Contract Catalyst
How to Speed Up the Contract Review Process

June 17, 2015
Introduction

“We’ve got Tom O’Brien on bass, Nick Weber on drums, and Matt McIntyre on contracts.”
Overview

• What is a contract?
• What is the purpose of a contract?
• Reviews of Contracts
  • Business Review
  • Legal Review
• Legal Review of Contracts
• How can we speed up the process?
• Negotiating Problem Provisions
• Tales from the Trenches
What is a contract?

- Generally,
  - Any agreement
  - Between the University and a Third Party (vendor, consultant, etc.)
  - Which obligates the parties to
    - Do something or
    - Refrain from doing something.
What is the purpose of a contract?

- State the business terms
- Define the relationship of the Parties
- Allocate risk
- Avoid ambiguities and vagueness
Reviews of Contracts

• A business and a legal review process applies to all contracts.
  • Business Review
    • Conducted by the submitter/department before submitting to OGC for legal review.
  • Legal Review
    • Currently, all contracts must be submitted to the OGC for legal review prior to signature.
    • Conducted by the OGC Contracts Review Team
    • Fun fact: In 2014, we processed and reviewed 3,635 contracts.
      • Of those contracts, 57% were templates.
    • “Approved as to form”
      • Reviewing legal terms, not business decisions.
Legal Review of Contracts

- Submit cover sheet, contract in hard copy to OGC
  - TIP: Include the previous agreement and/or relevant agreements.
    - If submitting a Statement of Work on a previously executed Master Agreement, send the Master Agreement.
    - If we’ve negotiated with this party before and made changes, submit the prior agreement.
- OGC logs contract into SharePoint, sends email notification to submitter that we have the contract and it is under review.
  - Assigned to member of Contracts Review Team
Legal Review of Contracts

• Standard Review Time – 2 weeks
  • Non-templates and negotiating contracts pushes out timeframe
    • TIP: Use template agreements and addendums to speed up the review process.
    • TIP: Contact us if you need assistance negotiating terms before submitting contract.

• Once approved, OGC will send for signature to appropriate office.

• Once signed, submitter is notified that contract is ready for pickup.
  • No changes can be made after University signs the contract
    • If changes, need amendment, contact us.

• Submitter then obtains counterparty signature
  • Responsibility of department to keep a copy of signed contract.
How can we speed up the legal review process?

• Use templates –
  • Choose the right one
    • Master Agreements
    • Statements of Work
  • Professional Services
  • Service Provider
  • Performer
  • Non-Disclosure
  • Photographer/Videographer
  • Amendment/Addendum
• Fill them out completely and correctly
  • Effective dates, termination dates
  • Use legal name of counterparty
  • Complete exhibits
How can we speed up the legal review process?

- Submit previous agreements
  - Can work off of previously accepted agreements and edits.
- Know who to contact
  - OGC Contracts Review Team
  - contractquestions@neu.edu
  - x2157
- Don’t sign the contract
  - What happens when someone signs a contract that was not supposed to?
    - Depends...but contact us.
- Plan ahead
  - Remember, signed contract needs to be in place before the work/event begins.
  - Every contract cannot be a “Rush”!
- Negotiating
  - Significant changes to problem provisions?
  - Contact us!
Negotiating Problem Provisions

• Indemnity
• Confidentiality
• Limits of Liability
• Use of Northeastern’s Name/Intellectual Property
Negotiating Problem Provisions

• Indemnity
  • “If Northeastern gets sued by a third party because of the counterparty’s acts/omissions, the counterparty must pay Northeastern.”

• Confidentiality
  • Safeguard and defend confidential information from unauthorized access, use, disclosure.
  • Breach of confidential information
  • FERPA, MA Privacy Laws, HIPPA, etc.

  • If Northeastern is paying for a counterparty to make/do the work, the work belongs to Northeastern.
Negotiating Problem Provisions

• Limits of Liability
  • We want the counterparty to stand behind its product/work.
  • We don’t like unreasonable limits of liability.
    • If Northeastern doesn’t cause the harm, it should NOT have to pay for it.
    • Not necessarily a direct correlation between the dollar value of the contract and amount of potential liability.
  • Northeastern resources are for its Education and Research missions, not to bear a counterparty’s financial risk.
  • A Statute of Limitations acts the same way.
    • We don’t like those either.

