Contracts 101 – Spotting Problematic Contract Terms

PURPOSE AND OVERVIEW

- This resource is intended to help Oxy stakeholders meaningfully and independently evaluate outside contracts and determine if additional review is required.
- This resource should be used in conjunction with the Oxy Contracts Checklist and provides an item-by-item explanation of that checklist. Examples are also provided to assist with identification of problematic terms ("issue spotting") that require revision and/or review by the Office of the General Counsel ("OGC").
- Stakeholders should consult Oxy's Standard Terms for contract language they can copy and paste as needed to ensure outside contracts comply with Oxy policy.
- Stakeholders are also encouraged to visit the Oxy Contracts Policy, which contains numerous resources for proper contracting.
- Stakeholders wishing to review a recording of the most recent Contracts Policy Training should reach out to the Business Office or OGC for login information.

TIPS AND TRICKS

- **General**:
  - The Oxy stakeholder initiating a contract should first read it from top to bottom, to ensure that they understand their/Oxy's obligations, any issues or risks that may arise, and the overall relationship between the parties.
  - Stakeholders should confirm with their own and any related departments that Oxy can meet its contractual obligations.
  - Stakeholders should contact the Assistant General Counsel if they are unfamiliar with or do not understand any terms, to ensure a complete and thorough understanding of the contract.

- **Locating the items from the Contracts Checklist**:
  - Many contracts utilize headers that will contain the same words as the Contracts Checklist (such as "Insurance" "Liability" and "Indemnification"). After a complete and thorough read of the entire contract, stakeholders may use the find function ("control F") to locate specific words or phrases. This can help expedite completion of the Contracts Checklist but should be used in conjunction with, not instead of, a comprehensive review.

TIPS AND TRICKS

- **Modifying an Outside Contract**:
  - Stakeholders who are comfortable doing so may address business and operational terms (e.g. payment amount, quantity, completion dates) in an outside party's contract by making changes directly to the contract. Stakeholders may also substitute any Oxy Standard Terms for a corresponding term in an outside contract.
  - Any other concerns about or changes to legal terms (e.g. liability, indemnity, privacy, copyright) should be reviewed with the Assistant General Counsel.
  - Stakeholders are strongly encouraged to make any and all changes in a Word document, as this is typically the most widely-available and frequently-used format.
  - Any and all changes to an outside party's contract must be made using Track Changes. This ensures transparency between the parties and helps support the enforceability of the contract.
  - Stakeholders are encouraged to submit their redlined outside contract to OGC for review before submission to the outside party.

IDENTIFICATION OF PARTIES

- **Is the College properly identified as Occidental College, with its primary place of business at 1600 Campus Road, Los Angeles, CA 90041?**
  - Does the contract contain Oxy's full business name and business address?
- **Is the other party and its address clearly identified?**
  - Does the contract contain the full business name (or legal name) of the vendor and their full business address?

IDENTIFICATION OF PARTIES

- **Are abbreviated descriptions of the parties (e.g. “User” “Licensee” “Client”) and other defined terms (e.g. “Services”) consistent throughout the contract?**
  - Many contracts contain abbreviations for long or repeated phrases. Are those abbreviated terms consistently used or does the contract refer to the same party, thing, or service by different terms?
  - Example:
    - Occidental College (“OXY”) agrees to not use any of Bob Smith Company’s (“Vendor”) trademarks and gives Company the limited right to use College’s trademarks.
      - Concern: Oxy is referred to as both OXY and College; outside party is referred to as both Vendor and Company. A lack of clarity can create confusion and increase the risk that the contract will not be enforced the way Oxy believes or even be enforced at all.

DUTIES AND OBLIGATIONS

- **Are the obligations of each party described clearly, including where the proposed activities will take place?**
  - Does the contract clearly state what each party is required to do and, when applicable, where and when?
  - Stakeholders must be aware of all of Oxy's obligations.
  - Stakeholders must also ensure that the outside party's obligations are objectively clear, firm, and enforceable. Examples of problematic language:
    - Contractor will endeavor to complete the Deliverable by Jan 1, 2024.
      - Concern: This is not firm or enforceable – the contractor will try to do it by that date but, if they don't, what happens? As drafted there is really no way for Oxy to enforce this sentence.
    - Contractor will provide supportive services to Oxy for social media needs.
      - Concern: This is not objectively clear – what is the contractor doing for us? Are they making social media graphics? Coordinating our social media accounts? Providing guidance on how to best utilize social media to recruit students? Because it is not clear what the contractor was supposed to do, it would be very difficult for Oxy to seek enforcement.

