

Georgia College & State University

Contract Process & Procedures Manual

Approved by University Cabinet March 7, 2012
Updated August 20, 2013

Memorandum

TO: Georgia College Campus
FROM: Office of Legal Affairs
Date: April 3, 2012
Re: Contract Process

Georgia College through the Office of Legal Affairs has developed and now publishes a manual for Contract Process and Procedures. The Office of Legal Affairs has taken the manual and broken it into specific links for your convenience. You may choose to download and review each link separately or the manual in its entirety.

All the information can be found at: <http://www.gcsu.edu/legal/contracts.htm>.

The manual will enable the person needing a contract, to find answers to such questions as who has to sign the contract, how is it routed for approval, what language should (or should not) be included and where can I find help.

The manual includes a “Contract Cheat Sheet” to ensure your contract meets all requirements.

The following documents, when used in the order listed, can prove to be the most efficient and helpful when writing, negotiating, reviewing and/or routing a contract for approval:

1. GC Contract Procedures
2. Contract Checklist
3. Contract Requirements for Approval
4. Contract Routing Form

The document ‘Boilerplate Language’ also has helpful language that must be placed in each contract. It should be attached as an “addendum” to all contracts.

There are times when the other party states the contract is their standard contract and the language cannot be changed. The document titled ‘Letter to Vendors and Contractors’ (already signed by GC general counsel) can be sent to the other party as it is written to explain why certain terms are not acceptable and why certain terms are necessary.

After reviewing the above four documents (five if you include the cheat sheet) and you still have questions regarding any process involved in the contract, please do not hesitate to contact the Office of Legal Affairs for further assistance at x2037.

Training regarding the new Contract Process & Procedures is forthcoming. Please contact the Office of Legal Affairs at x2037 for more information.

Table of Contents

Georgia College Procedures on Contract Review and Approval.....	1
Section 1. General.....	1
Section 2. University Contract Defined.....	1
Section 3. Administrative Review.....	2
Section 4. Contract Requirements.....	4
Section 5. Authorizing Signatures.....	5
Section 6. Approval Routing Forms.....	6
Section 7. Contract Retention.....	6
Section 8. Contract Administration.....	6
Section 9. Contract Procedures Training.....	7
Section 10. Contract Procedures Violations.....	7
Contract Cheat Sheet.....	10
Contract Checklist.....	11
Basics.....	11
Payment Terms.....	11
Liability and Indemnification Issues.....	12
Insurance Requirements.....	13
Breach of Contract and Termination Clauses.....	14
Terms Governing Disputes and Lawsuits.....	16
Modifications.....	17
Miscellaneous.....	18
Boilerplate Language.....	20
Letter to Vendors and Contractors.....	22
Contract Routing Document.....	44
Signature Lines for Academic Affairs.....	45
Center for Program & Evaluation.....	46
Deans.....	47
Enrollment Management.....	48
Extended University.....	49
Honors Program.....	50
International Education Center.....	51
Information Technology.....	52
LITC.....	53
The Macon Center.....	54
Signature Line for Campus Operations and Administration.....	55
Signature Line for Student Affairs.....	56
Signature Line for University Advancement.....	57

Georgia College Procedures on Contract Review and Approval

Section 1. General

This procedures handbook defines the general process by which a contract involving the Board of Regents of the University System of Georgia (“Board”) by and on behalf of Georgia College & State University (“University”) might be (1) created; (2) reviewed and approved; (3) appropriately signed by an authorized University official; (4) administered and (5) retained for records retention purposes and to ensure the purpose of the contract is performed.

Contracts must satisfy three basic criteria in order to be approved by an authorized University official:

- The contract must be appropriate to the mission and operation of the University.
- The funds and other resources must be available to carry out the obligations of the contract.
- The terms of the contract must comply with Board and University regulations, and applicable local, state, and federal laws.

Individuals having ultimate responsibility to oversee the performance for contracts should have signature authority for them. Prior to final signature, contracts need to pass through only those offices having direct oversight for the activities (or their funding) and those assuring administrative or regulatory compliance.

Section 2. University Contract Defined

For the purposes of this policy, a “University Contract” is defined as an agreement between two (2) or more parties, one of which is the University or any of its subunits intended to have legal effect or be otherwise recognized at law. There must be 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.

Examples of University contracts include, but are not limited to:

- Agreements to buy, sell, or rent goods;
- Agreements to provide, obtain, or rent services;
- Volunteer agreements;

- Memorandum of Understanding or Cooperation with government agencies and other organizations for the accomplishment of particular purposes;
- Grants and subgrants awarded by government agencies and private organizations;
- Affiliation/clinical agreements;
- Leases of movable property, such as tools, equipment, vehicles, etc.
- Leases, deeds, and other conveyances affecting interests in real property;
- Employment contracts;
- Waivers and releases;
- Nondisclosure agreements;
- Material transfer agreements;
- Student or faculty exchange agreements; and
- Software license agreements.

Section 3. Administrative Review

A person initiating a University contract, also referred as “contract originator”, **IS** responsible for the following:

1. Reading the contract entirely and determining that:
 - a. the contract meets programmatic and University mission and operational requirements;
 - b. the contract language accurately reflects the current state of negotiations;
 - c. the contract is in the best interests of the University;
 - d. he/she can ensure compliance with the obligations it places on the University;
 - e. the contract is sufficiently clear, consistent, and fiscally prudent; and
 - f. ensures the contract language is proper and meets University requirements.

In addition, such person(s) must have the cooperation and approval of any University department/unit that may be directly or indirectly involved in the performance or funding of the contract. Accordingly, **PRIOR TO BEING SIGNED BY THE APPROPRIATE UNIVERSITY OFFICIAL**, all contracts must be reviewed and approved by: (1) the University department chair or unit director; (2) the University dean (if the requesting department/unit is an academic department) or division head; (3) the Office of Legal Affairs if required; and (4) the appropriate University Vice President or President. The following outlines the responsibility of each of these reviewing offices:

- **Department Chair/Unit Director**
 - Assures that the contract is appropriate and necessary to the department’s missions and priorities.

- Guarantees that the department or unit can furnish services, materials, and/or funds provided for in the contract.
- Assures that alternative activities, actions and/or providers have been considered, and that those stipulated in the contract or agreement represent the most feasible, reasonable, and fiscally prudent arrangements for the department.

- **Academic Dean/Division Head**
 - Assures that the contract is appropriate and necessary to the college or school's mission and priorities.
 - Guarantees that the college or school can furnish the services, materials, and/or funds (including any matching requirements) designated in the contract.
 - Assures that alternative activities, actions and/or providers have been considered, and that those stipulated in the contract or agreement represent the most feasible, reasonable and fiscally prudent arrangements for the college or school.

- **Office of Legal Affairs**
 - Assures that the contract does not subject the University to undue liability or risk.
 - Assures that the contract does not contain any prohibited clauses.
 - Assures that the terms of the contract comply with Board and University regulations, and applicable local, state, and federal laws.

- **Appropriate Vice President or President**
 - Assures that the contract is appropriate and necessary to the University's mission and priorities, and is not in conflict with the needs, mission, or priorities of any other division within the University.
 - Verifies that all appropriate signatures are intact, including Legal Affairs approval and Accounting Services/Grants and Contracts approval as necessary.
 - Obligates the University and the Board of Regents to the terms of the contract.

Approvals from the above departments/units are to be endorsed in writing in two locations:

- (1) At the designated signature location of the contract (either by signature where indicated or initialing where appropriate); and,
- (2) On the Contract Approval Routing form attached to the front of **ALL** University contracts.

The Routing form can be found at: <http://www.gcsu.edu/legal/contracts.htm> . These signatures assure the authorized University Vice-President the terms of the contract have been appropriately reviewed.

NOTE: Initialing and /or signing the contract indicates each approver has followed the GC contract review procedures. For more information regarding contracts, please visit our website at <http://www.gcsu.edu/legal/contracts.htm>.

Section 4. Contract Requirements

Prior to final University approval, every contract must go through the above mentioned administrative review as outlined. Please review the document titled “Contract Requirements for Approval” for additional information regarding the requirements for contracts seeking approval. If an agreement requires the signature of a member of the executive level and there is **NOT** a signature line already in place do the following:

1. State in the signature line on the original contract “Please see the attached signature line document for all University signatures pertaining to this contract”
2. Print the signature line associated with the university department that is originating the contract and attach it to contract. You may delete any name that is not needed for your specific contract.

Please see pages 8 and 9 of this document for examples pertaining to step 1 above. After steps 1 and 2 are complete, please continue routing the contract for appropriate approvals. This will eliminate any confusion where the executive member should sign. Signature lines for each VP of the university can be found on the Office of Legal Affairs website located at <http://www.gcsu.edu/legal/contracts.htm> . However, if a contract is written correctly there will be a signature line already in place for each signatory at Georgia College therefore the signature line inserts will not be needed.

Every contract that is approved on behalf of Georgia College must contain the correct contract language. The Office of Legal Affairs will return the contract to the originator due to incorrect language used in the contract along with an explanation as to why the language will need to be changed. The contract originator should be aware of the ramifications this may cause between the originator and the other party listed on the contract. In order to avoid this, please review the documents titled “Contract Checklist” and “Boilerplate Language” that can be found at <http://www.gcsu.edu/legal/contracts.htm> . The Office of Legal Affairs is available to assist any

person with contracts, contract language and, if necessary, contract negotiations as to necessary legal requirements.

