

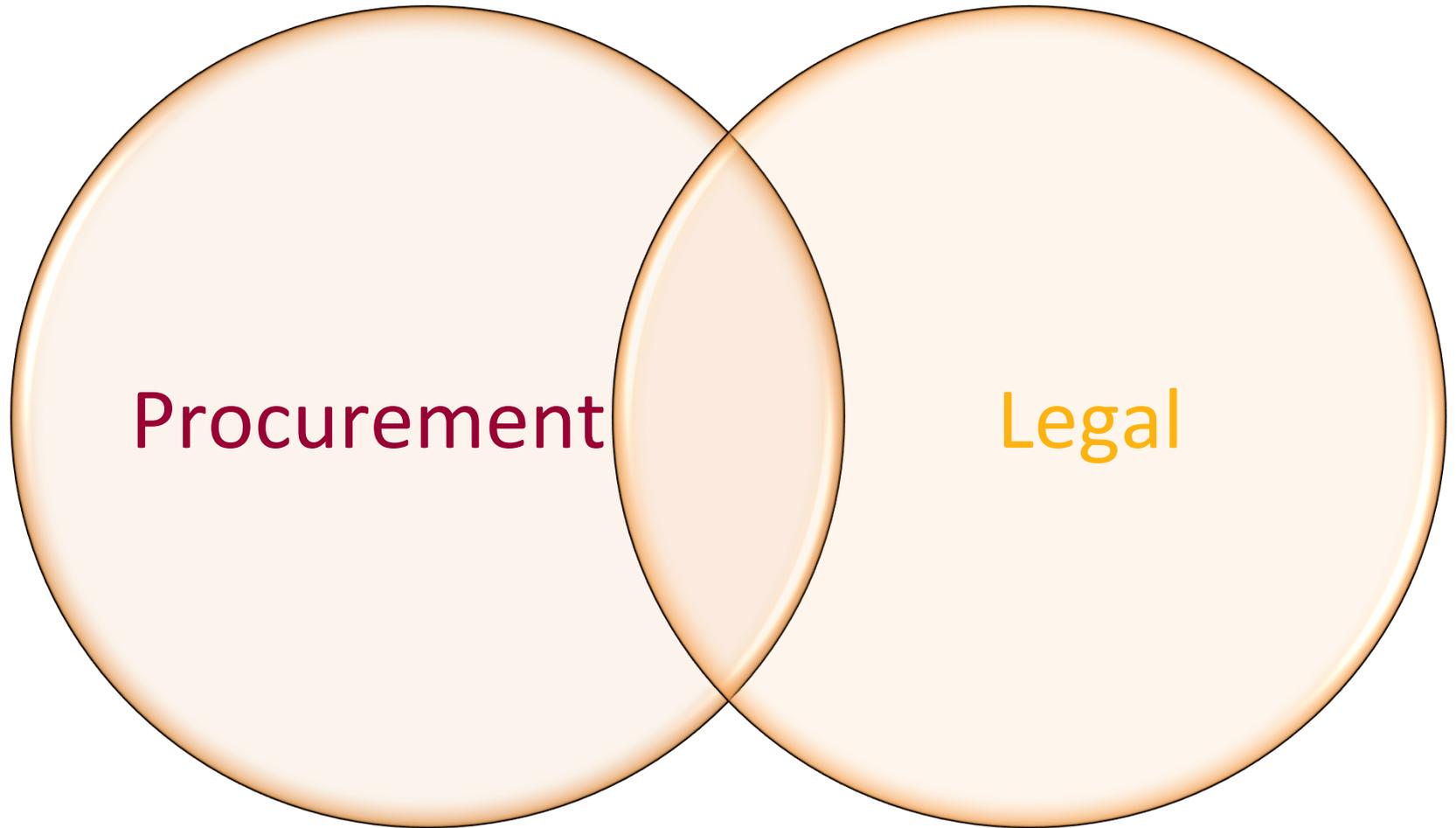


Contracts 101 for Non-Lawyers

Presented by ASU

Procurement and Office of General Counsel

Relationships



WHAT IS A CONTRACT

Contracts are binding agreements between **two or more parties** that create **rights** and **obligations** that may be enforced by a court of law.

