

**Doc. T92-031, as amended
(Appendix A)
Passed by the BoT
6/3/92
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Revised 8/7/02
Revised 6/12/08
Revised 6/8/11
Revised 9/17/14**

**UNIVERSITY OF MASSACHUSETTS
PROCUREMENT POLICY**

I. INTRODUCTION

The purpose of this policy is to govern the procurement of all goods, materials, commodities, and services by the University, including but not limited to, design services, vehicles, equipment, library materials, software, and real property, whether by purchase order, contract, license, lease, or other form of agreement. In accordance with the provisions of Sections 3 and 13 of Chapter 75 of the General Laws, as amended, all purchases irrespective of source of funds, under the provisions of said Section 13 shall be governed by this policy subject to subsequent amendment, revision, or repeal, from time to time, by the Trustees.

This policy shall apply to each campus and to the President's Office, as well as to multi-campus or system-wide agreements. This policy shall not supersede any of the provisions of the Senior Vice President for Administration & Finance and Treasurer's Delegations, Doc. T97-014. All University employees must follow Doc. T08-028, the Policy on Codes of Conduct for University/Vendor Relationships.

All persons responsible for procuring goods and services governed by this policy shall confer with the General Counsel as advisable in order to assure compliance with these terms.

II. POLICY STATEMENT

A. Competitive Procurement Practices:

The University shall obtain all goods and services covered by this policy at the best over-all value to the University as is consistent with the quantity, quality, durability, availability, serviceability, and other factors affecting service and use as required by the using department of the University. In complying with this policy, the cost of acquisition and the delivery time required shall be considered as well as the cost of the item being purchased. All procurements must (1) have prior approval of the relevant Purchasing Department; and (2) must follow delegation and signatory authority in accordance with University policies and campus/President's Office procedures and guidelines to bind the University.

To maximize vendor competition and volume discount purchases, departments shall make use of Campus, University, State, or Massachusetts Higher Education Consortium publicly bid contracts whenever appropriate and practicable. Contracts of other consortia and group purchasing organizations may also be utilized when approved by the University Purchasing

Council based on evidence of the consortia's sound competitive and ethical procurement practices.

To encourage open and fair competition, advertisement for and receipt of competitive bids shall be used whenever practicable, or when required by law. The University's commitment to the principles of Affirmative Action shall be applied to purchasing with the objective of: (i) achieving and fostering greater participation in University procurement activity by minority-owned small business, small disadvantaged business, women-owned small business, HUBZone small business, Veteran-owned small business, and service-disabled Veteran-owned small business enterprises and (ii) encouraging socially or economically disadvantaged business owners to respond to invitations to bid on University business.

B. Delegations of Authority:

- 1. To the President**, with authority to re-delegate to the Senior Vice President for Administration & Finance and Treasurer, or any member of the President's Office as the President may determine:
 - a. Authority to require the campuses to utilize a system-wide or multi-campus procurement for any purchase covered by this policy. The President shall issue standards for when a system-wide or multi-campus procurement for purchases is required. A Chancellor who believes such procurement would not be in the best interest of his/her campus shall be entitled to request not to participate in such procurement, but the President shall make the final decision.
- 2. To the President**, for President's Office, and multi-campus or system-wide procurements, with authority to re-delegate to the Senior Vice President for Administration & Finance and Treasurer, and/or such other designees as the President shall determine:
 - a. Authority to enter into and execute agreements for goods, materials and commodities.
 - b. Authority to enter into and execute Sub-contract(s), Consultant contract(s), and Services contract(s) as provided in the Procurement Standards.
 - c. Authority to enter into and execute contracts for labor and materials for repair or construction, including design services, of real property used by the President's Office subject to any applicable requirements under G.L. ch.7C, G.L. ch.30, or G.L. ch.149.
 - d. Authority to enter into and execute agreements relating to the use of real property by the President's Office.
 - e. Authority to enter into and execute agreements for the use of President's Office real property by non-affiliated entities which do not exceed five years, including any renewals or options for renewal. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements relating to real property must be approved by the General Counsel prior to execution.
 - f. Authority to enter into and execute agreements for use of University real property by non-affiliated entities which exceed five years upon Board of Trustees approval and

any necessary campus approvals. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements relating to real property must be approved by the General Counsel prior to execution.