DUTIES AND OBLIGATIONS

- **Does the contract identify any obligation by the contractor to comply with applicable federal, state, and local laws?**
  - Does the contract explicitly state that the outside party will comply with all applicable laws? Many contracts require Oxy to comply with law, so stakeholders should ensure any such obligation is at least mutual.
    - By including this language, the outside party's violation of law is also a breach of contract, which may allow Oxy to terminate the contract or entitle Oxy to certain contractual benefits (such as indemnification or additional insured coverage).
  - Example:
    - Contractor agrees to comply with all applicable federal, state, and local laws, statutes, ordinances, orders, rules, and regulations in its performance of its obligations under this Agreement.

- **Does the contract require the contractor to comply with Oxy's COVID-19 protocols and all applicable laws regarding same?**
  - For as long as Oxy has COVID-19 practices and restrictions in place, contracts with outside parties who will be present on campus should include this language.
  - Stakeholders are empowered to take the approved language in Oxy's Standard Terms and insert it into any qualifying contract.

TERM AND TERMINATION

- **Are start and end dates clearly stated?**
  - For services of a fixed duration, does the contract state the start (or effective) date (which may be made by references such as “when signed by the parties”) and an end date (which may be made by reference such as “once the Services are fully completed”)?
  - Not all contracts require an end date – evergreen Master Services Agreements and contracts that may be terminated for convenience (no reason required) do not always require an end date. Contact OGC for guidance.
- **Does the contract contain an automatic renewal provision?**
  - Oxy policy forbids automatically renewing contracts because these contracts passively lock Oxy into paying for services it may not utilize or even realize it has a contract for.
  - Example of automatic renewal clause:
    - This Agreement will automatically renew for successive terms of the same duration, unless either party gives the other party at least 60 days’ written notice, prior to the renewal date, of its request to terminate this Agreement.

TERM AND TERMINATION

- **Does the contract specify the mechanism for termination by Oxy (e.g in writing, with notice)?**
  - Does the contract provide Oxy with a way to terminate the contract if necessary? Most contracts will give the outside party an option to terminate the contract, but may not provide one for Oxy. Without a way to terminate the contract, Oxy will be bound for the entire term and will be required to perform all of its obligations thereunder.
  - Ideally, Oxy should be granted a right to terminate for convenience (for any or no reason) and may be required to provide a certain amount of notice and/or written notice. Example:
    - OXY may terminate this Agreement with or without cause upon thirty days' written notice to Contractor.
  - Generally, if the outside party gives themselves a termination option, they should be willing to extend a termination option to Oxy.

TERM AND TERMINATION

- **Does the contract provide for termination in the event of a material breach by contractor? Are the situations establishing material breach clearly defined?**
  - Although these two items appear separately on the contracts checklist, they will almost always appear in the same paragraph of the contract.
  - A “material breach” is a legal term of art describing a breach of contract that is so serious that it substantially alters the benefit of the contract. A contract might only state what happens if a material breach occurs (leaving the determination of what is a material breach to the parties and/or a court) or specifically identify certain types of breaches that are material.
  - At a minimum, the contract must state that Oxy can terminate in the event of a material breach to pass muster under Oxy policy. Example:
    - In the event that either Party breaches a material term of this Agreement that is not cured within thirty days’ of receipt of written notice specifying the breach, the non-breaching Party may terminate the Agreement immediately upon expiration of such notice.
  - Where certain breaches are particularly important to either party (including Oxy) those should be explicitly identified.
  - Stakeholders should also ensure they understand what happens in the event of a material breach. Does Oxy get money back? Lose everything it paid? Some alternative outcome?

INSURANCE

- **Is there an insurance clause, consistent with College requirements?**
  - Every contract with an outside party must contain a requirement that the outside party obtain and maintain insurance at a level consistent with Oxy policy. Many contracts will require that Oxy maintain insurance, but to pass muster under Oxy policy, the outside party must also have sufficient insurance.
  - Oxy's Standard Terms contain acceptable insurance limits for general services as well as enhanced insurance requirements for other types of contractors. Stakeholders should consult the Standard Terms for proper insurance amounts for the type of contractor and may copy and paste language from the Standard Terms directly into an outside party's contract when appropriate.
    - Types of contractors requiring enhanced insurance: educational consultants; general contractors; directly-hired construction subcontractors; outside transportation (including bus companies); architects, engineers, and other professionals; customized computer software/programs; and software/computer vendors holding Oxy data.
- **Does the contract require the other party to provide proof of insurance?**
  - Does the contract specifically state that the outside party will provide proof of insurance (commonly known as a certificate of insurance)? When? Example:
    - Contractor shall provide evidence of all insurance listed above before or at the time of execution of this Agreement
  - Obtaining proof of insurance is most critical where there is an elevated amount of risk.
    - Examples: High-value contracts; contracts that involve the use of sensitive data; contracts that involve elevated physical risks (such as tree or electrical work).