The Office of Legal Affairs has drafted a letter that may be sent to outside vendors for clarification regarding common required and prohibited contract language. The title of this letter is “Letter to Contractors and Vendors” and can be found at <http://www.gcsu.edu/legal/contracts.htm>.

By utilizing these documents, the contract can be issued by the originator correctly the first time thus avoiding any issues regarding language and signature lines. Should you have any questions please contact the Office of Legal Affairs.

Section 5. Authorizing Signatures

All contracts involving the University must be signed by an authorized University official. The President must sign certain types of contracts, such as Joint Staffing Agreements. The President may sign any other type of contract for the on-going operations of the University. All other contracts may only be signed by University administrators who have authority delegated in writing directly from the President to sign University contracts.

The following persons have signature authority to commit the university on a contract.

1. President. The President has delegated authority to sign contracts to the following persons. If there are any questions as to whether the President needs to sign the agreement, contact the Office of Legal Affairs prior to routing the contract for signature. Otherwise, the contract needs to be routed to one or both of the following offices after it is reviewed by the Office of Legal Affairs.
2. VP for Administration and Operations when any contract requires GC to spend any money.
3. Provost for any contract involving Academic Affairs.

Vice Presidents may **NOT** delegate final signature authority for contracts.

Contracts and agreements signed by other than authorized officials will be rejected and returned to the originating department. **Failure to follow University policies and procedures regarding signature authority may result in an employee’s loss of insurance coverage, personal liability for all contractual obligations, and/or disciplinary action.**

Vice Presidents may authorize their direct reports to "recommend" contracts be approved to the President or delegated Vice President after the contract has been reviewed by the Office of Legal Affairs. This authority would be specifically in lieu of the Vice President reviewing and approving the contract prior to it being sent to the President or delegated Vice President for approval. Prior to this authority taking effect, the Vice President

will notify the Office of Legal Affairs in writing or by electronic mail for records purposes. Absent such written signed approval, the Office of Legal Affairs will return the contract for proper review and signature. The Vice President authorizing their direct reports to directly recommend contracts be approved as previously set forth in this paragraph shall, nonetheless, retain full responsibility for the contract.

Section 6. Approval Routing Forms

To assure the proper and timely routing of University contracts through the approval process, the University requires the use of the approved routing form. This form should be attached to the front of the University contract. The form provides contact information and shows the next steps in the routing process so that University contracts can be handled expediently. The routing form may be found at:

<http://www.gcsu.edu/legal/contracts.htm>

Section 7. Contract Retention

The University complies with the Board's published record retention guidelines, which may be reviewed at <http://www.usg.edu/usgweb/busserv/series/index.phtml>. Unless otherwise required within any particular division or for any particular contract, departments/units should retain the final, executed agreements for retention purposes; the department/unit is responsible for maintaining copies of such agreements in its own files and for complying with the specific retention requirements. In addition, any University contract provisions dealing with document retention by the parties must be satisfied, even if such contractual provisions require longer retention periods than the Board's guidelines. The Office of Legal Affairs is designated as the University's overall records retention office. Guidance on records retention for any particular document may be obtained by contacting the Office of Legal Affairs if the above site is not helpful or adequate.

Section 8. Contract Administration

Unless otherwise provided by University policy, the individual, or his/her designee, who originates the University contract is responsible for properly carrying out the terms of the contract for the University. It may be advisable for each University department/unit to establish a database of all its current contracts, including such information as performance dates, payments to or from the University, and receipt of certificates of insurance, performance bonds or letters of credit. Failure to monitor these requirements can expose the University department/unit and the University to financial loss, legal actions, and potential claims for breach of

contract or default. If any contract administrator has any questions regarding these matters, he/she should contact the Office of Legal Affairs.

Section 9. Contract Procedures Training

The Office of Legal Affairs will provide Contract Procedures training for any department and/or individual as requested. There will be Contract Procedures training material forthcoming to the Office of Legal Affairs website found at: <http://www.gcsu.edu/legal/contracts.htm>

Section 10. Contract Procedures Violations

Any contract found to be out of compliance with any of the above mentioned procedures, except for missing signatures, will be sent back to the contract originator to correct the matter with an attached memo specifying what needs to be corrected. In the event the only correction needed is if the contract does not have all approvals listed in the above Section 3, the contract will be sent directly to those individuals for signature. An email will be sent to the contract originator advising them the contract was sent to the specified individual(s) needing approval. Continued failure by an originator to route contracts for appropriate signature(s) may cause contracts to be sent back to the originator for proper routing.

Appendix

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This Agreement shall consist of these Basic Terms and the Additional Terms attached hereto and incorporated by reference. In the event of conflict between these Basic Terms and the Additional Terms, the provisions of these Basic Terms shall control.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first set forth above.

gn:

EDUCATIONAL BENCHMARKING, INC.

By: _____
Name: _____
Title: _____

Participant:

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%Jv; Newill, S'avo

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF, the Division and Contractor have executed this Agreement as of the date first above written.

STATE OF GEORGIA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION

BY: _____
Judson H. Turner
Director

Georgia College and State University

BY: J. Rose *see a+h.r hed* cLoc.u. + f6v- LLvL' VevS ■
Paul Jones · 10· -- y
VP for Administration and Operations

Contract Cheat Sheet

1. Does the contract properly identify all parties of the contract?
- 2 . Are the effective dates properly identified?
- 3 . Does the contract have signature lines for all individuals listed in the administrative review?
4. Have all levels described in the administrative review initialed and/or signed the contract?
5. Does the contract have the appropriate language, some of which may need modification or deletion, for the following:
 - a. 30 days for payments
 - b. Finance charges and/or payment penalties
 - c. Liability
 - d. Indemnification
 - e. Attorney fees and/or court costs and/or litigation expenses
 - f. Insurance
 - g. Termination Clauses
 - h. Breach of Contract Clauses
 - i. Any state laws other than Georgia governing the contract
 - j. Binding arbitration or mediation laws
 - k. Other
6. Does the contract have the routing form attached?

Contract Checklist

Basics

Question	Your Answer	Modification
1. Does the contract correctly identify the parties?	No	Modify to show: “The Board of Regents of the University System of Georgia, on behalf of Georgia College.”
2. Does the contract correctly identify what type of entity each party is? (Corporation, company, governmental entity of the State of Georgia, etc)	No	Modify or insert correct type of entity.
3. Does the contract contain the Federal Tax ID number for the vendor?	No	Obtain Tax ID number from vendor and insert
4. Is the other party an independent contractor?	Yes	Insert the following language if not already included: Georgia College and [<u>other contracting party</u>] shall be deemed to be and shall be independent contractors. Neither party is authorized or empowered to act as agent for the other for any purpose and shall not on behalf of the other enter into any contract, warranty or representation as to any matter. Neither party shall be bound by the acts or conduct of the other.

Payment Terms

Question	Your Answer	Modification
1. Does the contract provide for payment at least thirty days after receipt of a proper invoice?	No	Modify to Insert
2. Does the contract call for late payment penalties or finance charges? Ex: In the event of delay in payment Vendor reserves the right to levy a service charge to cover administrative and other associated costs in relation to overdue accounts at the rate of 1% per month on all unpaid amounts [or] If University does not pay any invoice by the due date, Vendor may charge interest on the outstanding amount, calculated daily at an annual rate equal to Prime Rate plus 1.5% from the due date to the date of payment.	Yes	Delete clause

Liability and Indemnification Issues

Question	Your Answer	Modification
<p>1. Does the contract seek to limit the Vendor's liability and the University's scope of recovery?</p> <p>Ex: In no event shall VENDOR be liable to University for any special, incidental, or consequential damages, arising from breach of warranty, breach of contract, negligence, strict liability in tort, or any other legal theory, even if VENDOR has been advised of the possibility of such damages. Such damages include, but are not limited to, loss of profits/revenue, cost of capital, overhead costs, costs of any substitute services or claims of University for any such damages. <i>Or in combination with other terms that limit Vendor liability:</i> The remedies set forth in this Agreement shall be University's sole and exclusive remedies for any claims against Vendor under or related to this Agreement.</p>	Yes	Delete. If unsuccessful, seek counsel from Office of Legal Affairs.
<p>2. Should the contract require VENDOR to indemnify the University for any personal injury?</p>		Consult with client and negotiate mutually acceptable term.
<p>3. Does the contract subject the University to tort liability or otherwise waive State's sovereign immunity?</p> <p>Ex: University assumes all risk of loss for any damages that arise under this Agreement.</p>	Yes	Delete
<p>4. Does the contract contain "hold harmless" or indemnification clauses <i>in favor of</i> the Vendor?</p> <p>Ex: University shall defend, indemnify, and hold Vendor harmless against any expense, judgment or loss or which results from University's actions under this Agreement.</p>	Yes	Delete
<p>5. Does the contract provide for personal liability of the University signer or any other University employee?</p>	Yes	Delete
<p>6. Does the contract provide for the University to pay attorney fees, court costs, or other litigation expenses of other parties if there is a dispute?</p> <p>Ex: In the event of a breach of this Agreement, the breaching party shall pay to the other party all attorneys' fees and other costs and expenses incurred by the nonbreaching party in connection with the enforcement of any provision of this Agreement.</p>	Yes	Delete

