



UNIVERSITY OF DALLAS

*Vice President for Board and Legal
Services and General Counsel*

ITEMS TO CONSIDER IN CONTRACT DRAFTING Spring 2022

The Office of General Counsel has identified various items to consider during contract drafting and negotiation. To discuss these items or other issues, please contact Ms. Heather Lachenauer, Vice President and General Counsel, at hlachenauer@udallas.edu.

I. Arbitration / Alternative Dispute Resolution

The University of Dallas should not agree to a clause that provides that any future disputes be resolved through binding arbitration or other form of alternative dispute resolution.

II. Assignment

The University of Dallas generally does not agree to allow the other party to assign its rights under the contract to a third party. We suggest inserting the following language:

“This Agreement shall not be assigned by either party without the prior written consent of the parties hereto.”

III. Attorneys’ Fees / Costs

The University of Dallas should not agree to a provision that awards attorneys’ fees and costs to the prevailing party in any dispute arising out of the contract.

IV. Complete Agreement (or Merger) Clause

The contract should contain a “complete agreement” clause, which incorporates all prior representations made during negotiations into the current contract and provides that the representations set forth in the contract are the only representations that bind the parties. We suggest inserting the following language:

“This document contains the complete agreement between the University of Dallas and [other contracting party], who stipulate that they, including persons acting on their behalf, have made no representations with respect to the subject matter of this Agreement except such representations as are

The Catholic University for Independent Thinkers

specifically set forth herein and that any other representation not contained in this Agreement is not binding.”

V. Confidentiality

The other contracting party may attempt to keep information that it provides to the University of Dallas, and even the terms and conditions of the contract itself, confidential. Generally, the University may agree to use that care which it uses to protect its own confidential information not to disclose to any third-party information provided to it by the other contracting party. However, the contract must clearly identify certain specific instances where such an obligation of confidentiality does not apply. One of these instances involves information required to be disclosed by law, regulation or court order. We recommend the following language:

“During the Term, either party may be provided, have access to or be exposed to information, data or materials (the “Receiving Party”) that the other party (the “Disclosing Party”) or an Affiliate of the Disclosing Party regard as confidential, including intellectual property, marketing and sales information, customer lists, “know-how,” or other proprietary information (collectively “Confidential Information”). All Confidential Information received by Receiving Party (including information disclosed in any preliminary discussions or negotiations in contemplation of Work Product and the existence of such discussions or negotiations), directly or indirectly, shall be held in strictest confidence by Receiving Party, who shall not directly or indirectly disclose or use any Confidential Information, except 1) for the purpose of conducting business with Disclosing Party under this Agreement, 2) as may be required by law and then only after making reasonable efforts to consult with the Disclosing Party, or 3) to a court for the purpose of enforcing or interpreting this Agreement. Confidential Information shall not include any information which is already in the public domain, provided such information is not in the public domain as a consequence of disclosure by a party in violation of this Agreement.”

If confidentiality is an issue, please contact the Office of General Counsel.

VI. Damages / Limitation of University of Dallas’s Liability

When the University of Dallas is providing services under a contract, the University of Dallas’s liability under the contract should be limited to the amount of monies that the University of Dallas receives from the other contracting party. We suggest

The Catholic University for Independent Thinkers

inserting the following provision. This provision, or any provision that includes a limitation of liability, should be in bold or otherwise conspicuous (e.g., a larger font or a contrasting type or color).

“In no event shall the University of Dallas 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 gross negligence) or otherwise. Any damages arising under this Agreement for which the University of Dallas may be liable for any purpose whatsoever shall be limited to the monies actually paid by [other contracting party] to the University of Dallas.”

VII. Damages / Limitation of Contracting Party’s Liability

It is generally unacceptable to the University of Dallas for the contracting party to limit its liability for breaching the contract, to restrict the remedies or relief that the University of Dallas may seek in the event of a breach, or to disclaim express and/or implied warranties. If the other contracting party is attempting to limit its liability in these or other ways, please contact the Office of General Counsel.

VIII. Delivery / Risk of Loss

If an item is to be delivered to the University of Dallas, it is preferable that the contract provides that the item be tendered F.O.B. destination point. When so shipped, the risk of loss does not pass to University of Dallas until the item is delivered to the pertinent University of Dallas facility.

IX. Effective Date of Contract

Normally, a contract becomes effective when it is signed by both parties. In some instances, a contract is worded such that the effective date of the contract is a date before the parties have actually signed the contract. Although this practice should be avoided if possible, if it is essential that the effective date of the contract be before the date that the parties have signed the contract, then the effective date should be referred to “as of” the date in question. Performance should not begin under a contract until the contract has been signed by all parties.

X. Force Majeure

We recommend the inclusion of the following language to account for the possibility

The Catholic University for Independent Thinkers

of non-performance due to unforeseen circumstances:

“If the performance of any obligation, in whole or part, by a party under the Agreement is prevented, restricted, interfered with, or becomes commercially impractical due to causes beyond the reasonable control of the party, including, but not limited to, acts of God, acts of terrorism, civil disorder, industrial disputes, natural disaster, public health risk, governmental action, interruption or curtailment of commercial or public transport, or the issuance of a travel advisory, travel warning, travel alert, or public health alert by a governmental organization, then the impacted party will be excused from such performance due to such prevention, restriction, interference, or commercial impracticality.

