

# THE TOP TEN THINGS YOU NEED TO KNOW BEFORE YOU SIGN A CONTRACT FOR THE TEXAS A&M UNIVERSITY SYSTEM

The Texas A&M University System  
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## 1) What is a Contract?

- a) "Contracts are agreements which create an obligation to do or not do a particular thing." System Policy 25.07; See also Black's Law Dictionary, 322 (6th ed. 1990).
- b) "A contract is a promise or set of promises, the performance of which the law recognizes to be a duty and for the breach of which confers a remedy." Shelton Motor Co. v. Higdon, 140 S.W.2d 905 (Tex. Civ. App. -- Eastland 1940) rev'd on other grounds, 138 Tex. 121, 157 S.W.2d 627 (1941).
- c) Essential Elements:
  - i) offer and acceptance
  - ii) based on adequate consideration
  - iii) made by competent parties
- d) Contracts may have other names. Documents entitled: "Agreement," "Memorandum of Understanding," or "Statement of Intent", or "License Agreement" will generally be considered a legally binding contract if it provides for mutual promises or duties.
- e) Contracts provide for the rights and obligations of the parties to the contract and protect the parties in case a problem arises.

## 2) What is Sovereign Immunity?

- a) The doctrine of sovereign immunity, or, governmental immunity, protects the state from the kinds of lawsuits that are routinely brought against private citizens and business without the sovereign's [government's] consent.
  - i) It is originally based on the maxim, "The king can do no wrong."
  - ii) Also based on the common law rule that courts may not hear claims against the sovereign without the sovereign's consent.
- b) Sovereign Immunity protects the State of Texas and its agents in two ways.
  - i) The state is immune from being sued without its consent.
  - ii) If a plaintiff is granted permission to sue the state and wins, the state is immune from liability. A plaintiff cannot recover a court judgment unless the state agrees to pay the judgment.
- c) Sovereign Immunity and Contracts in The Texas A&M University System

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- i) The System and its components are agencies of the State and are immune from suit when contracting. Therefore, a plaintiff must be given permission to sue. Federal Sign v. Texas Southern University, (Tex. 1997).
  - ii) However, when a System component enters into a contract with a private party, the state waives immunity from liability and agrees to abide by the terms of a contract.
- d) Alternative Dispute Resolution
- i) Mediation: A neutral third party reviews evidence of the dispute and helps the parties negotiate a settlement.
  - ii) Arbitration: A neutral third party hears evidence of the dispute and resolves the dispute. The arbitrator's decision may not be binding upon the State.
  - iii) (This text was added March 2000 and was not presented at the 98 Symposium). While the above are used in the normal course of business, the 76th Texas Legislature enacted HB 826 which sets out an alternative dispute resolution process. Mediation and arbitration language should be replaced with the dispute resolution clause as provided by the Texas Attorney General.
- 3) Who can enter into contracts on behalf of the System?
- a) Contracts within the System are founded on an agency relationship.
    - i) An agent is one who is authorized by another, the principal, to transact some business or manage some affair for the principal.
    - ii) For an agency relationship to exist, there must be a meeting of the minds of the parties to establish the relationship and there must be some act constituting the appointment of the agent.
  - b) System Policy provides that the Chancellor, university presidents and agency directors shall provide "written express delegations of authority specifying those officers who are authorized to execute contracts on behalf of the System, institution, agency or service." See System Policy 25.07.
  - c) Check your contract administration rules for written delegations of authority.
  - d) System Policy provides who can sign agreements.
    - i) The Texas A&M Board of Regents.
      - (1) Board approval is required in the following contracts:
        - (a) contracts which involve a stated or implied consideration of more than \$300,000.00\*;
        - (b) contracts with a primary term longer than 5 years;
        - (c) certain real estate contracts;
        - (d) contracts with firms in which a Board member is the director, or owns stock.See System Policy 25.07 and 25.07. 01.
    - ii) The Chancellor approves contracts that are more than \$200,000 and less than \$300,000.