Question	Your Answer	Modification
<p>7. Does the contract provide for a limitation of damages to be paid by GC? The following language should be inserted into the contract:</p> <p>In no event shall GC be liable for any indirect, consequential, special or incidental damages whatsoever, for losses that may arise out of the performance of this Agreement, whether based in contract, tort (including negligence) or otherwise. Any damages arising under this Agreement for which GC may be liable for any purpose whatsoever shall be limited to the monies actually paid by [other contracting party] to GC</p>	Yes	Delete

Insurance Requirements

Question	Your Answer	Modification
<p>1. Does the contract require the University to obtain general liability insurance or a bond?</p> <p>Ex: University shall provide, maintain, and pay for public liability insurance naming VENDOR as an additional insured party.</p>	Yes	<p>Delete and insert the following:</p> <p>The University is self-insured and will be responsible for its own negligence in accordance with the Georgia Tort Claims Act to the limits set by law.</p>
<p>2. Should the contract require the VENDOR to obtain GCL insurance or a bond?</p>		<p>Conduct a risk assessment and consult with client.</p>

Breach of Contract and Termination Clauses

Question	Your Answer	Modification
<p>1. Does the contract allow the Vendor to unilaterally terminate the contract for cause?</p> <p>Ex: Vendor may terminate this Agreement for breach [or cause] at any time upon thirty (30) calendar days' prior written notice to University.</p>	<p>Yes</p>	<p>Modify the contract to make the clause mutual to both parties, so that the University may also terminate for cause in the same way the Vendor can, and allow for a cure period. Check with client to determine if more time is required to terminate the agreement.</p> <p>Revision: Either party may terminate this Agreement at any time upon prior written notice to the other Party of a specific breach and the failure of the other Party to cure its breach within 30 days of receipt of notice of breach.</p>
<p>2. Does the contract allow the Vendor to unilaterally terminate the contract for convenience?</p> <p>Ex: Vendor may terminate this Agreement at any time upon thirty (30) calendar days' prior written notice.</p>	<p>Yes</p>	<p>Modify the contract to make the clause mutual to both parties, so that the University may also terminate for convenience in the same way that the other party can. Check with client to determine if more time is required to terminate the agreement.</p> <p>Ex: Either Party may terminate this Agreement at any time it determines it is in its best interest to do so upon thirty (30) calendar days' prior written notice to the other Party.</p>
<p>3. In the event of termination by Vendor does the contract allow the Vendor to receive full payment under the contract?</p> <p>Ex: In the event Vendor terminates this Agreement for breach, Vendor shall retain the deposit and University shall issue payment on the remaining balance [or loss of business] within 30 days of the date of termination.</p>	<p>Yes</p>	<p>Modify the contract to provide that the University will reimburse the Vendor for reasonable costs incurred prior to the date of termination. If not successful, then delete the clause.</p>

Question	Your Answer	Modification
<p>4. Does the contract state that a breach by the University would cause irreparable harm and justify injunctive action?</p> <p>Ex: University acknowledges that for any breach of the confidentiality article of the contract, Vendor will not have an adequate remedy at law and shall be entitled to obtain entry of an injunction against University in a court of competent jurisdiction.</p>	<p>Yes</p>	<p>Delete the clause. If unsuccessful, seek advice from the Office of Legal Affairs.</p>
<p>5. Does the contract contain a survival clause?</p> <p>Ex: Termination of this Agreement by either party shall not affect the rights and obligations of the parties accrued prior to the effective date of the termination. The rights and duties under Articles survive the termination or expiration of this Agreement.</p>	<p>Yes</p>	<p>Ensure that the articles specified in the survival clause are ones that the University wants to survive the contract, such as those shown in the revision below.</p> <p>Ex: Termination of this Agreement by either party shall not affect the rights and obligations of the parties that accrued prior to the effective date of the termination.</p>

Terms Governing Disputes and Lawsuits

Question	Your Answer	Modification
<p>1. Does the contract require binding arbitration, binding mediation?</p> <p>Ex: Any dispute, claim, or disagreement that arises under this Agreement shall be submitted and resolved by binding arbitration.</p>	<p>Yes</p>	<p>Delete Clause</p>
<p>2. Does the contract provide less than three years for the University to file a legal claim or sue for breach of contract?</p> <p>Ex: Any legal action brought pursuant to this Agreement shall be initiated within a period of one (1) year following the discovery by the party bringing such action of the event giving rise to the cause of action.</p>	<p>Yes</p>	<p>Delete the reference so that the contract is silent on the issue or modify the contract to include the relevant Georgia statute of limitation as shown below. If unsuccessful, seek advice from the Office of Legal Affairs.</p> <p>Revision: Any legal action brought pursuant to this Agreement shall be initiated within the period authorized under the laws of the State of Georgia following the discovery by the party bringing such action of the event giving rise to the cause of action.</p>
<p>3. Does the contract contain clauses that would make it subject to the courts of another state?</p> <p>Ex: Any legal action brought pursuant to this Agreement shall be brought only in the State or Federal courts of New Hampshire.</p>	<p>Yes</p>	<p>Delete section entirely so that contract is silent on the issue or modify the contract as shown below. If unsuccessful, seek advice from the Office of Legal Affairs.</p> <p>Revision: This Agreement shall be governed in accordance with the law of the State of Georgia.</p>

Modifications

Question	Your Answer	Modification
<p>1. Does the contract allow modifications to be made by any means other than mutual written agreement of authorized signatories of the Parties?</p> <p>Sample: Vendor retains the right to increase the Fees at any time with prior written notice to University. OR Vendor may modify the terms of this agreement by posting of notice on Vendor's website.</p>	<p>Yes</p>	<p>Modify to provide upon written notice to and acceptance by University or upon mutual written agreement of the parties.</p> <p>Revision: This Agreement may only be modified upon mutual written agreement of the parties.</p>
<p>2. Does the Agreement specify that any statements made by any University employees in connection with the Agreement are binding on the University?</p> <p>Sample: The University shall be bound by any representations or statements on the part of its employees or agents whether oral or in writing.</p>	<p>Yes</p>	<p>Modify as follows:</p> <p>Revision: The University shall <i>not</i> be bound by any representations or statements on the part of its employees or agents whether oral or in writing. This Agreement may be modified only by mutual written agreement of the parties.</p>

Miscellaneous

Question	Your Answer	Modification
<p>1. Does the contract allow the Vendor to use the University's name in any advertising, endorsement, or promotion?</p>	<p>Yes/No</p>	<p>Include the following language</p> <p>Revision: Vendor agrees that it shall not use the name of the Georgia College, University of Georgia or any other entity of the University of Georgia System, any trademarks of Georgia College or any other entity of the University of Georgia System in any campaign of advertising, or in any commercial or promotional manner whatsoever, without the express written permission of the University.</p>
<p>2. Does the contract specify that the contract is confidential?</p> <p>Sample: The terms of this Agreement are confidential and University shall not disclose this Agreement to any third party without Vendor's prior written consent.</p>	<p>Yes</p>	<p>Delete or modify the contract to contain the language below. If unsuccessful, seek advice from the Office of Legal Affairs.</p> <p>Revision: Vendor acknowledges that the Georgia Open Records Act governs the disclosure of the terms of this Agreement</p> <p>Or</p> <p>University shall not disclose the terms of this Agreement unless they become publicly available through no wrongful act of the University or the University is obligated to disclose them to comply with applicable laws or regulations, including the Georgia Open Records Act, or pursuant to an order of a court of competent jurisdiction or a valid administrative or congressional subpoena.</p>

Question	Your Answer	Modification
<p>3. Does the contract permit the Vendor to assign the contract to a third party without the University's written consent?</p> <p>Ex: Vendor may assign the performance of this Agreement to a qualified third party without prior notice to or consent of the University.</p>	<p>Yes</p>	<p>Modify as follows</p> <p><i>Revision:</i> This Agreement shall not be assigned by either party without the prior written consent of the parties hereto.</p>
<p>4. Does the Agreement incorporate other documents or information by reference or refer to information that is not in the Agreement?</p> <p>Sample: All payments owed to Vendor shall be issued in accordance with Vendor's standard procedures.</p>	<p>Yes</p>	<p>Delete and use GC or Georgia System standard payment terms or ask for a copy of the document or information, review it against the check list, modify it as needed, and then attach it to the Agreement.</p>
<p>5. Is GC's intellectual property or patent rights part of the contract?</p>	<p>Yes</p>	<p>Contact the Office of Legal Affairs for advice</p>
<p>6. Does the contract contain a non-discrimination clause?</p>	<p>No or is incomplete</p>	<p>Insert the following clause:</p> <p>Neither GC nor [<u>other contracting party</u>] shall discriminate against any person on the basis of age, disability, gender, national origin, race, religion, sexual orientation, or status as a veteran in the performance of this Agreement</p>
<p>7. Does the contract contain a clause that GC is exempt from taxes?</p>	<p>No</p>	<p>Insert the following language:</p> <p>GC is exempt from payment of taxes. No money shall be withheld by either party for the payment of taxes except as required by law.</p>

Boilerplate Language

Language which should be included in all contracts. This may be attached as an Addendum to the contract.

