
Standard Operating Procedures for Contracts, Commitments & Agreements

Objective

All contracts below \$50,000 (one-time or annual, whichever is greater) may be reviewed and approved by the department or area manager, provided the attached *Authorized Approver's Checklist* is completed and SEAS Finance is informed of all contracts.

Overview

A contract is an agreement between two or more parties that creates enforceable rights and obligations and has commercial substance. Contracts may be written, verbal or implied. Contracts are complex and can be difficult to read and decipher. Failure to engage in a *pre-commitment* review of contracts and agreements could expose Harvard John A. Paulson School of Engineering and Applied Sciences (SEAS) to both reputational and legal risks. SEAS Finance is here to help with the *pre-commitment* review of contracts and agreements, and we hope that this SOP will provide you with the relevant guidance and resources associated with this review.

Utilizing SEAS Finance as the single point of contact will ensure all contracts and agreements will be cohesively and centrally managed at the school and authorized approvers¹ will be contacted prior to entering into commitments. There is also the potential for realization of economies of scale should we determine that multiple areas or centers are contracting with the same vendor.

A sufficient pre-commitment review will allow SEAS to achieve the following:

- Ensure compliance with relevant SEAS and Harvard University policies
- Ensure compliance with relevant external regulations and accounting standards²
- Enhance the evaluation of related financial, legal and other considerations
- Enhance the risk assessment associated with commitment
- Enhance communication among units

Please note that this SOP is intended to serve as supplemental guidance. It is not intended to conflict with, or supersede the University's Office of General Counsel Legal Agreement Workflow.

Scope

The scope of this SOP includes any binding agreements intended to purchase or lease goods or services in a manner that would commit the resources (sponsored funds or non-sponsored funds) of SEAS, seek to leverage or license SEAS' Intellectual Property, technology, trademarks, or entitle SEAS to future revenue sources.

Below please find a list of examples of some key types of contracts included, but not limited to, the scope of this SOP:

- Purchase agreements or commitments to procure goods/services
- Equipment purchase and lease commitments (*in consultation with Science Ops or Facilities*)
- Building and installation commitments (*in consultation with Facilities*)
- Performance contracts
- Hotel contracts

¹ Approval requirements are dependent on the **nature and dollar value** of the contract or commitment. For more information, refer to the 'Responsibilities of the Required Approver' section below.

² The Financial Accounting Standards Board (FASB) requires disclosure of certain types of commitments and contingencies in the footnotes of the University's financial statements. Contact SEAS Finance for details on annual disclosure requirements

- Real estate agreements and/or leases
- Software and other licensing agreements (*in consultation with IT/Computing*)
- Technology and web-based services user agreements (*in consultation with IT/Computing*)
- Intellectual property agreements (*in consultation with OTD*)
- Consulting agreements
- Academic collaboration agreements or memorandums of understanding
- Corporate governance
- Research & subcontract agreements³ (*in consultation with RAS*)

Procedures

The following steps **MUST** be taken **prior to** formally entering into commitments (unless the contract is being stewarded by OTD and/or OSP):

- 1) Route contracts or agreements to the authorized approver **AND** SEAS Finance for review prior to commitment and execution. “Authorized Approvers” are delineated based on the contract’s amount (For more information, please refer to “Authorized Approver Hierarchy.”)
- 2) The Authorized Approver should indicate their approval while performing a review in accordance with the “Authorized Approver’s Checklist”, found within the *Useful Links* section below.
- 3) Should the Authorized Approver’s initial review indicate terms or other complex language within the agreement that warrants the additional review by content area experts, such as HR (e.g., consulting contracts), OSP (e.g., agreements involving procuring research data), OVPR (e.g., export controls), and OTD (licensing, intellectual property), the Authorized Approver in consultation with SEAS Finance, will make the decision to consult with the applicable parties and maintain documentation of discussions and correspondence as part of the overall contract review package.
- 4) Upon completion of review, Authorized Approver will return signed agreement to local administrator/initiator with a cc to SEAS Finance (Devon Losada, Senior Accountant: dlosada@seas.harvard.edu).
- 5) Once the contract is fully executed, please provide a signed copy to SEAS Finance (Devon Losada, Senior Accountant: dlosada@seas.harvard.edu). This will ensure all contracts executed throughout SEAS (excluding sponsored agreements already in GMAS) are retained and catalogued. SEAS contracts will ultimately be stored in Novatus, a contract database utilized by Central and other groups throughout the University.

