of Work, may not be modified except by an instrument in writing executed by duly authorized representatives of the parties.
- **Entire Agreement.** This Agreement together with the exhibits hereto constitutes the entire agreement between the parties pertaining to its subject matter, superseding all prior and contemporaneous agreements, proposals, letters of intent and memorandums of understanding, and no other representations or understandings of the parties, whether written or oral, shall be binding.
- **Counterparts.** This Agreement may be executed in several counterparts, each of which so executed shall constitute one and the same instrument.