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.