A well-written **contact should **define** both parties' **rights and duties** and **create** a process for **decision making and dispute resolution.****

Contract Formation

- To be valid a contract must have:
 - Mutual Assent (Offer and Acceptance) by those with the Capacity to contract.
 - Consideration to both Parties.

Napkin Agreements

- Is an agreement written and signed on a cocktail napkin enforceable?
- What about verbal agreements?

Why Have a Written Contract?

- Legal Reasons
 - Statute of Frauds
- Regulatory Reasons
- Business Reasons

Why Have a Written Contract



Why Have a Written Contract

- Although important, a written contract has limits.
 - What a contract can and cannot do for you.
- Most important line in any contract?
 - The signature lines.

TYPES OF CONTRACTS

Trick Question

What is the difference, legally, between a **Contract**, an **Agreement**, a **Memorandum of Understanding**, a **Letter of Intent**, and a **Non-Disclosure Agreement**?

- There is no legal difference – all can be enforceable legal contracts.
- **Substance** is much more important than the **Form** of the document.

Common Template Forms

- Procurement Agreements
 - Consulting, Services, Deliverables
- Construction Agreements
 - Contractors, Engineers, Architects
- Software Agreements
- Facilities/Venue Agreements
- Speaker/Artist/Performer Agreements

Common Template Forms

- Non-Disclosure Agreements / Confidentiality Agreements
- Affiliation Agreements
- Research Agreements
- International Agreements
- MOUs/LOIs/Term Sheets

KEY CONTRACT TERMS

Key Terms

- Basic Terms
- Term; Termination; Renewals
- Covenants, Representations and Warranties
- Allocation of Risk (Indemnity)
- Insurance
- State Required Provisions

Basic Terms

- Who are the Parties?
- What is the nature of the agreement (e.g. what is being purchased?)
- Scope of work?
- What is the compensation or sales price?
 - Fixed Price vs. Cost-Plus

Term, Termination and Renewals

- Term
 - When does the contract end?
 - What happens at termination?
- Termination Rights
 - Who can terminate – Cause/No-Cause.
 - Termination for Convenience.
- Renewals
 - Automatic.

Covenants, Reps and Warranties

Covenants vs Reps vs Warranty.

- Covenants.
 - A promise by a party that something has been or will be done.
- Representations.
 - A statement of (usually present) fact that induces a party to enter into a contract.
 - Ownership of property, licensing, authority to sign, equipment is new, etc.

Covenants, Reps and Warranties

- Warranties.
 - A guarantee that a fact is true (form of indemnity).
 - A promise to ensure future performance (construction contracts).

Allocation of Risk

- What is Allocation of Risk.
 - The process of contractually agreeing upon which party will bear the liability resulting from certain events.
- Indemnification.
 - A promise to pay for the other party's damages, losses, or injuries.
 - Usually relates to third-party claims.

Allocation of Risk

- Duty to Defend.
 - Results from the “defend” in “indemnify, defend, and hold harmless...”
 - Relates to defense costs resulting from claims (attorney’s fees).
- Limitation of Liability.
 - Provision that “Caps” the amount a party will be liable for in certain cases.
 - State-by-State.