In the event of a Force Majeure, the impacted party must notify the other party if the Force Majeure prevents (or is likely to prevent) it from complying with any of its obligations as soon as it becomes aware of the Force Majeure.

The party affected by the Force Majeure must endeavor to work around or overcome the effect of the Force Majeure and must keep the other party informed of the continued and expected duration of the Force Majeure and of any measures taken to comply with the Agreement.”

XI. Governing Law and Venue

The contract should state that:

“The Agreement contains the entire understanding of the parties with respect to the subject matter of the Agreement and is governed by the laws of the State of Texas. For the avoidance of doubt, the interpretation of the terms and conditions shall be governed by the laws of the State of Texas and the performance of the Services shall be in full compliance with the laws of the State of Texas. The Agreement supersedes all other agreements and understanding, both oral and written, between the parties relating to the subject matter of the Agreement.”

If the other contracting party will not agree to the applicability of Texas law and prefers that the law of another state govern, please contact the Office of General Counsel.

XII. Indemnification / Hold Harmless / Exculpatory Clause

The Catholic University for Independent Thinkers

We recommend inclusion of the following provision. This provision, or any provision that includes indemnity, should be in bold or otherwise conspicuous (e.g., a larger font or a contrasting type or color).

a. [Other contracting party] hereby agrees to indemnify and hold the University harmless from and against any and all loss, cost, claim, expense or liability (including but not limited to attorney's fees) resulting from the loss of life of or personal injury to the officers, employees or agents of [other contracting party] or the damage to or loss of property of [other contracting party], its officers, employees or agents, arising from, incident to or occurring in connection with the performance by [other contracting party] of its obligations under the Agreement or the presence of its officers, employees or agents of [other contracting party] on the property of the University; provided, however, the foregoing indemnification shall not extend to loss of life, personal injury or property loss or damage caused solely by the negligence of the University.

b. Except as provided in subsection (a) above, each party agrees to indemnify and hold harmless the other party from and against any and all loss, cost, claim, expense or liability (including but not limited to attorney's fees), resulting from the loss of life or personal injury to any person or the loss of or damage to any property arising from, incident to or in connection with the negligent acts or omissions of the indemnifying party; provided, however, the responsibility of the indemnifying party to indemnify the other party shall be reduced in proportion to the negligence of the other party, if any, which proximately contributed to said loss of life, personal injury or property loss or damage.

c. The indemnification extended by [other contracting party] to the University under the Agreement shall extend not only to the University, but also to the University's Board of Trustees, officers, employees and agents.

d. The indemnity provided hereunder shall be without additional charge.

XIII. Independent Contractor Status

When the University of Dallas contracts with outside third parties, the contract should include language that makes clear that the parties are independent

The Catholic University for Independent Thinkers

contractors. We suggest inserting the following language:

“The University of Dallas and [other contracting party] shall be deemed to be and shall be independent contractors. Neither party is authorized or empowered to act as employee or 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. [Other contracting party] shall indemnify and hold the University harmless against all liability and loss resulting from Contractor’s failure to pay all taxes and fees imposed by the government under employment insurance, social security and income tax laws with regard to Contractor’s employees engaged in the performance of the Agreement.”

XIV. Insurance

Specify that the other party provide written proof of insurance, satisfactory to the University of Dallas, within ten (10) business days of the execution of the contract. In certain circumstances, the other contracting party should also list the University of Dallas as an additional insured. Please contact the Office of General Counsel should this term be negotiated.

XV. Intellectual Property / Patent Rights

The University of Dallas’s claims to intellectual property and patent rights should be protected. If these items are an issue in the contract being negotiated, the Office of General Counsel should be contacted.

XVI. Late Payment Fees

The University of Dallas does not agree to pay a charge or fee for late payment. Accordingly, sections or provisions in a contract that would obligate the University of Dallas to pay a late fee should be stricken.

XVII. Length of Contract

Ordinarily, the University of Dallas does not agree to enter into a contract longer than two years in duration. Exceptions to this may exist in certain circumstances, such as if the contract does not obligate the University of Dallas to pay money and gives the University of Dallas an unrestricted right to cancel the contract at any time.

If you believe that it is necessary to enter into a contract for a period longer than two

The Catholic University for Independent Thinkers

years, please contact the Office of General Counsel. Contracts may also be renewed. See Renewal of Contract below.

XVIII. Non-Discrimination

The University of Dallas prohibits illegal discrimination and favors a diversified workforce. Accordingly, we suggest inserting the following language:

“Neither the University of Dallas nor [other contracting party] shall discriminate against any person on the basis of age, disability, national origin, race, religion, sex, or other protected class in the performance of this Agreement, except as otherwise permitted by law.”

XIX. Notice

The contract should contain the full name, title, address, e-mail address and telephone number of a designated contact person for the other contracting party.

XVIV. Payment

Particularly if the contract provides that the other party will pay the University of Dallas, the contract should clearly establish the time, place, method and frequency of payment.