- g. Authority to enter into and execute agreements for use of President's Office real property by affiliated entities which do not exceed twenty (20) years, including any renewals or options for renewal. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements for real property must be approved by the General Counsel prior to execution.
 - h. Authority to enter into and execute leases or licenses for any items, including but not limited to, equipment, vehicles, software, and library materials including electronic journals. Procurement of information technology, hardware/software, or peripherals must comply with the Information Technology Acquisition Policy, Doc. T08-086.
- 3. To the Chancellors**, for campus procurements with authority to re-delegate to such campus personnel as the Chancellor may determine:
- a. Authority to enter into and execute agreements for goods, materials and commodities.
 - b. Authority to enter into Sub-contract(s), Consultant contract(s), and Service contract(s) necessary for campus services as provided in the Procurement Standards.
 - c. Authority to enter into and execute contracts for labor and materials for repair or construction, including design services, of real property used by the campus, subject to any applicable requirements under G.L. ch.7C, G.L. ch.30, or G.L. ch.149.
 - d. Authority to enter into and execute agreements relating to the use of real property by the campus.
 - e. Authority to enter into and execute agreements for use of campus real property by non-affiliated entities which do not exceed five (5) years, including any renewals or options for renewal. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements for real property must be approved by the General Counsel prior to execution.
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4. **To the General Counsel**, with authority to re-delegate to an attorney in the General Counsel's office as the General Counsel may determine, authority to enter into Legal services agreements for attorneys or law firms to provide legal services for the University, as defined in the Procurement Standards. Any such attorney and/or law firm shall work under the continuing supervision of the General Counsel.

All sub-delegations of authority pursuant to this policy shall be made in writing and forwarded to the office of the Senior Vice President for Administration & Finance and Treasurer and to the General Counsel.

C. Legal Review:

1. The General Counsel shall review the following agreements and contracts, including multi-campus or system-wide procurements, entered into by the President's Office, or the campuses, which are required under this Policy and identified under the Procurement Standards prior to execution. Review by the General Counsel's office under this policy and the Procurement Standards is in addition to any other internal approvals that may be required under other University policies.
 - a. Agreements relating to any interest in real property.
 - b. Sub-contracts, consultant or services contracts as defined in the Procurement Standards.
 - c. Contracts for lobbying services.
 - d. Amendments, contracts or agreements which contain language that conflicts with, modifies, deletes, adds to, or otherwise alters the University's standard contract terms and conditions.

Legal review of additional contracts or agreements may be required pursuant to standards developed pursuant to this Policy. Review by the General Counsel's office under this policy and the Procurement Standards is in addition to any other internal approvals that may be required under other University policies.

2. The responsible procurement or contracting official for a campus or the President's Office shall confer with the General Counsel when advisable to assure compliance with this Policy.

III. THE STANDARDS

The President shall issue standards for the implementation of this policy. The Senior Vice President for Administration & Finance and Treasurer shall recommend such standards for the President's action. The Senior Vice President for Administration & Finance and Treasurer shall confer on a regular basis with the Purchasing Council and the General Counsel to determine whether revisions to the standards are appropriate to comply with University policies or law, and to assure that the University is using best practices to secure its goods and services.

**ADMINISTRATIVE STANDARDS FOR THE
PROCUREMENT POLICY
(Doc. T92-031, Appendix A)**

I. INTRODUCTION

The purpose of this policy is to govern the procurement of all goods, materials, commodities, and services by the University, including but not limited to, design services, vehicles, equipment, library materials, software, and real property, whether by purchase order, contract, license, lease, or other form of agreement. In accordance with the provisions of Sections 3 and 13 of Chapter 75 of the General Laws, as amended, all purchases irrespective of source of funds, under the provisions of said Section 13 shall be governed by this policy subject to subsequent amendment, revision, or repeal, from time to time, by the Trustees.

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To maximize vendor competition and volume discount purchases, departments shall make use of Campus, University, State, or Massachusetts Higher Education Consortium publicly bid contracts whenever appropriate and practicable. Contracts of other consortia and group purchasing organizations may also be utilized when approved by the University Purchasing Council based on evidence of the consortia's sound competitive and ethical procurement practices.

To encourage open and fair competition, advertisement for and receipt of competitive bids shall be used whenever practicable, or when required by law. The University's commitment to the principles of Affirmative Action shall be applied to purchasing with the objective of: (i) achieving and fostering greater participation in University procurement activity by minority-owned small business, small disadvantaged business, women-owned small business, HUBZone small business, Veteran-owned small business, and service-disabled Veteran-owned small

business enterprises and (ii) encouraging socially or economically disadvantaged business owners to respond to invitations to bid on University business.