INSURANCE

- **If so, has proof of insurance (a certificate of insurance) been obtained?**
  - If the contract states that the outside party will provide proof of insurance, has the stakeholder actually received a copy of the certificate of insurance?
  - Upon receipt, the stakeholder should review the certificate of insurance and ensure it aligns with the contract as to amount, type, and additional insureds (see below) and obtain any necessary corrections.
- **Is the other party required to name Occidental as an additional insured?**
  - Does the contract state that Occidental will be added as an additional insured? Example:
    - Such policy shall be written on a standard ISO form naming Occidental College, its trustees, officers, directors, employees (including student workers), and agents as additional insureds on the standard CG 2010 form or its equivalent on a primary and noncontributory basis.
  - Additional insured coverage extends the outside party's liability coverage to Oxy, giving Oxy an alternative way to recoup financial losses resulting from the outside party's provision of services. This is especially important in elevated-risk contracts.

INDEMNITY AND LIABILITY

- **Does the contract provide for indemnification of the College against third-party claims?**
  - Does the contract explicitly state that the outside party will indemnify Oxy against legal claims brought by a third party?
  - Indemnification is a promise by one party to financially compensate the other party for claims that arise from the indemnifying party's actions. Indemnification can be mutual (both parties agree to reimburse each other) or one-sided (only one party agrees to reimburse the other party). Other words commonly found in indemnification clauses include "defend" and "hold harmless."
  - *Stakeholders must be vigilant*: almost every contract contains an indemnification provision. However this indemnification *is frequently one-sided in favor of the outside party*, not Oxy. To pass must under Oxy policy, the indemnification clause must either be mutual or solely in favor of Oxy. Just because the contract contains the word "indemnification" does not mean that Oxy is adequately protected from risk.
  - Stakeholders should also be wary of limitations on indemnification. An outside party might only cover third-party claims, certain types of claims (such as intellectual property infringement), or claims arising from their own negligence or willful conduct. Any such limitations should be carefully evaluated and may be elevated to OGC for legal review.

INDEMNITY AND LIABILITY

- **Indemnification Clause Examples:**
  - One-way indemnification in favor of Oxy (acceptable):
    - Contractor agrees to defend, indemnify and hold harmless Occidental College and its affiliates, officers, directors, employees, trustees, agents, insurers, successors, and assigns from and against all losses, liabilities, actions, claims, judgments, interest, awards, penalties, fines, costs, and expenses (including reasonable attorney's fees and costs), arising out of or resulting from Contractor's performance under this Agreement.
  - One-way indemnification in favor of Outside Party (NOT acceptable):
    - Oxy agrees to defend, indemnify and hold harmless Bob Smith Company. and its affiliates, officers, directors, employees, trustees, agents, insurers, successors, and assigns from and against all losses, liabilities, actions, claims, judgments, interest, awards, penalties, fines, costs, and expenses (including reasonable attorney's fees and costs), arising out of or resulting from OXY's performance under this Agreement.
  - Mutual indemnification (usually acceptable):
    - Each party agrees to defend, indemnify and hold harmless the other party and its affiliates, officers, directors, employees, trustees, agents, insurers, successors, and assigns from and against all losses, liabilities, actions, claims, judgments, interest, awards, penalties, fines, costs, and expenses (including reasonable attorney's fees and costs), arising out of or resulting from the indemnifying party's performance under this Agreement.

INDEMNITY AND LIABILITY

- **Does the contract contain a limitation of liability provision?**
  - Limitation of liability ("LL") clauses act as a way to narrow the outside party's liability to Oxy if they breach the contract. LL clauses may cap the amount or types of damages Oxy can collect, exclude certain types of claims, require Oxy to pursue its claims in an alternative forum, require Oxy to pursue claims only as an individual, or prevent Oxy from suing certain parties.
  - To the extent feasible, Oxy's policy is to exclude any LL restrictions from the contract. However, this may not always be possible. OGC will work with stakeholders to determine what restrictions are permissible depending on the wording of the limitation, parties' respective bargaining power, importance and urgency of the contract, likelihood of the risk materializing, and reasonableness of the limitation relative to other terms.

