



FLORIDA A&M UNIVERSITY OFFICE OF THE GENERAL COUNSEL ADVISORY

OGC ADVISORY NO. 11-02		INITIAL ISSUANCE DATE: 07/25/11	
ATTACHMENT(S): OGC Contract Cover Sheet		REVISION DATE(S): 12/1/18	
TO:	University Administrators, Faculty, Staff and Volunteers		
FROM:	Shira R. Thomas, Interim General Counsel		
SUBJECT:	Contract Procedures		

Purpose:

The purpose of this Contract Procedures Advisory (Advisory) is to provide guiding principles and procedures regarding contract review by the Office of the General Counsel (OGC). This Advisory applies to all contracts concerning the Florida A&M University Board of Trustees (FAMU or University) or its resources and includes, without limitation, contracts requiring payment to or by the University, contracts funded from University sources, except University Direct Support Organizations, and other agreements creating University obligations such as memoranda of understanding or athletic competition contracts.

Policy:

The University routinely enters into contracts in the regular course business. The OGC reviews contracts to ensure that the legal terms are appropriate and favorable and to protect FAMU's legal and financial interests. As such, the OGC drafts standard University contract templates (University Templates) for various transactions and business relationships. Many departments use University Templates. If a department uses an unmodified University Template, the OGC is not required to review and sign the contract; however, if any modification is made to a University Template or if an outside party's contract is used, the OGC must review and approve the document.

Further, FAMU Regulations, including Regulations 1.021 and 6.005, require all contracts for commodities and services to be submitted to the OGC for review and approval as to form and legality, unless, as noted above, the contract is an approved unmodified template.

Authority to Execute Contracts:

Appropriate contracting authority is essential to FAMU as a public body corporate. Such authority must be expressly granted, as implied or apparent authority does not exist. Pursuant to the Florida Constitution and the Florida Board of Governors (BOG) and FAMU regulations, the President is the chief executive officer responsible for the operation and administration of the University. The President's authority includes the approval and execution of all contracts, agreements, memoranda of understanding, and other documents legally committing the University on behalf of the FAMU Board of Trustees. Therefore, the President is authorized to sign contracts on behalf of the University in accordance with FAMU regulations. However, the President has delegated specific written authority to

execute contracts, within the limits of their delegation, to a limited group of senior University administrators (e.g. Provost and Vice Presidents). An index of contract delegations is located on the OGC webpage under the "Delegation of Authority" tab. Delegated authority is only valid within the limits of the express delegation. This signature authority cannot be sub-delegated.

As expressly delegated, the President, Provost or Vice Presidents must sign all contracts, agreements, memoranda of understanding, and other documents regarding legal assurances, commitments, and obligations on behalf of FAMU. Consequently, University employees must not sign such contracts unless they have written delegated authority to do so by the President. University personnel must be careful not to misrepresent to a third party that they are in a position to commit the University. Any transactions conducted absent a written delegation of authority or contrary to the state laws, or the BOG or FAMU regulations are invalid because the individual signing on behalf of the public entity is operating without authority. An employee is subject to personal liability and possible disciplinary action for improperly signing contracts or obligating the University. The President shall sign all contracts in the absence of an express delegation.

Contracts: Definition/Types of Contracts Reviewed

A contract is any agreement between FAMU and another party creating an obligation to do or refrain from doing a particular thing and which is recognizable at law, regardless of its title as a "contract." Terms synonymous with "contract" include, but is not limited to: "agreement," "letter of agreement," "letter of understanding," "memorandum of understanding/agreement," "operating agreement," "teaming agreement," etc. A contract essentially binds the parties to their agreement. However, the terms "contract" and "agreement" are often used interchangeably.

The elements of a contract include: an offer, acceptance, consideration and mutual assent. There must be a meeting of the minds, i.e. contract terms are to be stated clearly and unambiguously and must contain material terms.

The OGC reviews the following non-exclusive categories of contracts: Affiliation Agreements, Articulation Agreements, Construction Contracts; Leases, Athletic Contracts, Service/Commodity Contracts, Research Contracts, Attorney Services, Film Agreements, Information Technology (Software/Hardware) Contracts, Licensing Contracts, Releases/Waivers, Speaker/Artist/Performer Contracts, Facility Use Agreements, Consultant Services Contracts, Sponsorships Contracts, Confidentiality and Non-Disclosure Agreements, Consortium Agreements, MOU/MOA, and Media/Publication Contracts.

Procedure:

Unmodified University Templates do not require further legal review or approval. However, outside party contracts, non-approved University contracts, and University Templates which have been modified, must be submitted to the OGC prior to execution by either party.

Please allow at least ten (10) business days for the OGC to review and process all nonstandard contracts and allow at least seven (7) business days for standard contracts. Any revisions made must be incorporated into the contract and/or initialed as appropriate. If the department or an outside party to a contract has questions regarding contract revisions made by the OGC, please direct them to the OGC.

After the OGC has completed its legal review, the contracts are returned to the delivering department/employee for additional processing (e.g. to obtain signatures and execution). Contracts must be completed and fully executed (signed by both parties) prior to receiving or providing commodities or services. Provide a fully executed copy of the Agreement for the OGC's file.