B. Delegations of Authority:

- 1. To the President,** with authority to re-delegate to the Senior Vice President for Administration & Finance and Treasurer, or any member of the President's Office as the President may determine:
 - a. Authority to require the campuses to utilize a system-wide or multi-campus procurement for any purchase covered by this policy. The President shall issue standards for when a system-wide or multi-campus procurement for purchases is required. A Chancellor who believes such procurement would not be in the best interest of his/her campus shall be entitled to request not to participate in such procurement, but the President shall make the final decision.
- 2. To the President,** for President's Office, and multi-campus or system-wide procurements, with authority to re-delegate to the Treasurer, and/or such other designees as the President shall determine:
 - a. Authority to enter into and execute agreements for goods, materials and commodities.
 - b. Authority to enter into and execute Sub-contract(s), Consultant contract(s), and Services contract(s) as provided in the Procurement Standards.
 - c. Authority to enter into and execute contracts for labor and materials for repair or construction, including design services, of real property used by the President's Office subject to any applicable requirements under G.L. ch.7C, G.L. ch.30, or G.L. ch.149.
 - d. Authority to enter into and execute agreements relating to the use of real property by the President's Office.
 - e. Authority to enter into and execute agreements for the use of President's Office real property by non-affiliated entities which do not exceed five years, including any renewals or options for renewal. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements relating to real property must be approved by the General Counsel prior to execution.
 - f. Authority to enter into and execute agreements for use of University real property by non-affiliated entities which exceed five years upon Board of Trustees approval and any necessary campus approvals. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements relating to real property must be approved by the General Counsel prior to execution.
 - g. Authority to enter into and execute agreements for use of President's Office real property by affiliated entities which do not exceed twenty (20) years, including any renewals or options for renewal. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc.

T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements for real property must be approved by the General Counsel prior to execution.

- h. Authority to enter into and execute leases or licenses for any items, including but not limited to, equipment, vehicles, software, and library materials including electronic journals. Procurement of information technology, hardware/software, or peripherals must comply with the Information Technology Acquisition Policy, Doc. T08-086.
- 3. To the Chancellors,** for campus procurements with authority to re-delegate to such campus personnel as the Chancellor may determine:
- a. Authority to enter into and execute agreements for goods, materials and commodities.
 - b. Authority to enter into Sub-contract(s), Consultant contract(s), and Service contract(s) necessary for campus services as provided in the Procurement Standards.
 - c. Authority to enter into and execute contracts for labor and materials for repair or construction, including design services, of real property used by the campus, subject to any applicable requirements under G.L. ch.7C, G.L. ch.30, or G.L. ch.149.
 - d. Authority to enter into and execute agreements relating to the use of real property by the campus.
 - e. Authority to enter into and execute agreements for use of campus real property by non-affiliated entities which do not exceed five (5) years, including any renewals or options for renewal. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements for real property must be approved by the General Counsel prior to execution.
 - f. Authority to enter into and execute agreements for use of campus real property by affiliated entities which do not exceed twenty (20) years, including any renewals or options for renewal. Any dispositions of University real property must comply with the University's Capital Planning, Land and Facilities Use Policy, Doc. T93-122 and with the Treasurer's Delegations, Doc. T97-014. All agreements for real property must be approved by the General Counsel prior to execution.
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- 4. To the General Counsel,** with authority to re-delegate to an attorney in the General Counsel's office as the General Counsel may determine, authority to enter into Legal services agreements for attorneys or law firms to provide legal services for the University, as defined in the Procurement Standards. Any such attorney and/or law firm shall work under the continuing supervision of the General Counsel.

All sub-delegations of authority pursuant to this policy shall be made in writing and forwarded to the office of the Senior Vice President for Administration & Finance and Treasurer and to the General Counsel.

C. Legal Review:

1. The General Counsel shall review the following agreements and contracts, including multi-campus or system-wide procurements, entered into by the President's Office, or the campuses, which are required under this Policy and identified under the Procurement Standards prior to execution. Review by the General Counsel's office under this policy and the Procurement Standards is in addition to any other internal approvals that may be required under other University policies.
 - a. Agreements relating to any interest in real property.
 - b. Sub-contracts, consultant or services contracts as defined in the Procurement Standards.
 - c. Contracts for lobbying services.
 - d. Amendments, contracts or agreements which contain language that conflicts with, modifies, deletes, adds to, or otherwise alters the University's standard contract terms and conditions.

