

TAMUS Contract Review Guidelines and Checklist

[Member] Department:
Dept. Contact:
Contact #:
Contract Effective Date:

Vendor/Contractor:
Vendor/Contractor Contact:
Contact #:
Contract Expiration Date:

Level of Approval Required by System Policy and Regulation:

Does Contract Require Review by TAMUS Office of General Counsel (“OGC”)? ___ Yes ___ No

Section A General Contract Evaluation and Processing

1. System Policy 25.07 and System Regulation 25.07.01, along with System members’ respective rules, procedures, and the A&M System contract management handbook describe: (a) requirements for contracts between the System or a System member and a third party; and (b) persons who are authorized to sign on behalf of the Board of Regents or on behalf of the System or a System member.
2. The steps described below are to be used to evaluate and process contracts to be signed on behalf of the System or System members. These steps are to be used for evaluating most types of contracts. There are some specialized contracts that may require additional or different evaluations and procedures. These special contracts are described in Section E, below.
3. These procedures are intended to provide information and guidance regarding contracts in general. Because they are generalized, you may need specific legal advice regarding a specific contract. In such situations, you should contact OGC for legal advice that is specific to that particular contract.
4. As an initial consideration you need to verify that this acquisition of goods or services has been reviewed by the member procurement office for compliance with proper procurement procedures.
5. Steps:
 - (a) Review the list of special contracts in Section E, below, to determine whether you will need to follow guidelines and procedures in addition to or in lieu of these general guidelines and procedures.
 - (b) Review the General Contract Approvals and Requirements Guidelines in Section B, below to become familiar with any issues you will need to address.
 - (c) Review the proposed contract to determine if these issues will be present and adequately addressed.
 - (d) Review the General Contract Structure, Terms, and Information Guidelines to become familiar with the types of terms and conditions that should be included (or deleted).
 - (e) Read the proposed contract and note any contractual provisions that need to be added, revised, or deleted in compliance with Sections B and C, below.

- (f) Contact the other party to discuss and resolve any issues.
- (g) Revise the proposed contract to conform the terms and conditions to the results of the final negotiations.
- (h) Review the requirements and guidelines in Sections B and C, below, explaining any deviations and the justification for such proposed deviations. Keep a copy of the completed questions and explanations in your file.
- (i) Using Section D, below, determine if the proposed contract will need to be reviewed and approved by OGC.
- (j) If your contract needs to be reviewed and approved by OGC, forward a copy of the revised contract to OGC along with your completed copy of the questions in Sections B and C, below, and any other pertinent information related to any proposed deviations.
- (k) OGC will review the proposed contract for any issues and will contact you following such review. OGC may also identify certain business issues in order to confirm that your institution or agency has considered these business issues.
- (l) Make any needed changes required by OGC.
- (m) If OGC is satisfied that the terms and conditions of the proposed contract are acceptable as to form and legal sufficiency, OGC will advise you accordingly.
- (n) Following receipt of OGC approval, submit the documents required by the rules, procedures, and the A&M System contract management handbook to the person at your institution or agency with delegated authority to sign the contract.
- (o) Provide a copy of the fully executed contract to OGC.
- (p) If your proposed contract does not require OGC approval, you are encouraged to contact OGC for advice and assistance regarding any issues or concerns you may have.
- (q) If your proposed contract does not require OGC approval but does contain deviations from the guidelines in Section C, you may accept the deviations if your institution or agency believes that they are reasonable and appropriate so long as such terms and conditions do not contradict state law, System policy, System regulations, or the rules and procedures of your institution or agency.

Section B

General Contract Approvals and Requirements Guidelines

1. Legal Review

- (a) Determine whether the contract must be approved by OGC as required by System Policy 25.07, Section 4, or as described in Section A.
- (b) If OGC approval is not required and an OGC approved standard contract is not being used, you should follow the guidelines in Section C, below.

2. Authorized Approval and Signatures

(a) Determine the authorized representative that will be signing the contract on behalf of your institution or agency in accordance with System Policy 25.07, System Regulation 25.07.01, and the rules and procedures of your institution or agency.

(b) Verify that the responsible person or persons for your institution or agency has indicated in writing to the authorized representative that the contract's business terms are correct and acceptable.

(c) You must obtain the approval of your authorized representative.

(d) If approval of the Board of Regents is required but the contract must be signed in advance of obtaining such approval, the contract must clearly state that it is not binding and conditioned unless and until the Board of Regents approves.