Compliance: The parties agree to comply with all the federal, state, local, and institutional laws, ordinances and rules applicable to the Institution, and specifically agree not to unlawfully discriminate against any individual on the basis of race, creed, color, sex, religion, age, disability, or national origin, and to comply with all anti-discriminatory laws and policies which Institution promulgates and to which Institution is subject

Default: In case of default, the Institution reserves the right to hold the other party responsible for any actual expenses incurred.

Entire Agreement: This Agreement, together with the other appendices hereto, constitutes the entire Agreement between the parties and supersedes all previous agreements, whether written or oral, between the parties with respect to the subject matter hereof, whether expressed or implied, and shall bind the parties unless the same be in writing and signed by the parties. The parties hereto further understand and agree that the other party and its agents have made no representations or promises with respect to this Agreement, except as in this Agreement expressly set forth.

Modification: This Agreement contains all the terms between the parties and may be amended only in writing signed by both parties.

Severability: Each paragraph of this Agreement is severable from all other paragraphs. In the event any court of competent jurisdiction determines that any paragraph or subparagraph of the agreement is invalid or unenforceable for any reason, all remaining paragraphs and subparagraphs will remain in full force and effect.

Assignment: Nothing in this Agreement shall be construed to permit the assignment by any party of any rights or obligations hereunder, and such assignment is expressly prohibited without the prior written consent of the University. No such assignment or transfer shall relieve the non-University party from its obligations and liabilities under the Agreement.

Force Majeure: Neither party shall be liable for defaults or delays due to Acts of God or the public enemy, acts or demands of any Government or and Governmental agency, strikes, fires, floods, accidents or other unforeseeable causes beyond its control and not due to its fault or negligence. Each party shall notify the other in writing of the cause of such delay within five (5) days after the beginning thereof.

Headings: The headings of this Agreement are for the purposes of convenience and reference only and shall not in any way define, limit, extend or otherwise affect the meaning or interpretation of any of the terms hereof.

Laws: This Agreement shall be construed in accordance with and governed by the laws of the State of Georgia.

Non-Discrimination in Employment: It has been and will continue to be the policy of and to be an equal opportunity institution. All decisions of admissions and employment are based on objective standards that will

further the goals of equal opportunity. is committed to assuring that all programs and activities are readily accessible to all eligible persons without regard to their race, color, religion, gender, national origin, ancestry, age, disability, Vietnam-Era and/or disabled veteran status, any protected class under relevant state and federal laws, and in accordance with University policy, sexual orientation.

Notice: Any notice or communication required or permitted to be given under this Agreement shall be in writing and shall be deemed given upon the mailing thereof, postage prepaid, by certified or registered mail, return receipt requested, addressed to the other party at the address set forth below, or at such other address as either party shall designate to the other in writing hereafter:

Notices shall be sent to the University as follows:

Either VP of Operations and Administration or Provost

All such notices shall be effective when deposited in the United States Mail.

Waiver: Except as specifically provided for in a waiver signed by duly authorized representatives of the Agency and the Contractor, failure by either party at any time to require performance by the other party or to claim a breach of any provision of the Contract shall not be construed as affecting any subsequent right to require performance or to claim a breach.

Letter to Vendors and Contractors

This letter may be set to vendors and contracts regarding any legal issues.



**GEORGIA
CoLLEGE.**

GEORGIA'S PUBLIC LIBERAL ARTS UNIVERSITY

Office of Legal Affairs
Campus Box 41
Milledgeville, Georgia 31061-0490
Phone(478)445-2037
Fax (478) 445-2049

January 5, 2012

Re: Letter to Contractors/Vendors Regarding Legal Issues Related to Georgia College Contracts

Dear Sir/Madam:

As a public institution and an instrumentality of the State of Georgia, Georgia College & State University is subject to a number of regulations that prevent us from entering into certain kinds of contracts. While these rules may occasionally make the process of negotiating a contract with the University more difficult, these rules are not unique to Georgia College. They apply to all of the other public colleges and universities in Georgia. In fact, many if not most public institutions of higher education throughout the United States are subject to similar restrictions.

1. Legal Name of Georgia College

The correct legal name of Georgia College, which should appear on all of Georgia College's contracts, is "Board of Regents of the University System of Georgia by and on behalf of Georgia College & State University".

Georgia College & State University is a unit of the Board of Regents of the University System of Georgia, and is not a separate legal entity. Using names such as "Georgia College" or "Georgia College & State University" or the name of a college or department within the university is not appropriate for contracts.

2. Indemnities

An indemnity is a contractual clause by which a contractor may ask that the University defend it against any claims of other persons who might be injured as a result of something that happens while the parties are carrying out their duties under the contract. The Georgia Attorney General has determined that public agencies cannot enter into agreements indemnifying contractors, or any other entity, against third party claims. A copy of an official opinion from the Attorney General to this effect is attached to this letter as Exhibit "A."

Milledgeville • Macon • Warner Robins

Georgia College & State University, established in 1889, is Georgia's Public Liberal Arts University. University System of Georgia

Occasionally a contractor will attempt to deal with this restriction by rewriting an indemnity clause so as to eliminate the words "indemnity" or "indemnify," while leaving the intent of the clause intact-that is, to obligate the University to defend the contractor against third party claims. "Indemnity" is not a magic word, and if a contract clause has the effect of creating an indemnity, we would not be able to agree to it even though that word has been removed.

Georgia College does not enter into clauses that obligate it to indemnify a contractor "to the extent permitted by law." There are two reasons for this. From our standpoint, because we know that the extent to which the law permits us to indemnify contractors is no extent whatsoever, it would be disingenuous for us to imply in a contract that there might be some set of circumstances under which we would defend the contractor against a third party claims. We would not agree to something that we know we could not do. Secondly, the "extent" clause is simply an invitation to litigate the matter in the event a third party claims arises, and we prefer not to enter into agreements that invite litigation.

Please do not ask us to ignore this rule. Because the University lacks the contractual authority to enter into an indemnity, any person who is signing such a document on the University's behalf signs it without authority to do so. We would not ask our administrators to expose themselves to personal liability by signing contracts that they know cannot be enforced.

We find that the indemnity issue is seldom a problem once contractors understand that we cannot provide indemnities, and why. If you think about what an indemnity is, it starts to look a lot like a policy of liability insurance. While the University cannot offer its contractors indemnities, there are many insurance companies that exist for precisely that purpose.

3. Insurance

Many contractors ask for clauses that define the manner in which the University insures itself. As a state instrumentality, the University is covered under the Georgia State Tort Claims Act (GSTCA), O.C.G.A. § 50-21-20 et seq. The GSTCA is too voluminous to attach to this letter, but you can see it online at <http://w3.lexis-nexis.com/hottopics/gacode/Default.asp>. Look at Title 50, Chapter 21, Article 2. The State of Georgia waives its sovereign immunity as to covered claims, but retains it as to other claims.

The GSTCA works in much the same way as liability insurance, or self-insurance. For all the types of claims that are covered under the GSTCA, coverage is provided at a limit of \$1,000,000 per person, \$3,000,000 per occurrence. GSTCA coverage is administered by the Georgia Department of Administrative Services, Risk Management Division.

The GSTCA is different from liability insurance in that we cannot adjust the coverage limits upward or downward; the limits are set by law. Also, because it is not insurance in the conventional sense, we cannot add contractors as additional insured parties.

4. Multi-year contracts

The authority to commit taxpayer funds to various agencies for various purposes from year to year belongs to the Georgia General Assembly. While the Board of Regents of the University System of Georgia receives an appropriation every year, and the Board of Regents allocates a

portion of that appropriation each year to Georgia College, we cannot presume by contract to commit the General Assembly to doing so. That power belongs to the General Assembly exclusively. Consequently, we cannot enter into contracts that commit funds from future years' appropriations. For example, we cannot enter into multiyear leases with public funds. An opinion of the Georgia Attorney General on this point is attached to this letter as Exhibit "B".

This does not mean that we cannot enter into any multiyear contract. Contracts that have appropriate escape clauses do not create problems. Nor do contracts that do not require funding, such as sponsorship contracts. And contracts that are funded through non-public sources of money may be permitted under some circumstances.

5. Unliquidated expenses

We cannot presume that we would have funds available to pay for claims that might exceed our available funding. Certainly indemnities would fall into this category – who can say how it might cost to fund an indemnity that has no cap? But the same thing is true as to any other potential expense that cannot be calculated, such as paying a contractor's attorneys fees, paying for add-ons which aren't priced in the contract, paying for unknown cost increases during the life of the contract, and so on.

6. Credit agreements; interest

The Board of Regents lacks the legal authority to borrow money. An opinion by the Georgia Attorney General on that point is attached as Exhibit "C." When the State of Georgia borrows, it does so by issuing bonds through the Georgia State Finance and Investment Commission. Other State agencies don't borrow money. Please don't ask us to fill out credit applications in conjunction with contracts. We simply cannot do that. Nor can we agree to pay interest on late payments, which is tantamount to borrowing money. The State of Georgia enjoys the highest bond ratings, and Georgia College is an excellent customer with a reputation for honoring its financial obligations promptly. We do that without the need to apply for credit, and without the threat of interest charges.