INDEMNITY AND LIABILITY

- Examples of LL terms which should be referred to OGC for review:
  - Damages Exclusion: In no event shall Provider be liable for any lost profits or any general, incidental, direct, indirect, punitive, exemplary, or consequential or other damages whatsoever (including damages for loss of profits, interruption, loss of business information or any other pecuniary loss) in connection with any claim, loss, damage, action, suit or other proceeding arising under or out of this Agreement, whether the action is based on contract, tort (including negligence), infringement of intellectual property rights, or otherwise.
  - Damages Cap:
    - In no event will provider's liability under this agreement exceed all amounts paid by client to provider for one year of service under this agreement or $50,000.00.
    - Notwithstanding any other provision contained herein, Provider's total maximum aggregate collective liability under this Agreement under any and all circumstances, arising in any manner whatsoever, shall be limited to the provider’s total aggregate collective liability for the total service fee amount required to be made in this agreement
  - Alternative Forum: The Parties agree that all disputes, claims and controversies between them arising from this agreement or otherwise, including without limitation contract and tort disputes, shall be arbitrated in the county of Los Angeles pursuant to the financial services rules of J.A.M.S. or its successor in effect at the time the claim is upon request of either party.
  - Individual Claims: Any dispute arising under this agreement shall be determined on an individual basis, shall be considered unique as to its facts, and shall not be consolidated in any arbitration, suit, or other proceeding with any claim or controversy of any other party.

INDEMNITY AND LIABILITY

- **Does the contract otherwise limit Oxy's ability to bring any claims against the contractor?**
  - Contracts can require that a party give up a legal right to do something. Some outside parties ask Oxy to give up its legal right to pursue claims against them or try to limit the amount of time Oxy has to bring claims. Generally, such restrictions are prohibited and must be stricken. An outside contract containing any of the terms below (or similar) should be elevated to OGC for review.
  - Examples:
    - Limit on time to bring a claim: "Client may not commence any action or proceeding under this Agreement more than two (2) years after the occurrence of the applicable cause of action."
    - Sole/Exclusive Remedy: This section 6 sets forth client's sole [or exclusive] remedies and provider's sole liability and obligation for any actual, threatened, or alleged breach of this agreement.

MISCELLANEOUS

- **Does the contract have provisions regarding entire agreement, severability, trademarks, modifications, non-assignment, non-waiver, no agency, execution in counterparts, force majeure, and authority to execute?**
  - These terms are commonly known as “boilerplate” and are important for contract interpretation and enforcement. As their function is relatively unimportant for most stakeholders, explanation of their importance has been largely omitted. Stakeholders should contact OGC with questions.
- Boilerplate Examples:
  - ENTIRE AGREEMENT. This Agreement contains the entire agreement and understanding between the Parties and supersedes any prior written or oral agreements between them.
  - SEVERABILITY. The terms of this Agreement are severable, such that if any term or provision is declared by a court of competent jurisdiction to be illegal, void, or unenforceable, the remainder of the provisions shall continue to be valid and enforceable.
  - TRADEMARKS. Contractor shall not, without express prior written consent in each case, use any Occidental College trademark in advertising, publicity, promotional, or other activities including social networking sites and the Internet.
  - MODIFICATION OR AMENDMENT. No modification or amendment of any provision of this Agreement shall be valid or effective unless made in writing and signed by an authorized officer or representative of each Party.

MISCELLANEOUS

- Boilerplate Examples Cont'd:
  - NO ASSIGNMENT. This Agreement may not be assigned to any other person, group, or organization without prior written consent of both parties.
  - NON-WAIVER. If either Party shall waive any right, obligation, or remedy arising under this Agreement or any applicable law, such waiver shall not be deemed a waiver of right, obligation, or remedy upon a later occurrence or similar event. No act, delay, or course of conduct by Occidental College or [Other Party] shall be deemed to constitute a waiver except upon an express written waiver signed by the waiving Party.
  - NO AGENCY. Contractor shall have no authority to act, create any obligation, or enter into any agreement on behalf of Occidental College or in a way that is binding on the College.
  - EXECUTION IN COUNTERPARTS/ELECTRONIC SIGNATURES. This Agreement may be executed in multiple counterparts and by electronic signature, each of which shall be deemed an original and all of which together shall constitute one instrument.

