

Problem Contract Clauses and Why You Should Care

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CSU Authority to Contract

Purchase and Sale of Goods and Services

- Authority Granted by Education Code
- Exempt from DGS
- Delegated to Campuses

Construction Authority

- Authority Granted by Public Contracts Code
- Exempt from DGS
- Delegated to Campuses

CSU Authority to Contract cont . . .

Real Property

- Purchase and Sale
Not delegated to campuses, but may accept gifted land
- Leases
Delegated to campuses with OGC approval, except:
 - 20 years or longer term
 - \$100,000 or more annual rent
- Easements
Delegated to campuses with OGC approval
- Licenses
Delegated to campuses

CSU Authority to Contract cont . . .

Who Has the Authority to Contract?

Authority to contract must be properly delegated

Procurement Authority vs. Payment Authority

“apparent” authority concept does not apply to the State

Indemnity and Defense

- The Contractor agrees to indemnify, defend, and save harmless the CSU, its officers, agents and employees from any and all claims and losses accruing or resulting to any other person, firm or corporation furnishing or supplying work, service, materials or supplies in connection with the performance of this Contract, and from any and all claims and losses accruing or resulting to any person, firm or corporation which may be injured or damaged by the Contractor in the performance of this Contract.

Indemnity and Defense

- Indemnity protects against suits by a third party
 - Third party vs. first party
- Protects against paying your own attorneys fees
- The party providing the indemnity and defense normally controls litigation and settlement
 - May raise issues of important governmental policy and sovereignty
 - Negotiate that CSU must substantively participate in defense and must approve settlement

Indemnity and Defense

- Negotiate indemnification as broadly as possible
 - Expect efforts to limit the scope
- Mutual Indemnity
 - “Its only fair, right?”
 - If agree to mutual indemnification, the clause will get very complicated and should be negotiated with the help of University Counsel
 - Better to not have an indemnification provision than to enter into a bad one

Governing (Applicable) Law

- Establishes which jurisdiction's law will apply in interpreting the contract and resolving disputes
 - Insist that California law apply
- Without an express choice of law provision, the choice of law principles of the state where the lawsuit is brought will determine which state's law will govern interpretation of the contract. Factors such as where the contract was signed and where it was performed are usually relevant in determining which law governs. Agreement as to governing law settles this question.
- This would apply to contracts with non-California residents, other states, foreign governments and their nationals, and Native American tribes.
- If cannot have California law apply, consider eliminating the provision

Jurisdiction and Venue

- Establishes the location of the court in which contract disputes will be resolved
- Related to, but not the same as the Governing Law provision

Arbitration

- Courts favor arbitration – less work for them
- OGC policy is to NOT agree to arbitration
 - Binding
 - No appeal right – can't challenge the decision even if the arbitrator made a mistake of law or fact – only if arbitrator exceeded authority
 - Usually no right to discovery
 - Often not faster or cheaper than litigation
 - General trend is away from arbitration

Attorneys Fees for Prevailing Party

- American jurisprudence has tradition against awarding attorneys fees to the prevailing party
 - Statute
 - Contract provision
- Always mutual, even if written as unilateral
- OGC policy is to NOT agree to attorneys fees provision
 - Historically has not benefitted CSU
 - Often hinders settlement

Confidentiality

- Public Records Act (not FOIA!)
 - All CSU agreements are public records
 - PRA provides limited exemptions from disclosure
 - Personal information
 - Trade secrets (ex. Coca-Cola recipe; internal pricing information)
 - Party claiming trade secret must specifically identify the information
 - CSU determines whether to disclose
 - Entire agreement CANNOT be trade secret!

Possessory Interest Tax -- Leases

- Leasing CSU property to a private party or company may create a possessory interest subject to taxation
- Revenue and Taxation Code sec. 107.6 requires written notice of tax exposure
 - No written notice = Campus pays tax liability!!
 - Recently campus paid nearly \$300,000
 - “The ____ County Assessor may value the possessory interest created by this lease or any subleases. Under California Revenue and Taxation Code section 107.6, a property interest tax may be levied on that possessory interest. The lessee is obligated to pay this property tax, and failure to do so may be considered a material breach of the lease”

Questions?

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