7. Waivers of jurisdiction and service; arbitration; laws of another state

Under Georgia's constitution, the Attorney General is the State's attorney for all purposes—including, especially, management of litigation. Georgia College cannot usurp his authority by agreeing in advance to control the way litigation would be managed in the event of a dispute. We cannot agree that we would submit to the laws or jurisdiction of another state, that we would waive formal service of process, or to binding arbitration. It doesn't mean, for example, that we would absolutely refuse to arbitrate a dispute if one arose. It simply means that decisions of that nature are reserved for the Attorney General and we cannot sign a contract that would usurp his constitutional authority. However, we are always willing to consider mediation as a non-binding dispute resolution alternative. The text of Art. 5, Sec. 3, Par. 2 is attached to this letter as Exhibit "D."

8. Confidentiality

As a State institution, Georgia College is subject to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.). While many types of records are protected by the Family Educational Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act (HIPAA),

and by various exceptions contained within the Georgia Open Records Act, this Act gives any party the right to inspect and receive copies of most university records, including documents, contracts, and communications related to Georgia College's normal course of business. We cannot agree, for example, to provisions that attempt to prohibit Georgia College from releasing bid or contract documents, or the release of communications between Georgia College and a contractor/vendor, to any party that submits a request to inspect and obtain such records.

In conclusion

There are a few other special rules that come up from time to time, but these are the rules that come into play most often. Georgia College enters into hundreds of contracts every year, with a huge array of vendors and contractors from every field imaginable. With an impact worth hundreds of millions of dollars a year to the local economy, Georgia College is the kind of customer vendors cherish. Though the special rules that apply to public institutions can make doing business with us a little different, we think the value of a business relationship with Georgia College is well worth the effort for our vendors. On very rare occasions, these rules do prevent us from entering into a contract with a vendor. But the University works hard, and creatively, to find ways to work with vendors to build good business relationships while staying within the rules. And we find that most of our vendors are willing to work just as hard, and just as creatively, to achieve the goal. We appreciate the understanding that all of our vendors show. If there is any further information that you need to help you understand the rules that govern Georgia College, please contact us.

General Counsel

— — Marc P. Cardinalli

EXHIBIT A

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA

OPINION 80-67

1980 Ga. AG LEXIS 138; 1980 Op. Atty Gen. Ga. 141

May 23, 1980

To: Superintendent, Georgia Fire Academy

From: ARTHUR K. BOLTON, ATTORNEY GENERAL

You have requested an opinion from the Attorney General on the question of whether or not the Georgia Fire Academy may agree to terms set forth in a Georgia Power Company Encroachment Agreement which would require the Fire Academy to indemnify the Power Company for money paid for personal injuries and property damages arising from the Fire Academy's use of its right of way and to reimburse the Power Company for its cost for any damage to its facilities resulting from the Fire Academy's use of its right of way.

Paragraph 8 of the Encroachment Agreement requires the Fire Academy "to indemnify and save harmless and defend the Power Company" from the payment of money on account of injuries to persons or damage to property in any way attributable to use of the right of way by the Fire Academy. Article III, Section VIII, Paragraph XII of the Constitution of Georgia of 1976 (Georgia Code Annotated § 2-1413) forbids the state's granting "any donation or gratuity in favor of any person, corporation, or association." In *Washburn v. MacNeill*, 205 Ga. 772 (1949), the Georgia Supreme Court held that the prohibition against gratuities prevents the state from refunding payments made by sureties on a recognizance bond. See also, *McCook v. Long*, 193 Ga. 299 (1942); Op. Atty Gen. U76-28.

Op. Atty Gen. 68-328 (unofficial) interpreted Article III, Section VIII, Paragraph XII of the Constitution to prohibit an indemnity and hold harmless clause in a proposed contract, under which clause the Georgia State Patrol would indemnify Brink's, Incorporated, for any liability, personal injury and property damage incurred as a result of use by the State Patrol of a vehicle leased pursuant to the proposed contract.

The opinion advised that the "hold harmless" agreement in the proposed Brink's contract was also violative of Article VII, Section III, Paragraph III of the Constitution of Georgia of 1945 (Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976 [Georgia Code Ann. § 2-4804]) which provides that "the credit of the State shall not be pledged or loaned to any individual, company, corporation or association." See also, Op. Atty Gen. 74-115 which discusses the application of this constitutional provision to the contractual incurring of a liability which is not to be discharged by a tax levied within the year in which the liability is undertaken. It is my opinion that the proposed hold harmless provision in Paragraph 8 of the Encroachment Agreement constitutes both a gratuity and a pledge of the state's credit and thus falls within the prohibitions contained in Article III, Section VIII, Paragraph XII and in Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976.

By virtue of the doctrine of sovereign immunity, suit may not be maintained in the courts of this state against the state without the express consent of the legislature. *Koehler v. Massell*, 229 Ga. 359 (1972);

Crowder v. Department of State Parks, 228 Ga. 436, 438 (1971). See the discussion contained in Op. Att'y Gen. 66-261 in which the Attorney General advised the Board of Regents that the legislature's delegation of the power to contract to the Regents does not include by implication the power to waive sovereign immunity by the contractual assumption of tort liability and that an attempt by Regents to do so would be ultra vires and void. Similarly, an attempt by the Georgia Fire Academy to contractually waive the state's sovereign immunity by entering into an indemnity agreement would be ultra vires and void.

Therefore, in summary it is my official opinion that Article III, Section VIII, Paragraph XII and Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976 prohibit execution of an indemnification agreement by the Georgia Fire Academy and that such an agreement would furthermore be invalid as an unauthorized attempt to contractually waive the state's sovereign immunity.

In Paragraph 6 of the proposed Encroachment Agreement the Fire Academy agrees to reimburse the Power Company for all cost and expense for any damage to Power Company facilities resulting from its use of the right of way. The Fire Academy further agrees that if in the opinion of the Power Company it becomes necessary, as a result of the Fire Academy's use of the right of way, to relocate, rearrange, change or raise any of the Power Company's facilities, it will promptly reimburse the Power Company for this expense. Since Paragraph 6 involves a contractual pledge of the state's credit to pay for damages and expenses incurred by the Power Company without time or monetary limits, it is my official opinion that it is prohibited by Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976.

EXHIBITB

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA

Opinion 74-115

1974 Ga. AG LEXIS 115; 1974 Op. Atty Gen. Ga. 242

August 23, 1974

To: State Auditor

From: Arthur K. Bolton, Attorney General

This is in reply to your request for my opinion as to whether, and under what circumstances, a state agency may lawfully execute a contract with a private party to purchase goods or services where the term of the contract extends beyond the current fiscal year. Your request is drawn in terms of an inquiry as to a proposed contract by the Department of Administrative Services for computer goods and an inquiry as to the extent the Board of Regents of the University System of Georgia is bound by the principles applicable to other state agencies in this area.

Because prior opinions on this question may not adequately explain their reasoning sufficiently to govern the specific inquiries made, I have undertaken to set forth herein a restatement of the underlying rationale and specific conclusions for the purpose of future guidance. ¹

I.

The resolution of the issue presented requires consideration of several constitutionally embodied concepts, each of which is related to the underlying purpose of foreclosing the state from incurring "debt" except in specified instances.

The first of these is Art. VII, Sec. III, Par. *N*. With certain exceptions authorizing certain types of debt, none of which is here pertinent, it provides that

"... the credit of the state shall not be pledged or loaned to any individual, company, corporation or association..." Ga. Const., Art. VII, Sec. *M*, Par. *N* (Ga. Code Ann. § 2-5604).

¹This opinion deals exclusively with contracts between state agencies and private parties. Contracts between state agencies or between a state agency and another instrumentality of the state involve different considerations. Ga. Const., Art. VII, Sec. VI, Par. I (Ga. Code Ann. § 2-5901).

This limitation, which gathers meaning from its own terms and from the exceptions authorizing the state to incur debt for certain purposes, forecloses the execution of any contract which pledges the faith and credit of the state. *State Ports Authority v. Arnall*, 201 Ga. 713 (1947). The purposes and meaning of this prohibition, contained also in the Constitution of 1877, were exhaustively treated by the Supreme Court in *City Counsel of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696 (1899), where, although dealing specifically with similar prohibitions applicable to political subdivisions of the state, the court delineated the pertinent limitations with reference to the state itself. The court noted that

"Taking into review, as the framers of the Constitution did, the condition of the public debt of the state . . ., nothing can be plainer than that the power to create debts, incur liabilities and impose burdens to be discharged in the future, was liable to be grossly abused, if the same existed without restrictions . . . in the hands of the General Assembly. . . . In light of all those facts, what is meant by the various provisions of the constitution we have above referred to? What was the plan to be followed in the future in regard to the public debt of the state itself? Nothing can be clearer. The public debt of the state must not be increased for any purpose except those few above mentioned. * * *

The various departments of government must be supported from year to year by taxation, and only in [certain] instances is the state authorized to incur a debt. . . ." *Id.* at 705-706.

The Supreme Court's definition of "debt" was also drawn in reference to the state itself. "Almost without exception," the court noted, "not only in regard to the subordinate public corporations of the state, but in regard to the state itself" the general rule had been that ". . . salaries and all expenses of government are paid by the year out of taxes raised during the year in which the service to be compensated was rendered. * * * Debt, therefore, as used in the Constitution is to be understood as a liability which is undertaken and which must be discharged at some time in the future but which is not to be discharged by a tax levied within the year in which the liability is undertaken." *Id.* at 711-712.