Legal review of additional contracts or agreements may be required pursuant to standards developed pursuant to this Policy. Review by the General Counsel's office under this policy and the Procurement Standards is in addition to any other internal approvals that may be required under other University policies.

2. The responsible procurement or contracting official for a campus or the President's Office shall confer with the General Counsel when advisable to assure compliance with this Policy.

III. STANDARDS STATEMENT

A. Procurement Administration

The Senior Vice President for Administration & Finance and Treasurer, under the direction of the President, is designated as the officer of the University responsible for issuing procurement standards applicable to the five campuses and the President's Office, and to multi-campus or system-wide procurements. The General Counsel's Office in conjunction with the Procurement Council shall regularly review these Standards and propose any changes to the Senior Vice President for Administration & Finance and Treasurer. The Procurement Council shall consist of the chief procurement/purchasing officer of each campus and the President's Office, and shall meet at least annually to discuss system-wide procurement issues and to maximize economies through cooperative efforts.

Each campus and the President's Office shall maintain a central procurement department. Each Chancellor may delegate responsibility for developing procedures to implement, review, monitor, and enforce approved purchasing policies.

All procurements of goods, materials, commodities, and services by the University, including but not limited to, vehicles, equipment, library materials, software, design services, or real property, whether procured by purchase order, contract, license, lease, or other form of agreement (collectively “Procurements”) regardless of the source of funds must comply with the University’s Procurement Policy, Doc. T92-031 as amended and these Standards.

These Standards shall apply to any University sub-contracts for services or consultants entered into to meet the University’s contractual obligations to third parties.

All Procurements must (1) comply with campus procurement procedures and (2) must follow appropriate delegation and signatory authority in accordance University policies and campus or President’s Office procedures to bind the University.

B. Definitions. Chief procurement/purchasing officers should consult with the General Counsel’s office if clarification is needed for any of these definitions.

1. Consultant services: Services provided by an individual, company, or entity in a specific specialized field(s) with little or no University direction or supervision. Consultant services shall include lobbying services as defined by state or federal law.
2. Contract: The University’s contract for services including consultant services, purchase order, or any other written, legally binding agreement between the University and an external individual or entity.
3. Independent Contractors: Contracts with individuals engaged to perform services or consultant services for or on behalf of the University under a Contract or Sub-contract, other than in an employment status, and minimally supervised by University personnel. These individuals engaged must meet the requirements for independent contractors under state and federal law, including G.L. ch.149, section 148B. Questions or guidance concerning independent contractor status should be directed to Human Resources.
4. Legal services: Attorneys or law firms retained to provide legal advice or representation for the University, a campus, or University employees in matters relating to their official duties. Any legal counsel retained by the University on a permanent, temporary, or consultant basis shall be approved and retained by, and subject to the continuing supervision of, the General Counsel of the University, pursuant to the vote of the Board of Trustees, May 1, 1974.
5. Services: Duties, work, or activities performed by an individual, company, or entity for the University under a written contract; or on behalf of the University under a written sub-contract; or performed by the University for a third party under a written contract. Services as defined in this subsection shall not include consultant or legal services.
6. Sub-contracts: The University, through the President’s Office, or any campus may enter into contracts with other persons or entities, including other governmental agencies, by which the University agrees to provide services. In order to fulfill these contractual obligations, the University may enter into sub-contracts with persons or firms. These sub-contracts shall be subject to the Procurement Policy and any standards or campus

guidelines developed pursuant to the Procurement Policy in the same manner as if the University were procuring goods and services for itself, unless other contractual terms apply.

C. Competitive Procurement

Competitive procurement is the acquisition of Procurements through fair and open competition. Acceptable methods of competitive procurement include invitations to bid, requests for proposals, requests for quotes, or a combination of these (collectively “Invitations”).

Invitations shall be written in a manner to encourage fair and open competition. All Invitations issued shall include specifications and all contractual terms and conditions applicable to the particular procurement. Invitations may include language for the submission of samples that may be examined, tested, and analyzed to determine if they meet the stated specifications provided for in the Invitations.