• Use of Northeastern’s Name/IP
  • Highly controlled
  • Use rarely permitted
  • Always required: prior, written approval in each case.
Tales from the Trenches

What not to do (part one)

1. CAN YOU APPROVE THE PURCHASE OF THIS SOFTWARE?
2. YOU NEED TO RUN THE SOFTWARE LICENSE PAST LEGAL FIRST.
3. YOU NEED TO FILL OUT A LEGAL SERVICES REQUEST FORM, I'LL EMAIL IT TO YOU.
4. MAKE SURE YOU SPECIFY WHETHER THE SOFTWARE IS OPEN SOURCE OR NOT.
5. HOW WOULD I KNOW IF IT MEETS YOUR DEFINITION OF OPEN SOURCE?
6. IT DEPENDS HOW THE LICENSE IS WRITTEN. YOU'LL NEED TO ASK LEGAL TO REVIEW IT.
7. NEVER MIND, I'LL JUST FORGE YOUR SIGNATURE ON THE FORM.
8. MAYBE THIS IS WHY I'VE NEVER SEEN A SOFTWARE LICENSE.
Tales from the Trenches

What not to do (part two)
Not my employee!

The University of Massachusetts and UMass Medical Center had clinical affiliation agreements for UMASS medical students to perform educational clinical rotations at the Medical Center.

The agreements were seemingly contradictory as to which entity is responsible for the students while they are on clinical.

In the case of malpractice by a resident, who has the liability—the University or the Hospital?
A university entered into an agreement for a 3-hour cruise around Boston Harbor during one of the Tall Ships festivals. The event was marketed and several hundred people purchased tickets for the cruise.

By oversight, the contract was not sent to OGC and the agreement did not have an exit strategy in case of inclement weather.
No Way Out

A university entered into a lease for office equipment and related maintenance. However, the agreement automatically renewed without providing a termination clause. Eventually the equipment became outdated.
The $18 million Motorcycle Ride

On April 1, 2012, Bobby Petrino, head football coach at the University of Arkansas, was involved in a motorcycle crash with his 25-year old mistress.

Petrino was in the middle of a seven-year employment contract that contained a multi-million dollar severance package in the event that he was terminated without cause.

How could the University terminate Petrino for his behavior without paying his guaranteed $18 million severance?
“Moral Turpitude” clause saves the day!

The University protected itself by including a “moral turpitude” clause in Petrino’s employment contract, giving the University the right to suspend or fire Petrino for conduct that "negatively or adversely affects the reputation of the (university's) athletics programs in any way."

Petrino’s morally questionable conduct and misleading statements cost him more than $18 million remaining on his contract.

It was quite an expensive joy ride.
Sinking Stadium

The Project
A new $50 million multi-use stadium is 70% complete. In eight months, the seats will all be filled for the football team’s home opener. After that, more football, soccer, lacrosse, and outdoor concerts are scheduled.

The Problem
The University notices horizontal cracking in the concrete support columns. Investigation by structural engineers reveals the stadium is sinking under its own weight at six support columns. Costs are expected to exceed $8 million.
Who assumed the risk for the structural failures?

• The contract between the University and the Architect used the American Institute of Architects (AIA) standard form agreement. The contract included 3 troubling provisions:

1. Mutual Waiver of Consequential Damages
2. Exclusive Remedy
3. Limitation of Liability
Mutual Waiver of Consequential Damages

“The Architect and the [University] waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement.”

Impact of the Provision

The University cannot recover the following costs:

- $2 million in lost future profits
- $800,000 incurred because of increased interest rates
- $200,000 cost of the forensic engineers’ investigation
- $1 million delay claim by the contractor
Exclusive Remedy

“In the event any of the services of the Architect performed under this Agreement are adjudged to fail to meet the standard of ordinary care...such services shall be deemed ‘Defective Services.’ The Architect shall re-perform all such ‘Defective Services’ at the Architect’s sole cost and expense, and such re-performance shall be the owner’s sole and exclusive remedy for such ‘Defective Services.”

Impact of the Provision

- Architect only required to re-perform defective services
- Services must be “adjudged” to be defective
- Architect’s risk of loss is the design value ($100,000) v. University’s risk is estimated at $7.9 million
Limitation of Liability

“...the extent of the Architect’s liability to the Owner for any and all claims and damages recoverable under the terms of this Agreement is limited to the fee actually paid by the Owner to the Architect under this Agreement.”

Impact of the Provision

- $2 million liability cap
- $6 million shortfall for the University
Questions and Contact Information

Please do not hesitate to contact us with any questions!

- On the web at: www.northeastern.edu/general-counsel
- By phone at: (617) 373-2157
- By fax at: (617) 373-8090
- By email at: contractquestions@neu.edu