Specifically, the court held that

"The policy of the Constitution is not only against the incurring of liabilities to be discharged in the future for services rendered concurrently with the liability incurred, or previous thereto, but it is equally against the incurring of a liability which is to be discharged in the future, notwithstanding that it depends upon the performances of some service to be rendered in the future." *Id.* at 712.

This delineation of the debt limitation was incorporated in the present constitutional provisions. *Thompson v. Talmadge*, 201 Ga. 867,885-86 (1947).

Much of the court's discussion in *Dawson*, supra, is, of course, directed to municipalities of the state where there is a union of legislative and executive powers. When the issue is drawn to the state level, however, the required correspondence of the obligation and taxation as stated in *Dawson*, supra, is not entirely dispositive. That principle, established in Art. VII, Sec. III, must be considered with related provisions of the Constitution also bearing on the issue presented.

Article III, Sec. VII, Par. XI, provides:

"No money shall be drawn from the Treasury except by appropriation made by law."
(Ga. Code Ann. § 2-1911).

Article VII, Sec. IX, Par. I, requires the General Assembly to

"... annually appropriate the funds necessary to operate all the various departments ... and meet the current expenses of the state for the next fiscal year." (Ga. Code Ann. § 2-6201).

On the other hand, Art. VII, Sec. IX, Par. II, of the Constitution provides that the General Assembly

"... shall not appropriate funds for any given fiscal year which, in aggregate, exceed a sum equal to the amount of unappropriated surplus ... together with an amount not greater than the total Treasury receipts from existing revenue sources anticipated to be collected in the fiscal year, less refunds...." (Ga. Code Ann. § 2-6202).

These constitutional provisions are implemented by the Budget Act. Ga. Code Ann. Ch. 40-4, based on Ga. Laws 1962, p. 17, as amended.

Both under the Constitution and by statute, therefore, the General Assembly has, for purposes of the present issue, complete and absolute control over appropriations and other sources of state funds which may be made available to the department and has neither authorized any state agency to obligate the continued availability of appropriations or of any other sources of state funds, nor could it constitutionally do so, beyond the authorization contained in a presently effective General Appropriations Act.²

The import of these concepts on the question you presented may be succinctly stated: No agency of the state may execute a contract with a private party for the purchase of goods or services which purports to obligate appropriations or state funds from any other source not on hand at the time of the contract or where the fiscal obligation of the state agency depends for its full performance upon such future appropriations or the continued existence of any other source of state funds.

As a matter of general application, this principle forecloses a state agency from executing a contract the term of which extends beyond the current fiscal year.³ In such a case, the required correspondence of the incurring of an obligation and the availability of funds to satisfy the obligation is provided.

However, this is not necessarily the case. For example, a state agency may execute a contract for the purchase of goods and services even though the term of that contract extends to the next fiscal year **if** the state agency has on hand at the time of the execution of the contract available appropriated funds necessary to meet its entire obligation under the contract. Such a contract does not obligate an appropriation not then made. Moreover, the Constitution itself specifically provides that appropriations which would otherwise lapse at the close of the fiscal year do not so lapse **if** the appropriated funds are "contractually obligated." Art. VII, Sec. IX, Par. II (Ga. Code Ann. § 2-6202). The Constitution itself, therefore, specifically contemplates contracts of the type discussed above.

On the other hand, a state agency generally may not contract for the present purchase of goods or

² In certain instances, the Constitution mandates a continued availability of funds and we do not deal with those instances here. See, e.g., Ga. Const., Art. VII, Sec. IX, Par. IV (b) (Ga. Code Ann. § 2-6204).

³ The implication in prior opinions that the frame of reference is any twelve month period is, of course, not correct. See, e.g., Ops. Att'y Gen. 70-8, 67-345.

services in one fiscal year which is to be paid for out of appropriations, or funds to be derived from other sources, in a subsequent fiscal year.

A state agency may, however, under certain circumstances, execute a contract the term of which extends to the next fiscal year where the state's fiscal obligation is for services rendered or goods to be received in the subsequent fiscal year and is payable from an appropriation for that subsequent year as long as the General Appropriations Act for that fiscal year making the appropriation has become effective. While the appropriation constitutionally does not become available for expenditure until the fiscal year for which it is made begins, such a contract does not anticipate future appropriations or obligate other sources of funds, and thus does not create a present, unfunded obligation.

II.

In prior informal reviews of state agency contracts by this office, we have encountered multi-year contracts which contained several types of provisions designed to obviate the conflict with the Constitution which would otherwise be posed.

The first of these is a contract, otherwise within the limitations stated above, which grants to the state agency, but not to the private party with whom the contract is made, an option to extend the term of the contract for an additional fiscal year. Generally, the option may be exercised by the state agency within 60 days prior to the beginning of the next fiscal year and thus at a time when appropriations for that fiscal year under a General Appropriations Act have become effective. Such a provision does not in any way obligate future appropriations and is thus within the constitutional limitations set forth above.⁴

A second alternative employed in otherwise invalid multi-year contracts is an attempt to deal directly with the problem inherent in them. Under this approach, a multi-year contract is subject to automatic termination at the end of any fiscal year included in its term if there is a failure on the part of the General Assembly to appropriate sufficient funds for its continuation. Several factors make it apparent that such a clause is insufficient to avoid the constitutional deficiency otherwise inherent in the contract. The General Assembly does not, in fact, and serious doubts exist as to whether constitutionally it may, appropriate with reference to specific contracts executed or to be executed by state agencies. *Op. Att'y Gen. 73-132* (and constitutional provisions cited); *Ga. Const., Art. I, Sec. I, Par. XXIII* (*Ga. Code Ann § 2-123*); *Fuller v. State*, 232 Ga. 581 (1974) (concurring opinion of Hall, J.); *Boston & Gunby v. Cummins*, 16 Ga. 102, 105 (1854). Absent such a scheme for the appropriations process, the continuing fiscal obligation inherent in such contracts would purport to govern expenditure of appropriations in fact made to the state agency. See, *Irons v. Harrison*, 185 Ga. 244, 253-54 (1937); *Harrison v. State Highway Dept.*, 183 Ga. 290 (1936). For these reasons, it is my opinion that a "failure of appropriations" clause does not save an otherwise invalid multi-year contract.

The third device is a provision granting to the state agency, or to both parties, under a contract which otherwise violates the Constitution, an option to terminate the contract. Generally, such an option is subject to exercise within a period of time immediately preceding the beginning of a new fiscal year. In my opinion, such a contract does not comply with the Constitution and is beyond the authority of a state agency. A state agency is not authorized to pledge the credit of the state. A multi-year contract obligating future appropriations, even with an option to terminate, is a pledge of the state's credit thus beyond the authority of the state agency in the first instance and

⁴ Prior opinions make clear, however, that penalties imposed on the state agency incident to the failure to exercise the options are invalid. See, *e.g.*, *Ops. Att'y Gen. 1963-65*, p. 221; *Op. Att'y Gen. 70-8*.

therefore void. *Barwick v. Roberts*, 188 Ga. 655 (1938); *Ops. Att'y Gen. 1963-65*, p. 221. The option to terminate the contract does not modify the pledge of credit and purports to vest in the state agency a power to determine whether the pledge shall be terminated. No state agency has such a power and this becomes especially apparent in view of the fact that, under such a contract, the state agency's neglect will suffice to continue the pledge as sufficiently as a conscious determination not to exercise the power. *Ops. Att'y Gen. 1963-65*, p. 221.

m.

As you noted in your request, the Board of Regents of the University System of Georgia is not subject to the same limitations imposed on agencies of the state. See, e.g., *State of Georgia v. Regents of the University System of Georgia*, 179 Ga. 210, 222 (1934); Ga. Const., Art. VIII, Sec. IV, Par. I (Ga. Code Ann. § 2-6701). On the other hand, the Board of Regents is not authorized to obligate future appropriations which are made to it in its departmental capacity. *State of Georgia v. Regents*, supra; *State Ports Authority v. Arnall*, 201 Ga. 713 (1947). With respect to appropriations to it, the Board of Regents is subject to the same limitations which apply to other agencies of the state.

In your request, you make reference to a specific multi-year contract executed by the Board of Regents for computer equipment which it now desires to replace. In the bid documents issued incident to securing replacement equipment, prospective vendors are advised that the successful vendor must make the necessary arrangements to liquidate the existing contractual obligation to the vendor of the equipment to be replaced. Without reference to the existing contract, of course, I cannot reach an opinion as to the validity of that document.

The limitations applicable to other state agencies are also applicable to the Board of Regents of the University System of Georgia to the extent its contractual obligations are dependent upon appropriations made to it in its capacity as a department of State Government.

IV.

Your specific request with respect to the Department of Administrative Services seeks my opinion as to whether, as presently drawn, a proposed contract for the rental by that department of computer equipment and related goods is consistent with the limitations stated above.

Under that contract, the department agrees to rent the equipment for an initial six-year period for a rental payable in monthly increments of \$125,000. Anticipating the issue presented here, the contract provides:

"[DOAS] may terminate items of equipment . . . upon . . . written notice of thirty (30) days or the remainder of the . . . fiscal year, whichever is less, certifying that the availability of budgetary funding from those sources currently supporting these items of equipment can no longer support the affected items . . . so that termination of those items will have resulted from the loss of funding. It is not the intent of this provision to permit [the Department] to then make, request or allocate budgetary funding for the acquisition of new or use of existing [non-vendor] equipment. . . ."