1. Procurement specifications should be written in clear, simple language and provide an accurate description of the physical, technical, or functional characteristics of the Procurement. Procurement specifications shall be as detailed as practical presenting a clear statement of the required standards of workmanship, materials, services and/or performance of the Procurement to be procured. Specifications shall set out the essential characteristics of the Procurement being procured so that potential responders are responding to the Invitations on the same terms,
2. Invitations shall include the contractual terms and conditions relative to the Procurement being procured. All responders must be advised of those specific terms and conditions required by the University and which will not be negotiable.
3. Invitations for Procurements shall be posted on a publicly displayed bulletin board at the respective University campus, or University campus website and when deemed desirable, or as required by law, may be advertised in newspapers and trade journals in the State, Comm-Buys or other appropriate public internet websites. Advertisement for design and building construction must be in compliance with G.L. ch.7C, G.L. ch.149 and G.L. ch.30, section 39M.
4. University personnel responsible for purchasing shall, to the greatest extent possible, inform themselves of prices and specifications of items available through the Commonwealth of Massachusetts, Operational Services Division (“OSD”) and its contract price agreements and may utilize those agreements whenever it would be to the advantage of the University. When utilizing OSD, for Procurements, other consortia, or group purchasing organizations, the University must comply with the procedures and terms and conditions set forth for the procurement; including any requirements for obtaining quotes from multiple vendors.
5. Contracts of other consortia and group purchasing organizations may also be utilized when approved by the University Purchasing Council based on evidence of consortia’s sound competitive and ethical procurement practices whenever it would be to the advantage of the University

6. When practicable, requisitions and orders shall be grouped to take advantage of quantity discounts.
7. Competitive Procurement is required for purchases of materials, goods, commodities, leases (including equipment or real property) and licenses (including software, electronic journals, or real property) which exceed ten thousand dollars (\$10,000) per fiscal year; and for services contracts including consultant contracts, and sub-contracts which exceed fifty thousand dollars (\$50,000) per fiscal year.
8. All Labor and Materials construction projects must be bid in compliance with G.L. ch.149 and G.L. ch.30, section 39M.
9. Services for Building Projects (as defined in ch.7C) must be bid in compliance with G.L. ch.7C.

D. Exceptions to Competitive Procurement

Subject to the Procurement Policy, procurements made without advertising or some competitive procurement process should be limited to:

1. Purchases of materials, goods, commodities, leases (including equipment or real property) or licenses (including software or real property) less than ten thousand dollars (\$10,000) in value.
2. The best over-all value based on a minimum of two with a preferred three quotes for purchases of materials, goods, commodities, leases (including equipment or real property) and licenses (including software) between ten thousand dollars (\$10,000) and fifty thousand dollars (\$50,000) in value.
3. Consultant, services contracts, or sub-contracts with fees of fifty thousand dollars (\$50,000) or less per fiscal year.
4. Those instances where competitive bidding would be impracticable; and in all such instances, any department requesting the procurement must provide a written memorandum of "No Bid Justification," which must include the benefits and circumstances for procurement without competitive bidding. In those instances where competitive bidding is impossible and would have no practical value because of the nature of the Procurement, the campus chief procurement officer or chief purchasing officer, at his/her discretion, may determine whether a "No Bid Justification" is necessary.

E. Procedures

1. A University standard contract form agreement shall be used whenever possible for procuring consultant or other services under the Procurement Policy.
2. A purchase order may be used for procuring services, including consultant and sub-contract services with projected fees of ten thousand dollars (\$10,000) or less per fiscal year.

3. A purchase order may be used for Procurements publicly administered by the Commonwealth of Massachusetts, Operational Services Division.
4. A University standard amendment form or an amendment in substantially the same form as the University standard amendment form shall be used whenever possible when amending a contract or sub-contract.
5. Change orders should be made in accordance with the terms of a contract or sub-contract. A change order is a written order issued by a duly authorized individual who approves a change in the work, contract time and/or amount in accordance with the terms of the written contract.
6. Contracts for consultant or other services should include the University's insurance requirements identifying the appropriate insurance coverages required under the contract.
7. When a procurement of services, regardless of dollar value, for maintaining, disclosing, transmitting, accessing, using, or storing personal information or personally identifiable information (PI) as defined under state or federal law, or protected health information (PHI) as defined under the Health Insurance Portability and Accountability Act of 1996 as amended, the campus may need to either enter into an additional agreement or provide sufficient language in the existing agreement that outlines the obligations of a party in safeguarding PI or PHI from unauthorized disclosure or use. Questions about potential liabilities or other legal concerns should be directed to the Office of General Counsel.
8. A campus must notify the President or designee about any proposed campus contract for consultant services which will exceed \$300,000 annually.