XX. Renewal of Contract

As noted above, contracts are ordinarily limited to a period of two years. Contracts may, however, be renewed. A contract should not automatically renew and it should not renew without the University of Dallas having to affirmatively indicate in writing its agreement to renew the contract. If you desire to renew a contract beyond its initial term, the following language should be inserted:

“This Agreement may be renewed for additional periods of one year each if agreed upon in writing by both parties.”

Contracts requiring the University of Dallas to expend funds may not be renewed unless the necessary funds have been appropriated. Please consult with the Vice President & CFO to discuss any queries regarding designated funds.

XXI. Severability Clause

The Catholic University for Independent Thinkers

A severability clause allows a contract to remain enforceable if one or more of its provisions are found to be invalid. We suggest inserting the following language:

“If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws effective during the term of this contract, such provision is fully severable and this Agreement must be construed and enforced as if such illegal, invalid or unenforceable provision never comprised a part of this contract. The remaining provisions of the contract shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or its severance from this Agreement.”

XXII. Signatory Authority of University Officials

The President of the University of Dallas has the authority to sign all contracts for the University of Dallas and the President has delegated that authority in part to various University of Dallas officials. The [Designation of Contracting Authorities Policy](#) shows which officials have been delegated authority to sign what type of contracts.

XXIII. Tax-Exempt Status

As a private, non-profit educational institution, the University of Dallas is ordinarily not required to pay income or sales taxes. Accordingly, any section of a contract that provides for taxes to be withheld from payments owed to University of Dallas or sales taxes to be added to payments owed by the University of Dallas should be deleted.

XXIV. Templates

Contract templates have been developed for a number of types of agreements. These may be accessed at the Office of General Counsel website. Standardized “form” contracts have been developed for certain relatively routine transactions, such as University of Dallas faculty employment contracts and University of Dallas student housing leases (contact the Director of Housing Operations).

XXV. Termination

The following is an example of an acceptable termination provision:

The Catholic University for Independent Thinkers

“The Agreement may be terminated in whole or in part for any reason by the University upon sixty (60) days prior written notice. Upon receipt of notice of termination, [other contracting party] shall immediately cease performance of the Services to the extent set forth in the termination notice and shall take all reasonable steps to minimize costs related to such termination. The University shall pay for Services properly rendered through the date of termination.

Either party may terminate the Agreement at any time for breach by the other party.”

If the contract allows early termination by the other contracting party, the contract should also provide that the other party shall pay all costs accrued by the University of Dallas as of the date of the termination, including non-cancelable obligations incurred prior to the effective date of termination. In addition, the other party shall repay to the University of Dallas any monies that it received from the University of Dallas for any obligations that the other party has not fulfilled at the time of termination.

XXVI. Use of the University of Dallas Name

It is important to prevent the unauthorized use of the University of Dallas name. A contract should provide that:

“[Other contracting party] shall not use the University of Dallas’s name in any advertising or publicity material or make any form of representation or statement in relation to the work conducted under the terms of this Agreement that would constitute an express or implied endorsement by the University of Dallas of any commercial product or service, nor will [other contracting party] authorize others to do so, without first having obtained written approval from the University of Dallas.”

XXVII. Warranties

The University of Dallas should not “warrant” or make guarantees in a contract. If this is important to the other contracting party, the University of Dallas can agree to language that states that the University of Dallas will use reasonable efforts to perform in accordance with the terms and conditions of the contract.

XXVIII. “Whereas” Clauses

The Catholic University for Independent Thinkers

These clauses generally appear at the beginning of a contract. They often provide background information about the parties and the reason(s) the parties are entering into the contract. Such clauses may aid in establishing the intent of the parties and in interpreting the contract should a disagreement later arise.

XIX. Modification / Amendment Clause

Any modification or amendments to a contract should be in writing, and a contract should include a provision like the following:

“The Agreement may not be modified or amended except upon the mutual written consent of both parties through the signatures of their authorized representatives.”

DUE DILIGENCE CONSIDERATIONS

When the University of Dallas enters into a contract, it enters into a relationship with another party that offers potential risks and benefits. All University of Dallas personnel involved with a contract should consider the implications of such a relationship before they negotiate, draft, approve, or sign the contract.

Such considerations should, at a minimum, include:

- Does a contractual relationship with the other party support the mission of the University of Dallas?
- What are the potential costs and benefits of the contract? Are such costs and benefits of a one-time or recurring nature?
- Does the University of Dallas have the ability to fulfill what would be its obligations under the contract?
- Does the other party have the ability to fulfill what would be its obligations under the contract?
- Has the University of Dallas contracted with this party before? Have other entities that have previously contracted with this party been contacted?
- Does the individual who will sign the contract on behalf of the other party have the authority to do so?
- What are the consequences for the University of Dallas and the other party if either fails to fulfill its respective obligations?
- Will the contract impact other departments at the University of Dallas beyond the department responsible for managing the contract? If so, have the appropriate personnel at those other departments been notified and their views solicited?
- How will the contractual relationship appear to the Board of Trustees and the general public?
- Will the contract serve the best interests of the University of Dallas?

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