The Department of Administrative Services, in its provision of computer services, is in a unique position. Under the present statutory framework, the department does not receive for the provision of

those services a direct appropriation to it. Instead, DOAS invoices the state agency users of that equipment and by this method funds the costs of providing those services.

That the fiscal obligations of DOAS under contracts with vendors are not payable from direct appropriations to it but depend instead on user fees in turn supported by direct appropriations does not render any less applicable the debt limitations stated above. See, *State Ports Authority v. Arnall*, 201 Ga. 713 (1947); Op. Att'y Gen. 72-59. Unless the "escape" clause noted above is sufficient to negate a future obligation, it is my opinion that the contract is invalid.

In my opinion, moreover, the "escape" clause is not sufficient to avoid the conclusion that the contract creates a debt. In the first instance, the initial obligation of the Department of Administrative Services is stated as a continuing, general obligation. Even if the quoted language were otherwise sufficient to modify this conclusion as to the nature of the obligation, however, the contract imposes an obligation not to "make, request or allocate budgetary funding for the acquisition or use of [non-vendor] equipment. . . ." In my opinion, such a limitation retains the original character of the department's obligation and thus not only is insufficient to avoid the debt impediment but is further invalid because the nature of the obligation incurred and the period of time which that obligation encompasses is also beyond the contractual authority of the department conferred, or which might be conferred, by statute.⁵

However, because of the unique position occupied by the Department of Administrative Services, it is my conclusion that different considerations are applicable to its powers in connection with multiyear contracts. In my opinion, the department may remedy the deficiencies inherent in the existing language of the proposed contract if in lieu of the language quoted above the following is substituted:

"(a) The total monthly charge established hereunder is payable by the customer solely from fees received by the customer from other agencies of the State of Georgia for their use of the products, which, to the extent authorized by law, are established in the sole discretion of the customer. In no event shall the sum of the total monthly charges made in any fiscal year of the customer exceed the sum of the fees so received by the customer during such fiscal year.

"(b) In the event that the source of payment for the total monthly charge no longer exists or is insufficient with respect to the products or to any of them, then this contract as to all products, or, as the case may be, as to any products included under this contract, shall terminate without further obligation of the customer as of that moment. The certification by the customer of the event stated above shall be conclusive."

Under such a clause, the department does not obligate the continuation of any source as state funds and thus neither pledges the credit of the state nor obligates the state in a manner beyond the authority conferred by statute. See, e.g., *City Counsel of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 712 (1899); *Miller v. Head*, 186 Ga. 694 (1938).

It is my opinion, therefore, that if the Department of Administrative Services amends the proposed contract in the manner stated above, then the fact that the term of the contract extends beyond the current fiscal year does not invalidate the contract.

⁵Other considerations may also bear on the validity of such an undertaking but they are not pertinent here. Ga. Const., Art. IV, Sec. IV, Par. I (Ga. Code Ann. § 2-2701); Ga. Code Ann. § 26-2308 (a), based on Ga. Laws 1968, pp.1249, 1308; Op. Att'y Gen. 67-23.

EXHIBIT C

April 5, 1948

Hon. Harmon Caldwell, President
University of Georgia

I am pleased to acknowledge your letter of March 25th, in which you state the following:

"The question has arisen as to whether the University of Georgia Athletic Association is authorized to borrow money for the purpose of financing its operations. For many years the Association has followed the practice of borrowing money during the spring and summer months and repaying the loans during the fall when the sales of football tickets are made The Athletic Association of the University was incorporated in 1928 by action of the Superior Court of Clarke County. This charter expired last month. A petition is now pending for a renewal of the charter.....

"We should greatly appreciate your giving us an official ruling on the question of the Association's right to borrow money so that we will know how we can safely proceed in handling the affairs of the Athletic Association."

Article 8, Section 4, Paragraph I of the Constitution provides in part as follows:

"There shall be a Board of Regents of the University System of Georgia, and the government, control, and management of the University System of Georgia and all of its institutions in said system shall be vested in said Board of Regents of the University System of Georgia. ... The said Board of Regents of the University System of Georgia shall have the powers and duties as provided by law existing at the time of the adoption of this Constitution, together with such further powers and duties as may be hereafter provided by law."

It is well settled that physical education, which includes football and other athletic contests, are integral parts of the educational program conducted by the State of Georgia. See *Allen v. Regents of the University System of Georgia*, 82 L. Ed. 1448, and the cases cited therein. It must likewise follow that athletic contests engaged in by State institutions are under the control and management of the Board of Regents of the University System of Georgia. There is no legal method by which the Board of Regents of the University System of Georgia can be divested of this control over the athletic program conducted by the University and its various branches. It is also true that this authority cannot be delegated to a private corporation in such a way that the corporation will be performing functions and duties which are vested exclusively under the control and management of the Board of Regents.

The above statements however, do not prohibit the Board of Regents from exercising a sound discretion as to the means and methods to be employed in carrying out their control and management of the University System and its institutions. The only restriction on such authority is that to be found in the Constitution and statutory laws passed in pursuance thereof. The Board of Regents, being a constitutional department of the State government, is necessarily bound by all restrictions and limitations contained in the laws of this State to the same extent as all other departments and branches of the State government. The Board of Regents cannot contract debts or obligations on behalf of the State in violation of Article 7, Section 3, Paragraph I of the Constitution. Neither can the Board of Regents pledge the credit or property of the State to any individual, company, corporation or association, nor shall the State "become a joint owner or stockholder in or with, any individual, company, association or corporation." This would be in violation of Article 7, Section 3, Paragraph 4 of the State Constitution.

The Supreme Court of Georgia in the case of *State of Georgia v. Regents of the University*, 179 Ga. 210, at page 221 of the opinion in speaking of the status of the corporation known as Regents of the University System of Georgia, observed the following:

"The limitations upon the creation of State indebtedness as contained in that instrument do not apply to separate legal entities created as corporations by the State. The framers of the constitution saw fit to limit the bonded indebtedness which might be incurred by counties, cities, and other political divisions of the State, and it would seem that the omission of any limitations upon the university would imply that note of the inhibitions could be referable to that institution. Furthermore, the language of these constitutional provisions as to State indebtedness clearly indicate their applicability only to the State itself as a sovereign."

On page 222 of the opinion, the court in considering whether the bonds issued by the corporation were debts against the State held as follows:

"Regardless of the stipulations made, the State of Georgia could never be called upon to pay these bonds. Nor would it be under any obligation, moral or otherwise, to levy any tax for the purpose of repairing any loss that might result to the university in consequence of these transactions, if the action of the board should ultimately prove to be unwise and a loss should result..."

"The university corporation is not the State, or a part of the State, or an agency of the State. It is a mere creature of the State, and a debt of the creature does not stand upon a level with the creator and never can rise thereto. It is first, last, and always a debt of the creature and in no sense a debt of the creator."

Following the law as announced by the Supreme Court of Georgia in the above case, we must come to the conclusion that under no circumstances could the credit or property of the State be pledged by the Athletic Association, and likewise it is clear that this association could in no way create a debt against the State of Georgia. Regardless of the stipulation made in any agreement between the Athletic Association and the financial institution or person loaning money to it, it must be clearly understood that the State of Georgia is in no way responsible for such obligations. As stated above, the Constitution absolutely prohibits this.

Since you do not set forth the agreement or method by which it is proposed to permit the Athletic Association, Inc. to aid or assist in conducting the athletic program in State institutions, it must be understood that this opinion cannot rule upon the relationship between the Board of Regents and the corporation. The powers of the Board of Regents in exercising management over the various phases of the State educational system are very broad and comprehensive. In speaking of these powers, the Supreme Court of Georgia in *State of Georgia v. Regents of the University*, supra at page 218 of its opinion, held as follows:

"So long as the Board does not exercise its powers capriciously or arbitrarily, or so as to thwart the purpose of the Legislature in establishing a system of university education, the board itself must determine what is necessary for the usefulness of the system, and thus will govern the University of Georgia and its several branches. The powers granted are broad and comprehensive, and, subject to the exercise of a wise and proper discretion, the regents are untrammelled except by such restraints of law as are directly expressed, or necessarily implied. The Legislature does not pretend to govern the system, but has entrusted this responsibility to the Board of Regents."

The Board of Regents being a constitutional department of the State government and charged with the control and management of the entire university system, it must necessarily follow that at all times every phase and detail concerning the operation of the State educational system are under the direct and exclusive authority of the said Board of Regents. It can in nowise delegate this duty and responsibility to the Athletics Association, Inc. Likewise, any State function which may be performed by the Athletic Association, Inc. is always subject to the supervisory powers of other State officials who by law are charged with certain responsibilities to all departments of the State government. In other words, the State Auditor must at all times have complete access to the books and records of the Athletic Association, and the same is subject to his authority and direction to the same extent as any other department or unit of the State government.

It likewise follows that if the Board of Regents see fit to pennit the Athletic Association to aid or assist in the performance of the State educational program, this corporation is subject to the investigative powers of the Attorney General. In other words, the Board of Regents cannot escape its complete and full responsibility in relation to its athletic program.