Note: If assistance is requested with the pre-commitment review of any contract, regardless of size, reach out to Devon Losada, Senior Accountant at dlosada@seas.harvard.edu.

Resources & Useful Links

Appendix A - Authorized Approver’s Checklist

Appendix B - OGC General Contract Review Checklist

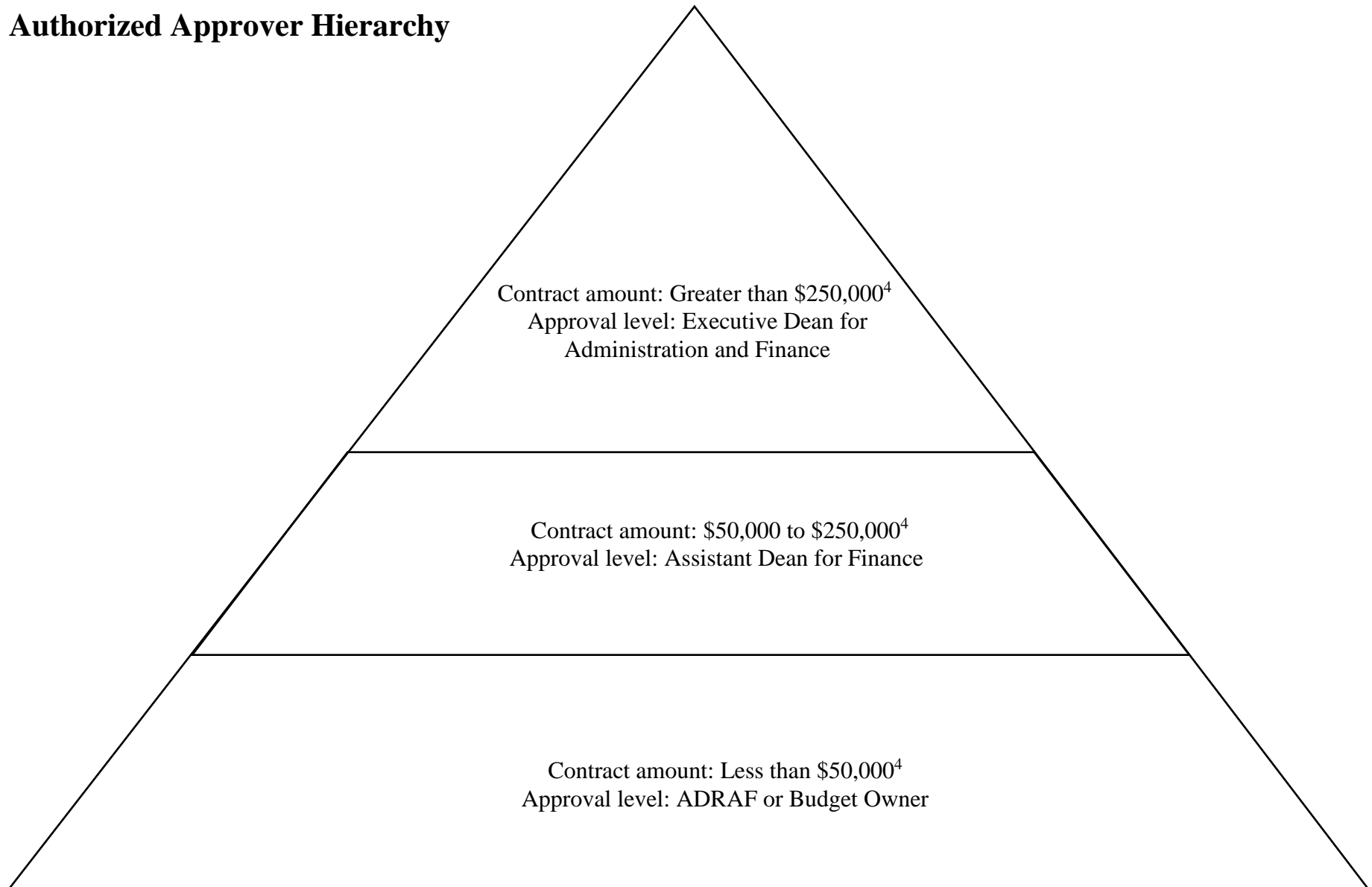
[Model agreements from OGC website](#)

[Harvard University Policy on Use of Harvard Names and Insignias](#)

[Harvard University Legal Agreement Workflow](#)

³ As noted in the Legal Agreement Workflow, agreements/contracts operating under a research agreement should be in compliance with the terms of the sponsored award, if applicable, and any questions should be run by the Office for Sponsored Programs. If questions of application remain, please contact SEAS Finance.

