

Contracts 101 – Spotting Problematic Contract Terms

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 [Standard Terms](#) for a corresponding term in an outside contract.

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 the College's

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?

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 a party's obligations.

Stakeholders must also ensure that the outside party's obligations are objectively clear, firm, and



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 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 (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?

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.

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 (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 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

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."

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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.

NONWAIVER. If either Party shall waive any right, obligation, or remedy arising under this Agreement

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 (art)2.7E-0.7 (e)2.1utm2(cy)0.7 ()6.3 ateil2.7 (e (s)2.1s1 (n)(t)2



QUESTIONS AND ADDITIONAL HELP

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