3. A disclosure statement of potential conflicts of interests for purchasing personnel of your institution or agency must be signed by all personnel involved in the contracting process as required by Texas Government Code Section 2262.004.

4. If the contract is valued at \$1,000,000 or more or requires action by the Board of Regents, you must obtain a disclosure of interested parties from the vendor/contractor (does not apply to sponsored research contracts; interagency contracts; or some contracts related to health services; see Texas Government Code Section 2252.908).

5. Verify that the procurement (competitive and "best value") and resulting contract was conducted in accordance with state law, System Regulation 25.07.03 and the rules and procedures of your institution or agency (including the A&M System contract management handbook). For contracts exceeding \$5,000,000, this should be verified in writing.

6. Determine whether there are any significant risks or issues related to the contract or if any significant risks or issues occurred during the procurement process. If so, identify and describe such risks or issues.

7. Verify that you complied with the purchasing accountability and risk analysis procedures of your institution or agency.

8. Confirm that the contractor does not owe any money to the State of Texas. If so, see Section 12(a)(ii), below.

9. Where applicable, determine whether the HUB Coordinator has verified that all applicable HUB laws, regulations, policies, and procedures have been followed.

Submitted by: _____

Printed Name: _____

Title: _____

Date: _____

Section C

General Contract Structure, Terms, and Information Guidelines

1. Parties and Preliminary Matters

(a) The parties to the contract should be clearly identified (name, address, and type of organization).

(b) All of the references to the parties (name, abbreviations, defined terms, etc.) throughout the document (including the signature blocks) should be accurate, complete, and consistent.

(c) Verify that this contract does not conflict with any other contracts, promises or obligations of your institution or agency. Verify that your institution or agency can comply with all terms and conditions.

(d) Verify the title and authority of person signing for the vendor/contractor. The person should be an officer or authorized agent of the vendor.

2. Statement of Work

(a) There should be a clear and understandable description of the subject of the contract (limit use of highly technical terms when possible).

(b) There should be a clear description of the goods or services to be received by your institution or agency.

(c) The contract should identify the time and place for performance of specific activities (e.g. dates for the performance of specific activities; dates when deliverables are due; etc.) as well as any other important dates (deadlines, mileposts, reports due, etc.). Dates should be clearly identified. Use full dates (e.g.: “name of month, day of month, year”) whenever possible. NOTE: in many foreign countries dates expressed in numerals use the Day/Month/Year format (e.g., September 1, 2015 would be written as 1/9/2015 rather than 9/1/2015).

3. Term, Termination, and Delays

(a) The contract should clearly state the beginning or effective date and the expiration date of the contract. If needed, the contract can include a provision establishing a deadline for receipt of invoices from the contractor.

(b) Determine whether the contract permits early termination for default (for cause) or convenience (no fault). Determine whether such clauses, if included, are appropriate. If such clauses are not included, determine whether it would be appropriate to include them.

(c) The contract should address what constitutes an “excusable delay” (e.g. force majeure clause) and how it is to apply.

(d) Determine whether the contract has any requirements for modifications, renewals or options (especially if the contract calls for automatic renewals). If so and if they are appropriate, these requirements should be clearly identified and understood. All modifications, renewals, or exercises of options should be required to be in writing and to be signed by both/all parties.

(e) The contract should clearly state the procedure for effectuating a termination.

(f) The contract should clearly state the method for providing notice of default and opportunity to cure (if appropriate). Generally, this is through a written notice and a stated period within which to effect a cure.

4. Consideration and Payment

(a) The contract should contain a clear description of the maximum amounts of money to be paid or other consideration for the entire term of the contract as well as a clear description of any interim payments.

(b) The contract should clearly state when and how payments are to be made. Payments should be stated with due dates and a description of what the payments are for stated in clear terms.

(c) The contract should clearly state that all payments made by the institution or agency will be subject to the Texas Prompt Payment Act (Texas Government Code, Chapter 2251).

(d) The contract should state that all payments are to be made in U.S. dollars. This is especially true if any part of the contract is performed or payable outside the U.S.

5. Duties and Obligations

(a) The rights, obligations, duties of every party should be clearly described. Each party's responsibilities should be identified in understandable wording to such an extent that each party knows the nature and extent of those obligations.

6. Confidentiality, Representations, and Warranties

(a) Determine whether the contract contains confidentiality provisions. TAMUS members cannot agree to keep information confidential if it is subject to public disclosure under the Texas Public Information Act (Texas Government Code Ch. 552). Other Texas laws may require disclosure as well (such as Texas Government Code Section 2261.253(a)(1) relating to the posting of certain contracts).