Contracts may be hand delivered, mailed, faxed, or emailed to the OGC.

Prior to forwarding the contract to the OGC for review, ensure that:

- the contract OGC cover sheet is completed (see the Attachment);
- the document is reviewed thoroughly to verify that all terms and conditions are clearly stated in the document; and
- to the extent possible, an editable version is provided.

Note: Procurement contracts (commodity/service acquisition contracts) must be routed to the OGC from the Purchasing Department.

The following BASIC TERMS AND CONDITIONS must be incorporated in the contract:

- Parties Names (Correct/Legal Name); the University must be identified by its legal name for contracting purposes: "Florida A&M University Board of Trustees" or "Florida A&M University (FAMU), acting for and on behalf of the FAMU Board of Trustees"
- Dates/Term of the contract or Period of Performance;
- The responsibilities and obligations of the parties respectively;
- Deliverables;
- Payment Terms, if applicable;
- Termination Language/Procedures (e.g., 30 days prior written notice);
- A signature line for the authorized individuals executing the contract; and
- Florida law and jurisdiction.

During the early negotiation phase, advise the other party that the University cannot accept or agree to the following terms:

- Language that requires FAMU to indemnify or hold harmless another party.
- Language that requires FAMU to list another entity as an additional insured.
- Confidentiality provisions contrary to Chapter 119, Florida Statutes.
- Alternative Jurisdiction--Governing Law/Venue in another state or county.
- Click-through agreements and signatures.

Avoid the common errors below:

1. **Improper Identification of Parties.** All parties must be clearly identified and the University must be identified by its legal name: "Florida A&M University Board of Trustees" or "Florida A&M University (FAMU), acting for and on behalf of the FAMU Board of Trustees."
2. **Insufficient Terms.** All terms must be clearly defined. For example, many contracts contain the term "travel expenses." However, absent a definition, this can include the more expensive, first class airfare, which the University never intended. If travel expenses include mileage, define the rate of compensation. There must be a "meeting of the minds" of each party as to the contractual terms.
3. **Fictitious Names.** When a party does business in a name other than its own, it is essential that the name of the party appears as "_____ doing business as (d/b/a) _____ (the fictitious name)." Please check www.sunbiz.org to ensure that the vendor can do business legally in Florida.
4. **Indemnification/Hold Harmless Clauses:** As a state university, FAMU should not indemnify and/or hold harmless other parties. This is comparable to waiving or altering the state's

sovereign immunity. The University cannot alter the state's sovereign immunity by contract and cannot lend the State's credit; only the Florida Legislature may do so. Section 768.28, F.S., outlines the extent to which FAMU's sovereign immunity is waived.

5. **Insurance Clauses:** may require higher coverage limit than is authorized by law. The University may also need additional coverage.
6. **Tax Clauses:** FAMU is exempt from paying state of Florida sales and excise taxes.
7. **Penalty for Early Termination:** Do not accept penalties for early termination of contracts.
8. **Contract Renewals.** Please attach the original contract for every contract renewal/extension. **Note: Renewals/Modifications Post-Contract.** No contract may be modified or renewed after its ending date. Please set up an internal mechanism to monitor contract expiration dates. Once a contract is expired, if work continues, it is unauthorized and may not be paid.
9. **Marking/Referencing Attachments.** Ensure that contract attachments, appendices, and exhibits are included and are appropriately numbered and/or labeled. Clearly mark and identify additional provisions/riders. Also, reference the attachments, including number of pages, in the contract and on the front of the attachment.
10. **Numbering Contract Renewals.** Contract renewals must have the original contract number and include a titled such as "Amendment," "Renewals," "Addendum," or "Modification," etc.
11. **Unilateral Additions.** At no time may a contract be modified without the explicit consent of both parties, unless expressly stated in the agreement. Do not add terms and conditions to a contract after it has been signed, without conferring with all parties. Documents, which are subsequently added, must be approved by the contractor prior to resending the document to the OGC.
12. **Initialing of Changes.** All changes, whether written on the contract or added by a separate addendum, must be initialed or signed by all parties. Please do not use white-out.
13. **Striking Language.** A broad X over inapplicable language may create questions as to what is excluded in a contract. Please draw lines through each and every inapplicable sentence and have all parties initial the change.
14. **Blanks.** Ensure that all blanks are completed and all information is provided before submitting the contract for review.
15. **Bidding Information.** Bidding information must be incorporated by reference in the contract, as applicable. Consult with the Procurement Department.
16. **Sole Source Contracts.** Please provide clear and detailed statements in the certification form justifying the sole source contract. Consult with the Procurement Department.
17. **Term of Contract.** Contract, including renewals, should not exceed five (5) years without prior approval from the Procurement Department or OGC, as applicable.
18. **Mandatory Clauses.** There are mandatory clauses that should be placed contracts.

Contract templates are located on the OGC webpage under the "Templates" tab. However, if a customized contract is needed or for further information regarding this Advisory, please contact the Office of the General Counsel at (850) 599-3591.