In view of the above laws and legal circumstances, it is my opinion that the Georgia Athletic Association may incorporate and borrow money to finance its operations, as a private corporation without in any way creating a debt or obligation against the State; but that it must operate under the supervision of the State Board of Regents subject to the Constitution and all provisions of law relating to the powers and duties of the Board of Regents in its control and supervisory power which in the present case is based upon its control and supervision of football as a part of the educational program of the University of Georgia.

EXHIBITD

Georgia Constitution, Art. 5, Sec. 3, Par. 3

The Attorney General shall act as the legal advisor of the executive department, shall represent, the state the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.

Contract Requirements for Approval

1. Please have **all** university signatures on the agreements prior to them reaching the executive level. The executive level includes: the President, Provost, all Vice Presidents and General Counsel. Not only does this demonstrate that the directors/deans are aware and approve of the agreement, it also saves time and the need to re-route the agreement.
2. If an agreement requires the signature of a member of the executive level and there is **NOT** a signature line already in place, please do the following:
 - a. Write in the signature line on the original contract “Please see the attached for all University signatures pertaining to this contract”
 - b. Print the signature line associated with the university department that is originating the contract and attach it to contract. You may delete any name that is not needed for your specific contract.

Please see pages 3 and 4 of this document for examples pertaining to step 2a above.

After steps 2a and 2b are complete, please continue routing the contract for appropriate approvals. This will eliminate any confusion where the executive member should sign. Signature lines for each VP of the university can be found on the Office of Legal Affairs website located at <http://www.gcsu.edu/legal/contracts.htm> . However, if a contract is written correctly there will be a signature line already in place for each signatory at Georgia College therefore the signature line inserts will not be needed.

If the contract does not have all approvals listed in the above Section 3 of the document titled ‘GC Contract Procedures’ located at <http://www.gcsu.edu/legal/contracts.htm> , the contract will be sent directly to those individuals for signature. An email will be sent to the contract originator advising them the contract was sent to the specified individual(s) needing approval. Continued failure by an originator to route contracts for appropriate signature may cause contracts to be sent back to the originator for proper routing.

3. All contracts must have the approved Contract Routing Form completed and attached to the document(s) requesting approval. If the documents do not have this form attached, the contract(s) will be returned to the originator unsigned with a memo explaining why.

4. The Vice President for Operations and Administration requests **ALL** contracts needing his signature, including change orders and pay requests, to be reviewed and approved by the Office of Legal Affairs **PRIOR** to his final approval. Please send all above stated documents including the required Contract Routing Form to the Office of Legal Affairs. After approval from general counsel, the Office of Legal Affairs will forward the documents to the Office of Administration and Operations for final approval. See #2 if there is no signature line indicated for Dr. Jones.
5. The Provost & Vice President for Academic Affairs requests **ALL** contracts relating to Academic Affairs to have a signature line inserted for each the following levels:
 - a. Department Chair → Dean → Provost
 - b. Director → Assistant/Associate Vice President → Provost
6. The Vice President for External Relations and University Advancement, and the Vice President and Dean of Students, both request **ALL** contracts relating to University Advancement and Student Affairs to have a signature line inserted for each of the following levels (the approval process will also follow this same direction):
 - a. Contract Originator
 - b. Director
 - c. Office of Legal Affairs
 - d. VP for University Advancement or VP and Dean of Students
 - e. VP for Operations and Administration
7. The Provost and Vice President for Academic Affairs, and the Vice President for Operations and Administration both require **ALL** contracts to follow the appropriate chain of command for approval; with final approval being their respected office.

Appendix

This Agreement shall consist of these Basic Terms and the Additional Terms attached hereto and incorporated by reference. In the event of conflict between these Basic Terms and the Additional Terms, the provisions of these Basic Terms shall control.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first set forth above.

.§!!:

EDUCATIONAL BENCHMARKING, INC.

By: _____
Name: _____
Title: _____

Participant:

\ense see (}t\at..ned docu.Mcn+
By: .-|bv \|evsi|j ;,;13 vc
Name: _____
Title: _____

IN WITNESS WHEREOF, the Division and Contractor have executed this Agreement as of the date first above written.

STATE OF GEORGIA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION

BY: _____

Judson H. Turner
Director

Georgia College and State University

BY: Paul Jones & VP for Administration and Operations *Y\mse &e. rtt+atched cLoc.u + -fbv LLvll VevSi-hJ*
Paul Jones
VP for Administration and Operations

Contract Routing Document



From:

Name:
Office Number:
Email:

Please provide all the following information prior to routing:

1. Name of other party to contract: _____

2. Effective Dates: Begins: _____ Ends: _____

Budget Account # _____ being used

4. If contract contains labor and services, and the amount paid by GC is \$2,500 or more, the vendor is required to attach a notarized affidavit to the contract stating they use E-Verify on all their employees.

5. Are fees being collected as part of this contract? **YES/NO**

6. Does this contract involve software and/or computer access to secure data? **YES/NO**
 If yes, route to the Chief Information Officer (IT) for approval.

List all needed signatures in order. Include where it should be returned after all signatures.

1.	2.
3.	4.
5.	6. Return to:

For use by Office of Legal Affairs

Contract Number:

Where contract sent:

Date contract sent to next location by OLA:

Approved As To Form:

By way of:

Signature Lines for Academic Affairs

Please scroll down to locate your department.

Center for Program & Evaluation

<Insert the names of all parties listed on the contract>

Recommended By:

Charles Martin
Director
Center for Program Evaluation and Development

Date

Approved As To Form:

Marc P. Cardinali
General Counsel

Date

Recommended/Approved By:

Kelli R. Brown
Provost and Vice President for
Academic Affairs

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

Deans

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, < Insert Title> _____ Date
<Insert Department>

<Insert Dean's Name>, Dean _____ Date
College of <Insert name of College>

Approved As To Form:

Marc P. Cardinalli _____ Date
General Counsel

Recommended/Approved By:

Kelli R. Brown _____ Date
Provost and Vice President for
Academic Affairs

Approved By:

Paul Jones _____ Date
Senior Vice President
for Finance and Administration

Enrollment Management

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, < Insert Title>
<Insert Department>

Date

Suzanne Pittman
Assistant Vice President
for Enrollment Management

Date

Approved As To Form:

Marc P. Cardinali
General Counsel

Date

Recommended/Approved By:

Kelli R. Brown
Provost and Vice President for
Academic Affairs

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

Extended University

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, < Insert Title>
<Insert Department>

Date

Mark Pelton
Associate Vice President
for Extended University

Date

Approved As To Form:

Marc P. Cardinalli
General Counsel

Date

Recommended/Approved By:

Kelli R. Brown
Provost and Vice President for
Academic Affairs

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

Honors Program

<Insert the names of all parties listed on the contract>

Recommended By:

Steve Elliott-Gower
Director of Honors Program

Date

Approved As To Form:

Marc P. Cardinalli
General Counsel

Date

Recommended/Approved By:

Kelli R. Brown
Provost and Vice President for
Academic Affairs

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

International Education Center

<Insert the names of all parties listed on the contract>

Recommended By:

Dwight Call
Assistant Vice President
for International Education

Date

Approved As To Form:

Marc P. Cardinali
General Counsel

Date

Recommended/Approved By:

Kelli R. Brown
Provost and Vice President for
Academic Affairs

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

Information Technology

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, < Insert Title> _____ Date
<Insert Department>

Robert Orr _____ Date
Chief Information Officer

Approved As To Form:

Marc P. Cardinali _____ Date
General Counsel

Recommended/Approved By:

Kelli R. Brown _____ Date
Provost and Vice President for
Academic Affairs

Approved By:

Paul Jones _____ Date
Senior Vice President
for Finance and Administration

LITC

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, < Insert Title> _____ Date
<Insert Department>

Joe Mocnik _____ Date
Director of Libraries

Approved As To Form:

Marc P. Cardinalli _____ Date
General Counsel

Recommended/Approved By:

Kelli R. Brown _____ Date
Provost and Vice President for
Academic Affairs

Approved By:

Paul Jones _____ Date
Senior Vice President
for Finance and Administration

The Macon Center

<Insert the names of all parties listed on the contract>

Recommended By:

Kendra Russell
Director of Macon Center

Date

Approved As To Form:

Marc P. Cardinalli
General Counsel

Date

Recommended/Approved By:

Kelli R. Brown
Provost and Vice President for
Academic Affairs

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

Signature Line for Campus Operations and Administration

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, <Insert Title>
<Insert Department>

Date

<Insert Name>, <Insert Title>
<Insert Department>

Date

Approved As To Form:

Marc P. Cardinalli
General Counsel

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

Signature Line for Student Affairs

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, < Insert Title>
<Insert Department>

Date

<Insert Name>, < Insert Title>
<Insert Department>

Date

Approved As To Form:

Marc P. Cardinalli
General Counsel

Date

Recommended/Approved By:

Bruce Harshbarger
Vice President and Dean of Students

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date

Signature Line for University Advancement

<Insert the names of all parties listed on the contract>

Recommended By:

<Insert Name>, *< Insert Title>*
<Insert Department>

Date

<Insert Name>, *< Insert Title>*
<Insert Department>

Date

Approved As To Form:

Marc P. Cardinalli
General Counsel

Date

Recommended/Approved By:

<Insert Name>
Vice President
for External Relations and
University Advancement

Date

Approved By:

Paul Jones
Senior Vice President
for Finance and Administration

Date