F. Legal Consultation and Review

1. Legal Review: Prior review and approval by the General Counsel's office is required for the following agreements.
 - a. Agreements relating to any interest in real property.
 - b. Sub-contracts, consultant or other service contracts which exceed \$100,000 per fiscal year.
 - c. Contracts for lobbying services.
 - d. Amendments which contain language that conflicts with, modifies, deletes, adds to, or otherwise alters the University's standard contract terms and conditions.

In addition to the preceding, the General Counsel's Office may review any agreement, including; but not limited to contracts, sub-contracts, or consultant contracts and amendments, which a campus reasonably believes requires legal review.

2. Exceptions to Required Legal Review:

a. The purchase of services for the necessary and routine operations or daily activities of the University and/or the repair or maintenance of University property or facilities.

3. Consultation: The General Counsel's office should be consulted regarding any interpretation or application of these Standards or the Procurement Policy. Attorneys in the office can provide review and advice for any aspect of procurement, including development of Invitations/RFP/RFQ, responses from bidders, post-award de-briefs and protests, proposed contract terms, and negotiations.

Attorneys in the General Counsel's office should be consulted regarding any contractual terms implicating the University's trademarks, copyrights, or intellectual property, or any terms which may require the University to indemnify, hold harmless, warranty, or otherwise agree to protect a third party from risk of loss in any respect.

G. Contract Best Practices. University employees should review the University's "Contracting Best Practices" document. See below.

8 Tips: For Reviewing Vendor Contracts

1. Preamble

Always start by reviewing the preamble to the contract. Make sure the University and the Vendor are properly identified as parties to the contract by their legal names. Use “University of Massachusetts _____” inserting the campus name. Do not use the Department or School name. The University is not a corporation, non-profit entity, or political subdivision. It is a “public institution of higher education within the Commonwealth of Massachusetts.” Legally speaking, it is an “agency” of the Commonwealth. Make sure that each party uses a physical legal address and not a P.O. Box. The Vendor should be identified by its full legal name, including the designation of the Vendor’s form of business entity (e.g. “Inc.” for a corporation, “LLC” for a limited liability company). If the Vendor is an individual acting as a sole proprietor, the Vendor should be identified by that individual’s first and last name.

2. Laws or Jurisdiction of Another State

Many contracts require the application of laws from another state or require the University to agree that it may be sued outside of Massachusetts. This language is often found under headings such as Applicable Law, Governing Law or Choice of Law. The laws and the jurisdiction of the Commonwealth of Massachusetts should always be substituted for that of any other state. The proper procedure for correcting such language is to:

- a) Request the Vendor remove the state's name and insert Massachusetts as the governing law and jurisdiction;
- b) If the Vendor will not accept the change from its chosen state to Massachusetts, request that the choice of law and/or Jurisdiction section remain silent: that is, agree not to have a choice of law section and have the Vendor remove the clause entirely;
- c) If the Vendor refuses to accept any of the above changes consult with the Office of the General Counsel (“OGC”).

3. Arbitration Clauses

If the Vendor requests an arbitration clause be included in the contract and you consent to having an arbitration clause included, it is recommended that you not accept a “non-binding” arbitration clause. Binding arbitration clauses may be acceptable so long as (1) the language does not require the arbitration to be conducted outside of Massachusetts or in accordance with another state or country’s laws and (2) the arbitration clause also includes language requiring the parties to participate in mediation prior to requesting arbitration.

- a) The proper procedure for correcting arbitration clauses containing unacceptable requirements is to:

- i. request the Vendor remove any language requiring arbitration be conducted outside of Massachusetts;
 - ii. request the Vendor to remove any language requiring arbitration be conducted in accordance with another state or country's laws;
 - iii. if the Vendor refuses to remove the above said requirements please consult with OGC.
- b) The proper procedure for correcting arbitration clauses that do not include mediation language is to:
- i. request the Vendor add the following language:

Mandatory Mediation. In the event a dispute shall arise between the parties to this [Contract, Agreement, etc.], the parties will make a good faith attempt to resolve any and all claims and disputes by submitting them to mediation before resorting to arbitration. The mediation will involve no formal court procedures or rules of evidence and the mediator shall not have the power to render a binding decision or force an agreement on the parties. The mediation of any claim or dispute must be conducted by a mediator who has had both training and experience as a mediator of commercial matters. Within thirty (30) days after the selection of the mediator, the parties will meet with the mediator for one (1) mediation session of at least four (4) hours.