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- iii) The CEOs may approve contracts not in excess of \$200,000 that are not otherwise reserved for approval by the Board. See System Policy 25.07.01
- e) Problems with unauthorized contracts
  - i) Any contract entered into on behalf of the System or any of its components that does not conform with the contract administration policy is null and void. See System Policy 25.07.
  - ii) An individual executing a contract on behalf of a state agency, without the authority to do so may be personally liable for damages flowing from repudiation of the contract. See *Thomas, Richardson, Runden & Company, Inc. v. State of Texas*, 683 S.W.2d 100 (Tex. App. - Tyler 1985 writ ref d n.r.e.). In *Thomas*, an employee of the Texas Railroad Commission was found personally liable for a contract he signed that he was not authorized to sign. The Railroad Commission repudiated the contract and the vendor sued the State of Texas and the Railroad Commission. The court found that the employee was liable due to the employee's "implied warranty" of authority to execute the contract. The court ordered the employee to pay for the value of the services performed by the vendor and court costs.
- 4) Venue, Forum and State law provisions.
  - a) Forum and venue provisions in a contract provide the location of the lawsuit.
  - b) State law provisions relate to whose law will govern the dispute in the event of a dispute.
  - c) You should not sign a contract that provides for a forum or venue outside Texas. Likewise, Texas law should govern any dispute.
- 5) What are "indemnification" and "hold harmless" provisions?
  - a) Indemnification is an assurance by one party to compensate for the damage caused by another. *Black's Law Dictionary*, 769 (6th ed. 1990).
  - b) If a contract states that one party will indemnify another party under certain circumstances, it means that the party will be responsible for paying the losses or damages that result from the specified circumstances.
    - i) If you agree to a provision which states that your institution or agency will "indemnify" the other party to the contract, you may be creating a "debt" on behalf of the State of Texas which is unconstitutional. TEX CONST. art. 111 Sec. 49.
    - ii) A state agency is ordinarily unable to execute an enforceable indemnity agreement in favor of another party. See *Op. TEX. ATT'YGEN. MW-475* (1982). This kind of provision creates a "debt" on behalf of the State of Texas.
  - c) If the contracts states that one party will hold another harmless, it means that the party cannot sue the other or hold it liable for losses.

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- d) You should not sign a contract containing language that obligates your institution or agency to indemnify or hold the other party harmless.
- 6) Confidentiality Provisions
- a) Before you sign a contract, check for a confidentiality provision.
  - b) These clauses may violate the Texas Open Records Act. See TEX. GOV'T CODE, Sec. 152.001 (b) (Vernon's 1974).
    - i) The Open Records Act applies to information of every "governmental body." See TEX. GOV'T CODE Sec. 552.003(a)
    - ii) Any institution or agency within The Texas A&M System is considered a "governmental body."
    - iii) The purpose of the Act is to maintain the people's control "over the instruments they have created." Tex. Gov't Code Sec. 552.001 (b).
  - c) Generally, you should avoid signing a contract containing language that certain information will be kept confidential. There are exceptions, however, it is OGC's job to apply the law.
- 7) Terms, Termination, and Default
- a) The contract should have clear beginning and end dates.
  - b) The contract should have a "no fault" termination prior to the ending date
    - i) "Funding out" clause provides that the institution or agency is not bound by the terms of the contract if the legislature does not appropriate funds. It is a good idea to include this type of clause in your contracts.
    - ii) "Funding Out" clause: *NONAPPROPRIATION. Notwithstanding anything in this Contract to the contrary, all obligations of TAMUS and the University to make payments hereunder are subject to the appropriation of sufficient funds for such payments by the Legislature of the State of Texas. Failure by the Legislature of the State of Texas to appropriate funds to TAMUS or the University sufficient to make such payment shall relieve TAMUS or the University from the obligation to make such payments during the term of the nonappropriation.*
  - c) The contract should provide for events of default of each party.
- 8) Attorneys' Fees
- a) Do not sign a contract containing a provision that your institution or agency will be responsible for the other party's attorney's fees.
  - b) Such provisions are considered binding upon the state, which is impermissible.

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- c) The Attorney General prosecutes and defends all actions in which the state is a party. See TEX GOVT CODE Sec. 402. 021.

### 9) Do I really need to read a written contract? YES!

#### a) Before you sign, think about the following:

- i) Does the contract reflect the intent of the parties as to all provisions? The Office of General Counsel may review the contract for legal sufficiency, but you are the one who knows what the parties were thinking when the contract was formed.
- ii) Does the contract state the purpose and is the purpose clear?
- iii) Can your institution or agency fulfill the contract terms?
- iv) Is the contract in the agency's best interest?
- v) Are the terms stated in the contract reasonable?
- vi) Is the contract consistent with your institution's or agency's policies and procedures?
- vii) Is the contract consistent with state and federal laws, rules and, regulations?

- b) Do not rely on another party's oral assurances that are inconsistent with the terms in the contract. In the event of a conflict, the terms as stated in the contract will govern the rights and duties of the parties. If in doubt about a particular obligation or right, add the appropriate language.

- c) Make sure that the legal names and locations of the parties who are entering into the contract are identified. Generally, any contract you sign should begin by stating: "This Agreement is made and entered into by and between \_\_\_\_\_, a corporation, and \_\_\_\_\_, a member of the Texas A&M University System."

### 10) HELP!

- a) The Office of General Counsel (OGC) provides legal advice and related services to our clients, which are the Board of Regents and the employees of The Texas A&M University System acting in their official capacities.
- b) OGC also provides other legal services including, writing legal opinions, drafting and reviewing legal documents, and assisting in litigation.
- c) CEO's and other designated officials may request legal assistance for official business directly from our office. Other officers are asked to route their requests through the chain of command at their respective institutions and agencies.

\* Some dollar amounts have been updated since this presentation. Please see the referenced rule or document for updated information.