Authorized Approver Hierarchy



⁴ One-time or annual, whichever is greater

Standard Operating Procedures for Contracts, Commitments & Agreements

Authorized Approver's Checklist

Appendix A to SEAS Contract SOP

All contracts below \$50k can be reviewed and approved by the department or area manager, so long as the attached *Authorized Approver's Checklist* is completed and SEAS Finance is informed of all contracts. If assistance is requested with the pre-commitment review of any contract, regardless of size, reach out to Devon Losada; Senior Accountant at dlosada@seas.harvard.edu.

| | | |
|---------------------------|-----------------------|---------------|
| Who is the contract with? | Contract Dollar Value | Contract Date |
|---------------------------|-----------------------|---------------|

| No. | REPRESENTATION | <\$50k Approver | \$50k-\$250k Approver | >\$250k Approver |
|-----|--|-----------------|-----------------------|------------------|
| 1 | Do I have the appropriate authority to review this contract/agreement as specified in the Authorized Approver's Hierarchy? | | | |
| 2 | Have all other necessary parties (HR, OSP, OVPR, OGC, etc.) reviewed this contract/agreement (as necessary)? | | | |
| 3 | Does the contract/agreement state the name of "President and Fellows of Harvard College, acting through John A. Paulson School of Engineering and Applied Sciences"? | | | |
| 4 | Does the contract/agreement include a clause prohibiting the other party from using Harvard's name for promotional or other purposes in connection with the contract without the express prior written permission of Harvard in each instance? See Appendix B - OGC General Contract Review for example statement. | | | |
| 5 | Is this agreement over \$25,000 and for sponsored research? If yes, does the contract/agreement include a debarment clause? See Appendix B - OGC General Contract Review for example statement. | | | |
| 6 | Have I reviewed the OGC Contract Review Checklist to ensure all necessary components are included within this contract/agreement? | | | |
| 7 | Does the contract/agreement conform to all necessary University policies? | | | |
| 8 | Does the contract have appropriate evidence of review with signoff (e.g. physically signing the document; digital signature via pdf; etc.)? | | | |
| 9 | Have the funds for the transaction been allocated or are otherwise available within regularly approved budgets, special appropriations, or restricted or designated accounts? | | | |
| 10 | Does the contract/agreement have a likely impact on other elements of the School, Central Administration, University and broader community? Has the appropriate consultation has taken place with any constituencies that would be impacted by the transaction or contract (e.g. Information Technology or Human Resources)? | | | |
| 11 | Is there a real or apparent conflict of interest on the part of the approving individuals or any other individual or organization involved in the transaction? | | | |
| 12 | When a real or apparent conflict of interest does exist, has the issue been resolved prior to entering into the transaction or contract, in accordance with the Harvard University and Harvard John A. Paulson School of Engineering and Applied Sciences Policy on Conflicts of Interest and Commitment for Senior Officers and Administrators. | | | |
| 13 | Are you the final reviewer for this contract/agreement? If yes, please sign the contract/agreement document. | | | |

<\$50k - ADRAF or Budget Owner Printed Name, Signature, and Date

\$50k-\$250k - Assistant Dean for Finance Printed Name, Signature, and Date

>\$250k - Executive Dean for Administration and Finance Printed Name, Signature, and Date

General Contract Review Checklist

Harvard Office of General Counsel (OGC)
February 2016 – Appendix B to SEAS Contracts SOP

This checklist is designed for review of contracts for acquiring goods or services when the document is originated by the vendor or consultant. For additional points to consider, see the comments in the OGC's "Model Consulting Agreement with Comments," <http://ogc.harvard.edu/pages/model-documents>.

1. Basic Review

- Read the entire contract and all attachments.
- Do you understand the contract?
- Does it contain all the business terms that you consider essential to the transaction?
 - For example, description of services and deliverables, price, payment schedule, and dates for performance or delivery.
- Are all necessary price lists, scopes of work, specifications, schedules, appendices, order forms, and other attachments mentioned in the contract attached?