(b) The contract should not require your institution or agency to represent or warrant anything other than clearly supported and accurately stated factual information or that your institution or agency is authorized to sign the contract. If it requires any representation or warranty beyond the foregoing you should contact your procurement/contract management office or OGC.

7. Liability, Indemnities, and Remedies

(a) The contract should not require your institution or agency to indemnify the vendor/contractor for claims of third parties for liability arising out of the acts or omissions of your institution or agency. In general, this is not permitted. If the other party to the contract will not delete such requirements you should contact your procurement/contract management office or OGC.

(b) Depending on the risks presented by the activities of the vendor/contractor in performing the contract, you should consider whether the contract ought to require the vendor/contractor to indemnify your institution or agency from claims of third parties for liability arising out of the acts or omissions of the vendor/contractor.

(c) If the contract contains a provision waiving any liability of the vendor/contractor or any other party you should try to delete such provision. If the vendor/contractor will not agree you should contact your procurement or contract management office or OGC.

(d) The contract should not contain a provision limiting the time within which your institution or agency may file a lawsuit based on a breach of the contract by the vendor/contractor. In general, this is not permitted.

8. Notifications

(a) The contract should contain the contact information (name, address, phone, email address) for each party.

9. Insurance

(a) If insurance is required to be obtained by the vendor/contractor, the types of insurance policies (e.g., liability, property, automobile, etc.) and policy limits of coverage should be listed. Standard language drafted by System Risk Management must be used when listing insurance requirements. In general, TAMUS and members are self-insured; provide vendor/contractor with self-insured letter and attempt to have insurance requirement deleted. The TAMUS Office of Risk Management should be consulted if there are questions about the levels of coverage and/or carriers.

10. Governing Law

(a) If a governing law provision is included in the contract it should state that the contract is to be governed by laws of the State of Texas. Generally, TAMUS members should consider not agreeing that the contract should be governed by the laws of another state because doing so will present additional risks to the member. If the vendor will not agree, stay silent on the issue and do not reference it at all in the contract terms.

(b) In general, if the contract addresses the venue of lawsuits for a breach of contract, the contract should state that the venue for lawsuits is in the county where the CEO of your institution or agency has his or her main office. State law (Tex. Educ. Code Sec. 85.18) mandates this venue: it is not negotiable. If Vendor will not agree, stay silent on the issue and do not address it at all in the contract terms.

11. Disputes

(a) Is the Dispute Resolution Clause (Ch. 2260) included? Not required for contracts with other agencies of the State of Texas or the U.S. Government.

12. Required Clauses

(a) You should include the following provisions that are recommended or required to be included in state contracts:

(i) a delinquent child support obligations certification required by the Family Code, Section 231.006(d) for a contract where payment is made from state funds by the institution or agency;

(ii) if the contract is with a person or entity that owes a debt or has a delinquency to state include a clause requiring that any payments due under the contract be applied directly towards eliminating the vendor's/contractor's debt or delinquency to the state (see Government Code Section 2252.903(b));

(iii) if the institution or agency is paying the vendor/contractor with state funds, include a provision stating that payment may not be made if the vendor/contractor has a tax deficiency (see Government Code Section 2107.008);

- (iv) a certification that the vendor/contractor is not ineligible to receive the contract and acknowledging that the contract may be terminated and payment withheld if the certification is inaccurate (see Government Code Section 2155.004(b));
- (v) in contracts for the acquisition or development of electronic and information resources, a requirement for access by individuals with disabilities consistent with Texas Administrative Code Title 1 Section 213(e);
- (vi) in contracts for the acquisition of goods, services, construction, and real estate, a disputes clause consistent with the requirements of Government Code Chapter 2260;
- (vii) a requirement for the disclosure of financial interests, as applicable.

(b) If you are using a vendor/contractor provided form of contractual document, you should incorporate the Contract Addendum for your institution or agency.

13. Additional Clauses

(a) Standard State Contracting Provisions: The following clauses are strongly recommended to be included in state contracts: Representations and Warranties by vendor/contractor; an audit clause consistent with Education Code Section 51.9335 for a contract for the acquisition of goods and services; products and materials produced in Texas; no financial interest; certification regarding debarment, suspension, and other responsibility matters (for federal contracts); sexual molestation training (for contracts involving adults in contact with students/minors); loss of funding; export control restrictions and requirements; confidentiality; limitations; and notice. For assistance with acceptable wording of such clauses, contact OGC.