MISCELLANEOUS

- Boilerplate Examples Cont'd:
  - FORCE MAJEURE. In the event that either Party is unable to perform its obligations under this Agreement as a result of war, civil riot, terrorism, strikes, work stoppages, fires, acts of God, epidemic or pandemic, litigation, an act of government, or any other circumstances beyond the parties' control, then the operation of this Agreement shall be suspended until such time as it may be resumed, and neither Party will have liability to the other for direct or consequential damages arising from such non-performance or delayed performance. Alternatively, in the event of any circumstance described above, either Party may terminate this Agreement without liability to the other Party, except that the terminating Party must make all reasonably necessary efforts to mitigate any related expenses or losses to the other Party.
    - Note: During the Covid-19 pandemic, force majeure clauses because of particular importance. Stakeholders should ensure that the force majeure clause protects both parties equally and that the outcome in the event of a force majeure is clearly stated.
  - AUTHORITY. By signing this Agreement, each Party represents and warrants that it has the right, power, and authority to enter into this Agreement, to become a Party hereto and to perform its obligations hereunder. This Agreement is a legal, valid and binding obligation of each Party, enforceable against each Party in accordance with its terms.

MISCELLANEOUS

- **Is the contract governed by the laws of California? Does the other party consent to the jurisdiction of the California courts? Is the venue for disputes established in Los Angeles County?**
  - Although these three items appear separately on the contracts checklist, they will commonly appear in the same paragraph of the contract.
  - Does the contract explicitly state that it will be governed by or interpreted according to California law and/or contain language that is functionally similar (such as “this contract shall be governed by the law of the state where Client maintains its principal place of business”[which for Oxy is California])?
  - Does it explicitly state that the parties consent to the jurisdiction of the California courts and that any dispute shall be venued in the Los Angeles County courts, and/or functionally similar language (such as “any dispute arising from this contract shall only be brought in the courts of the county where Client maintains its principal place of business”[which for Oxy is Los Angeles])?
  - Example:
    - GOVERNING LAW AND VENUE. This Agreement shall be interpreted, construed, and enforced under the laws of the State of California without regard to choice of law or conflict of law principles (whether of the State of California or any other jurisdiction). Contractor agrees and consents to the exclusive jurisdiction of the courts of the State of California for all purposes regarding this Agreement and further agrees and consents that venue of any action brought hereunder shall be exclusively in the County of Los Angeles.
  - Stakeholders are empowered to revise an outside contract to change governing law and venue to California/Los Angeles County as appropriate.

MISCELLANEOUS

- **Will any necessary spaces and facilities involved in the contract be available? Have you confirmed with Facilities and CEAC, as applicable?**
  - This checklist item doesn't require any review or revision of the contract, its simply a reminder that, before entering into a contract for services to be performed at a specific space on campus, stakeholders must ensure the space will be available.
  - Depending on the language of the contract, the unavailability of Oxy's premises could result in additional fees or costs, the services not being performed at all, and/or Oxy losing the money it paid for the services.
- **Does the contract contain a non-discrimination provision, where any work will involve regular interaction with Oxy students or student employees?**
  - Under California law, Oxy (as an institution of higher education) must provide a notice of non-discrimination to any contractor who will provide services that will involve regular interactions with students. This legal requirement is unique and will *almost never* appear in an outside contractor's contract.
  - Stakeholders should take the approved language in Oxy's Standard Terms and insert it into any outside contract for qualifying services.

QUESTIONS AND ADDITIONAL HELP

- Office of the General Counsel (Legal and Contract Questions):
  - Stefanie Renaud, Assistant General Counsel and Contracts Administrator. Renaud@oxy.edu or (323) 259-2557
  - Nora Kahn, General Counsel. Nkahn@oxy.edu or (323) 259-1343
- Risk Management (Insurance Questions):
  - Jim Andersen, Senior Risk and Insurance Manager. Andersenj@oxy.edu or (323) 259-1364
- Business Office (Payment, Independent Contractor, and Tax Questions):
  - Lupe Salmeron, Assistant Controller for Disbursements. Lsalmeron@oxy.edu or (323) 259-1423
  - Barbara Valiente, AVP of Finance and Controller. Bgillett@oxy.edu or (323) 259-1417