2. Identification of the Parties

- Contracts should be made in the name of "**President and Fellows of Harvard College**," which is Harvard's legal name. Individual Schools, departments, and other units are not separate legal entities and should not contract in their own names. If you wish to refer to the specific School, department or other unit involved, state that the contract is being made by the President and Fellows "acting through" that School, department or unit.
 - For example, the contract might be with "President and Fellows of Harvard College, acting through the Office of the Xyz . . ."
- Be sure the other party is properly identified and that it is providing its full legal name and an address.
- If abbreviated terms are used to identify parties, such as "Harvard University (hereinafter referred to as 'Harvard')", be sure the terms are used consistently throughout the document.

3. Use of Harvard's Name

Every contract should include a clause along the following lines **prohibiting the other party from using Harvard's name for promotional or other purposes** in connection with the contract without the express prior written permission of Harvard in each instance:

"Consultant shall not use the name "Harvard" (alone or as part of another name, and in any language) or any logos, seals, insignia or other words, names, symbols, images or devices that identify Harvard or any Harvard school, unit, division or affiliate ("Harvard Names") for any promotional purpose or any other purpose in connection with the Work or this Agreement except as expressly provided in this Agreement or the SOW, or with the prior written approval of, and in accordance with restrictions required by, Harvard. Consultant shall not register any Harvard Name in any jurisdiction as a trademark, service mark, domain name, trade name, business or company name or otherwise. Without limiting the foregoing, Consultant shall cease any use of Harvard Names authorized under this Agreement on the termination or expiration of this Agreement."

Some parties may have legitimate reasons to refer to Harvard in other contexts. This language does not purport to prevent all use of Harvard names for any purpose.

4. Subject of the Contract

- The product or service must be clearly identified and fully described, including any needed specifications. The quantity of the product or the nature of the services being purchased must be stated specifically. There should be no ambiguity about what is being purchased.

5. Cost

- The total purchase price or other consideration to be paid by Harvard must be clearly stated.

- If the other party is promising a discount to Harvard, this should be specified in the contract and the total price should expressly reflect the discount.
- The contract should state whether or not Harvard will reimburse the other party's expenses. If Harvard will pay expenses, consider a description of what expenses Harvard will pay, and either a process for prior approval or a numerical limitation on the amount Harvard will pay.
- The date for payment or the schedule of payments must be clearly stated. It is advisable not to pay all amounts up front, but to establish a schedule of progress payments with a portion held back until the project is complete and accepted.
 - For example, if the service is to cater an event, only a portion should be paid in advance with the rest of the payment due upon the successful conclusion of the event. If the contract involves the purchase of complex machinery or systems, a portion can be paid up front, with the remainder paid after installation and a demonstration that the item works as intended.
- Avoid (strike out) provisions for late fees and interest on unpaid balances. Attempt to obtain as much time for payment as possible. Confirm that deadlines for payment can be met by Harvard's payment system.
- If Harvard is receiving payments, particularly from a foreign source, determine whether any tax will be withheld from the payment. The amount Harvard is entitled to receive should be net of such tax, for which the other party should be responsible.
- If Harvard is receiving payments, determine whether the payments constitute unrelated business taxable income ("UBTI"). UBTI must be reported on Harvard's tax return. For example, where Harvard is receiving payments for permitting advertising in a Harvard publication, the payments will constitute taxable UBTI.
 - For a discussion of UBTI, see <http://ogc.harvard.edu/pages/basics-unrelated-business-income-tax>.

6. Term and Dates

- Every contract should be dated and have a beginning date and an end date or language defining the end date.
 - For example, "The term of this contract shall be for one year from the date of signing, unless otherwise terminated by either party pursuant to this contract."
- The dates for delivery or performance of services should be specifically and clearly stated.
- Avoid automatic renewal provisions ("evergreen" provisions).
 - For example, a clause stating that "The contract shall remain in effect from year to year unless terminated by either party no later than 30 days prior to the conclusion of a contract year" should usually be deleted unless it serves a specific Harvard interest. It is preferable for renewal to be at Harvard's option or by mutual agreement in writing.

7. Early Termination

- Many contracts state that they are terminable by either party upon a breach of a material obligation by the other. Most contracts require a party to give written notice of what it believes is a breach of contract before exercising such a right of termination. Such provisions generally give the recipient of the notice the opportunity to "cure," or correct, the breach. Such provisions are usually acceptable.
- Does the contract contain a unilateral right of termination? This right enables a party to terminate the contract without cause at any time, usually a certain number of days after delivery of termination notice to the other party.
 - For example, "This contract may be terminated by either party at any time with or without cause upon 30 days prior written notice to the other". These may work to Harvard's benefit, but will be a concern if Harvard would not want the other party to have the freedom to end a commitment in the middle of a project.