14. Discouraged Clauses

(a) In general, the following types of contract provisions (as they apply to a TAMUS member) are discouraged: (i) release of claims by a TAMUS member; waivers (in whole or in part) or limitation of a vendor's or contractor's liability; (ii) liquidated damages to be paid by a TAMUS member (except for certain types of contracts such as construction); (iii) indemnification by the institution or agency; (iv) payment of attorneys' fees; (v) waiver of statutes of limitations; (vi) binding arbitration; (vii) granting of a security interest; (viii) prohibiting or limiting a TAMUS member's recovery of damages. Notify the vendor/contractor that these should be deleted. If the vendor/contractor will not agree to delete such provisions, contact your procurement or contract management office or OGC.

(b) In some Texas state agency contracts with institutions of higher education, Texas Education Code 51.954 prohibits state agencies from including provisions restricting the disclosure of data generated in the course of performing the research, subject to some broad exceptions (e.g., disclosure would adversely affect: (i) public safety; (ii) protection of the intellectual property rights of the institution or agency; (iii) publication rights; (iv) or the value of the confidential information of your institution or agency or that of a third party).

15. Structure and Formatting

(a) All pages, exhibits, attachments, appendices, schedules, etc. should be attached to the contract document. OGC normally will not approve a contract until all of these documents have been provided for review.

(b) The spelling, formatting, grammar, punctuation, and general appearance of the document should be accurate and professional.

Submitted by: _____
Printed Name: _____
Title: _____
Date: _____

Section D

OGC Contract Review and Approval Procedures and Guidelines

System Policy 25.07, Contract Administration, Section 4, Required General Counsel Review, provides that the Office of General Counsel (OGC) shall establish contract review procedures to be followed for all contracts or agreements entered into by a member and that all contracts or agreements must be submitted to OGC for review and approval as to form and legal sufficiency when required by OGC procedures that have been approved by the Chancellor.

Even where OGC review and approval is not required, OGC encourages members to seek legal review when the nature of the transaction, or any issues related to the transaction, may be unusual or have the potential to raise legal issues.

OGC guidelines (supplementing the guidelines in Sections A through C, above) and procedures for the review and approval of member proposed contracts and agreements governed by System Policy 25.07 are as follows:

1. **Review and Approval Threshold Amount.** Unless one or more of the exceptions described below apply, all proposed contracts and agreements having a cumulative stated or implied consideration (including any options) exceeding \$ 100,000 must be reviewed and approved by OGC as to form and legal sufficiency. A member may by rule adopt a lower threshold amount requiring OGC review and approval.
2. **Complex Documents.** Regardless of dollar value, all proposed contracts and agreements that (a) require a significant commitment of a member's resources; (b) present significant risk factors to the member; or (c) involve complex relationships and obligations must be reviewed and approved by OGC as to form and legal sufficiency.
3. **Exceptions.** Proposed contracts and agreements meeting one or more of the following requirements do not need to be reviewed and approved by OGC, provided that such contracts and agreements are reviewed by the member in accordance with System Policy 25.07 and System Regulation 25.07.01 and Section 4 of these guidelines and procedures:
 - (a) OGC review and approval is not required for those contracts and agreements entered into pursuant to a materially unaltered contract form or template approved by OGC within the preceding three years.
 - (b) Interagency and intra-system agreements entered into pursuant to System Regulation 25.07.06 are not required to be reviewed and approved by OGC.
 - (c) Sponsored research contracts, cooperative agreements, and grants entered into with an agency of the United States government that contain standard clauses and provisions common to such contracts, cooperative agreements, and grants do not require OGC review and approval.

4. Form and Content. Contracts and agreements, whether or not required to be reviewed and approved by OGC should generally contain, at a minimum, the information and provisions described in Section C, above.

Section E
Special Contract Review and Approval Guidelines

The following types of contracts and agreements require special handling and are separately addressed in System policy or regulation, including but not limited to:

1. Contracts involving the acquisition or disposition of an interest in real property, including leasehold interests, mineral interests, or easements prepared by SREO per System policy (System Regulation 41.01.01 *Real Property*).
2. Construction Contracts \$10 million or over (System Policy 51.04 *Delegations of Authority on Construction Projects*).
3. Contracts for the engagement of outside legal counsel procured, prepared and executed by OGC (System Regulation 09.04.01 *Legal Counsel and Attorney General Opinion Requests*)