Insurance

- Why Require Insurance?
 - Helps mitigate the potential risks
 - Demonstrates the viability of a company
 - Is a way to potentially obtain financial reimbursement in the event of a loss
- When should it be required?
 - Whenever the risks are greater than the contracting party is willing to accept

Insurance

- Types required?
 - Commercial General Liability, Commercial Automobile Liability, Workers Compensation, Professional Errors and Omissions, Technology Errors and Omissions, and Excess/Umbrella
- Certificate of Insurance

State Required Provisions

EXHIBIT A

ARIZONA STATE UNIVERSITY SUPPLEMENTAL TERMS AND CONDITIONS

To the extent any provisions of the foregoing contract with the Arizona Board of Regents, a body corporate, for and on behalf of Arizona State University (ASU) conflict with any of the provisions of this Exhibit, the provisions of this Exhibit will control. References to this Contract include the foregoing contract and this Exhibit. All provisions of this Contract that anticipate performance after the termination of this Contract, and all provisions necessary or appropriate to interpret and enforce such provisions, will survive termination of this Contract.

- 1. Nondiscrimination.** The parties will comply with all applicable state and federal laws, rules, regulations, and executive orders governing equal employment opportunity, immigration, and nondiscrimination, including the Americans with Disabilities Act. If applicable, the parties will abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.
- 2. Conflict of Interest.** If within 3 years after the execution of this Contract, Entity hires as an employee or agent any ASU representative who was significantly involved in negotiating, securing, drafting, or creating this Contract, then ASU may cancel this Contract as provided in Arizona Revised Statutes (ARS) § 38-511. Notice is also given of ARS §§ 41-2517 and 41-753.
- 3. Arbitration in Superior Court.** As required by ARS § 12-1518, the parties agree to make use of arbitration in disputes that are subject to mandatory arbitration pursuant to ARS § 12-133.
- 4. Dispute Resolution.** If a dispute arises under this Contract, the parties will exhaust all applicable administrative remedies provided for under Arizona Board of Regents Policy 3-809.
- 5. Records.** To the extent required by ARS § 35-214, the non-ASU parties to this Contract (jointly and severally, Entity) will retain all records relating to this Contract. Entity will make those records available at all reasonable times for inspection and audit by ASU or the Auditor General of the State of Arizona during the term of this Contract and for a period of five years after the completion of this Contract. The records will be provided at Arizona State University, Tempe, Arizona, or another location designated by ASU on reasonable notice to Entity.
- 6. Failure of Legislature to appropriate.** In accordance with ARS § 35-154, if ASU's performance under this Contract depends on the appropriation of funds by the Arizona Legislature, and if the Legislature fails to appropriate the funds necessary for performance, then ASU may provide written notice of this to Entity and cancel this Contract without further obligation of ASU. Appropriation is a legislative act and is beyond the control of ASU.
- 7. Weapons, Explosive Devices and Fireworks.** ASU prohibits the use, possession, display or storage of any weapon, explosive device or fireworks on all land and buildings owned, leased, or under the control of ASU or its affiliated or related entities, in all ASU residential facilities (whether managed by ASU or another entity), in all ASU vehicles, and at all ASU or ASU affiliate sponsored events and activities, except as provided in ARS § 12-781, or unless written permission is given by the Chief of the ASU Police Department or a designated representative. Notification by Entity to all persons or entities who are employees, officers, subcontractors, consultants, agents, guests, invitees or licensees of Entity (Entity Notification Parties) of this policy is a condition and requirement of this Contract. Entity further agrees to enforce this contractual requirement against all Entity Notification Parties. ASU's policy may be accessed at: www.asu.edu/aad/manuals/pdp/pdp201-05.html.

Signature Authority

ASU Policy

- Is **delegated** by the **President**
- Delegation is by **title** – not individual
- Delegation is **limited** to specific contract **types** and dollar **amounts**

Protects **you** and the **institution**.

Summary

Contracts play an important role in procurement by **stating expectations** of the parties and **process for resolution** if something goes wrong.

WDTCS

**WHAT
DOES
THE
CONTRACT
SAY**

Questions



Contacts

- Ben Mitsuda, Associate General Counsel:
benjamin.mitsuda@asu.edu
- Lorie Sheppard, Interim Associate Director of Procurement: lorie.sheppard@asu.edu