8. Warranties

An ordinary commercial contract should contain at least standard warranties of the goods or services by the vendor or consultant. These should include warranties that deliverables will conform to industry standards and to the vendor's specifications or product descriptions; that services will be performed with reasonable care and in accordance with professional standards and applicable law; and that services and deliverables will not violate the rights of third parties.

9. Limitation of Liability

Many vendors will seek to place limits on their liability for negligence, breach of contract, or other wrongful acts or omissions. Provisions that absolve the vendor of all liability, even for breach of warranty, are unacceptable and must be deleted. Harvard has every right to expect a vendor to stand behind its product and services and to accept responsibility for its own wrongdoing. In some situations, ceilings on liability are appropriate.

10. Indemnification

- In many contracts there will be sound business reasons for Harvard to require the vendor to indemnify Harvard (i.e., reimburse Harvard fees and costs and otherwise defend Harvard from liability) for claims against Harvard and other losses arising from breaches of the vendor's warranties, infringements of third party rights, or negligence.
- In those cases where Harvard agrees to indemnify a vendor, Harvard should only indemnify to the extent of its negligence or other wrongdoing, such as breach of the contract. Harvard should not indemnify for claims not based on Harvard's fault.

11. Vendors' Employees on Harvard Premises

If a vendor's employees are expected to spend material time on Harvard's premises, the contract should state that they will comply with applicable Harvard policies.

12. Intellectual Property Rights in Work Product

- Harvard should usually own the intellectual property rights in any deliverable produced by a vendor for Harvard. Pay careful attention to provisions that give the intellectual property rights in work product to the vendor. This may be appropriate in some cases, such as software consulting agreements, in which case it is important that Harvard is properly licensed to use the software.
- The consultant may want a provision that makes its assignment of rights to Harvard contingent on payment of the consultant's fees and expenses. Reject this request, which gives the vendor unreasonable leverage in a payment dispute.

13. Confidentiality

- The vendor should respect and preserve the confidential nature of any information pertaining to Harvard that Harvard identifies to the vendor as confidential. Confidentiality may be quite important in some contracts, less so in others. If the transaction involves sharing with a vendor any High Risk Confidential Information, as defined in Harvard's information security policy, or any other personal information about employees or students, you should contact your local Information Security Officer about security standards to be included in such agreements.
- Vendors regularly ask Harvard to keep certain parts of the vendor's information confidential. Be sure that the vendor's request is reasonable and that Harvard has the capacity to comply with it. The vendor should be required to describe clearly what information is confidential. If the vendor asks for non-disclosure agreements from Harvard's employees, review the form of agreement carefully before signing the contract and make sure that all current and new employees sign the non-disclosure agreement. You should generally reject provisions that require Harvard to keep the existence and terms of the agreement confidential; in certain cases it may be appropriate to agree to keep the financial terms confidential.

14. Contract Amendments; No Side Agreements

- The contract should contain a provision prohibiting the parties from amending it unilaterally or orally.
 - For example, "This contract may not be modified except in a writing signed by both parties".
- The contract should stipulate that it embodies the entire understanding of the parties. This is an acknowledgment that there are no side agreements or oral understandings. Because vendors often have multiple agreements with Harvard, it is advisable to specify that your agreement only covers the specific goods or services you are contracting for in this contract.

- For example, “This Agreement together with the SOW contains and constitutes the entire agreement between the parties with respect to the Work [*i.e., the specific deliverables or services to be provided under this agreement*] and supersedes and cancels all previous negotiations, agreements, commitments, and writings relating to the Work. It may be amended only by an agreement in writing that refers explicitly to this Agreement, signed by each of the parties hereto. The terms of this Agreement shall apply only to the Work and not to any other services performed by Consultant for Harvard under any other agreement”.
- You should confirm that this statement is correct with respect to the relationship between your agreement and other agreements with the vendor.

15. Governing Law and Dispute Forum

- In the event of a dispute over the meaning of a contract provision, parties must look to the law of a particular jurisdiction (state or country) for guidance. So-called ‘choice of law’ clauses are frequently found in contracts (“this contract shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, without reference to its conflict of laws rules”). Harvard naturally prefers to sign contracts governed by Massachusetts law. If you cannot persuade the other party to include a provision calling for Massachusetts law to apply, an option is to delete the provision altogether. However, the laws of other states or countries are often acceptable.
- The contract may state that any lawsuit shall be brought in the courts of a particular state or country. This is known as a ‘choice of forum’ clause. If possible, such provisions should be rejected (unless the forum is Massachusetts). If not Massachusetts, it is often preferable for the contract to be silent on choice of forum.