If the claim or dispute cannot be settled during such mediation session or mutually agreed continuation of the session, either party may give the mediator and the other party to the claim or dispute written notice declaring the end of the mediation process. All discussions connected with this mediation provision will be confidential and treated as compromise and settlement discussions. Nothing disclosed in such discussions, which is not independently discoverable, may be used for any purpose in any later proceeding. The parties agree to share equally in the costs of the mediation.

- ii. if the Vendor refuses to add the above said language please consult with OGC.
- c) Any language suggesting the prevailing party shall be entitled to recover its legal costs and attorney's fees should be removed. The proper procedure is to request the Vendor remove such language.

4. Confidentiality and Non-Disclosure Clauses

Pursuant to the Massachusetts Public Records Law (M.G.L. Ch. 66 §10), the public has the right to review, inspect and copy University records unless a specific exemption allows the withholding of a record. The existence of a service or goods contract in and of itself can never be confidential. The proper procedure for correcting the inclusion of a Confidentiality and/or Non-Disclosure clause is to:

- a) Unless absolutely required, request that any Confidentiality and/or Non-Disclosure clause(s) be deleted;

- b) If the Vendor will not accept the deletion of such a clause, request that the following language be inserted at the beginning of the clause: “To the extent permissible under Massachusetts Law...”

Some contracts require the University to provide notice if they are going to disclose the terms of the contract or other documents relating to a contract. Such language should be deleted. The Massachusetts Public Records statute does not require the University to provide any notice prior to disclosing documents or to seek prior authorization from the Vendor to disclose a document in accordance with the statute. If the Vendor requires notice you should consult with OGC.

Some types of contracts involve proprietary interests and/or trade secrets that may require a Confidentiality and/or Non-Disclosure clause to protect such interests. If the Vendor believes that a Confidentiality and/or Non-Disclosure clause is necessary in this instance, please consult with OGC.

5. Legal Fees and Cost of Enforcement

Have the Vendor remove any clause(s) obligating the University to pay legal fees or other costs relative to the enforcement of a contract. The University will only pay legal fees ordered by a court. The proper procedure for correcting such language is to:

- a) Request the Vendor remove any language or clause which suggests that a party is entitled to costs incurred in the enforcement of the contract;
- b) Request the Vendor remove any language or clause which suggests that the prevailing party shall be entitled to recover court costs and attorney’s fees in the event of litigation or arbitration;
- c) If a party refuses to strike such language or clause, consult with OGC.

6. Automatic Renewal

The University should not agree to language that creates an automatic renewal of a contract for an additional term. Contracts should be periodically reviewed for consistency with University policy, law, and business interests prior to any renewal; therefore, renewal options should always be at the University’s discretion. The proper procedure for correcting such language is to:

- a) Request the Vendor to remove the automatic renewal language and replace it with language that allows the University to renew the contract at its option e.g., “The University may, by providing written notice no later than thirty (30) days before expiration of the initial term, renew this [Contract, Agreement, etc.] for an addition term of [*insert time period*].”

7. Terms Requiring University to Indemnify Contracting Party

The University, as a public entity cannot indemnify Vendors or other parties to the contract as the University is prohibited from pledging the credit of the Commonwealth without the approval of a two-thirds vote of the Massachusetts Legislature. *See* Article 62 of the Massachusetts Constitution, as amended. The Massachusetts courts have construed statutory authorizations for public entities to enter into contracts as not authorizing indemnity clauses. *Lovering v. Beaudette*, 30 Mass.App.Ct. 665, 669 (1991); *Raisman v. Cunningham, Inc.*, Civil Action No. 93-5070-G

(Super. Ct. 1995). The proper procedure is to request the Vendor to delete the clause(s) in its entirety.

If a Vendor refuses to remove the clause(s), consult with OGC.

8. Amendments

Confirm the contract contains a provision requiring that amendments be in writing and signed by both parties. If not, request that the Vendor include the below language as a separate numbered paragraph near the end—before the signature lines.

Amendments. No amendment to this Agreement shall be effective unless in writing and signed by authorized representatives of both parties and complies with all other regulations and requirements of law.