16. Resolving Disputes

Sometimes a contract will spell out how the parties will resolve disputes (for example, arbitration, mediation, etc.). Litigation is the traditional method for dealing with contract disputes and is not usually specified – it is the default option. Often it is best not to mandate any particular method of resolving the dispute so that you have options later. Arbitration provisions may be useful in some cases, but require legal review.

17. Assignment

The contract should state that neither party may assign its respective rights or obligations without the prior written consent of the other. The contract should also prohibit the vendor from subcontracting the work without Harvard’s permission. This is especially important if Harvard is engaging the other party to do consulting work or perform other personal services.

- An example of such language: “This Agreement may not be assigned by either party, nor transferred by operation of law, without the prior written consent of the other. Any assignment or transfer without such consent shall be void. Consultant shall not engage any third party to perform any portion of the Work without Harvard’s prior written consent. If Harvard approves the engagement of a third party, Consultant shall remain fully responsible to Harvard for the performance of the Work and all other obligations of Consultant under this Agreement, and Harvard shall not be liable for any payments due to such third party.”

18. Non-solicitation

The vendor may want to include a provision prohibiting either party (or just Harvard) from offering employment to personnel of the other for a stated period of time after termination of the contract. Such a provision should state that it will not apply to general solicitations not specifically directed to the employees of the other party (such as on-line job postings). Also, it is preferable to limit the provision to employees (and not contractors) of the other party who have been involved in the work under the agreement. In Harvard’s case, the provision should apply only to solicitations by the Harvard unit engaging in the contract.

- For example: “During the term of this Agreement and for one year thereafter, neither party shall solicit for hire or hire any employee of the other party who was within the year preceding the solicitation engaged in the specific services that are the subject matter of this Agreement. This paragraph shall not

apply to general solicitations for employment not specifically directed to such an employee, or to solicitations or hires by any Harvard unit other than _____.”

- Reject a formula for damages, such as one year’s salary of an employee hired in breach of the provision.

19. Insurance

- Large long-term contracts, contracts involving atypical risks, and contracts under which the vendor is providing key deliverables should usually require the vendor to maintain liability insurance. See the Insurance Department’s standards and requirements for such insurance: <http://rmas.fad.harvard.edu/pages/vendor-insurance-requirements-0>
- Avoid provisions requiring Harvard to insure the vendor, its products or its employees. If such provisions must be included, consult with the Insurance Department.

20. Relationship of Parties

The contract should provide that the vendor is an independent contractor, and not an agent or employee of, or joint venturer with, Harvard, that Harvard will not withhold income or FICA taxes or provide unemployment insurance or worker’s compensation for the vendor’s employees, and that the vendor’s employees are not entitled to receive any Harvard benefits.

21. Notice Provisions

Contracts often require or permit one party to send notices to the other (for example, a notice of unilateral termination or a notice of intent to terminate for breach). It is helpful to have a provision specifying the methods of delivering such notices, which can include United States mail, messengers, faxes, and e-mail. The contact information of the person to whose attention notices are to be sent should be stated, or a means for obtaining this information should be stated.

22. Review by Others

For contracts involving High Risk Confidential Information, as defined in Harvard’s information security policy, and other personally identifiable information, consult with your local information security officer.

Contracts with foreign government agencies must be reviewed by OGC.

Contracts for the transfer or acquisition of Harvard intellectual property rights (excluding boilerplate transfers of rights from a vendor or consultant to Harvard) should be reviewed by OTD or OGC.

All contracts for security, custodial, or dining services for a period of nine months or more and payments exceeding \$50,000 must be reviewed by OGC or the Office of Strategic Procurement.

Consult the Office of Strategic Procurement if your business goal or the vendor’s is an agreement that will apply to the relevant activities of all or multiple Harvard units.

Consult the Office for Sponsored Programs (OSP) with respect to any subcontract under a federal contract or for the purchase of goods or services under a federal contract.

See the OSP Legal Agreements Workflow for information on responsibility for other types of contract: <http://osp.fad.harvard.edu/content/legal-agreements-workflow-negotiating-authority-and-signing-authority>

23. Debarment Clause

Example debarment clause: *By signing this agreement, the agreeing party certifies, to the best of his/her knowledge and belief that neither the company nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any federal department or agency, in accordance with 2 CFR 200.213 and 2 CFR 180.”*