

NCCU OFFICE OF LEGAL AFFAIRS
Prohibited or Risky Contract Clauses Checklist

The purpose of this document is to inform anyone who may enter into a contract on behalf of North Carolina Central University about specific clauses that should not be included in the contract. If any of the following clauses are in the contract, then the clause must be deleted or revised as set forth below in the "Required Modification" section. If you have any questions about this document, please contact the Office of Legal Affairs prior to entering or promising to enter into a contract.

PROHIBITED OR RISKY CONTRACT CLAUSE	LANGUAGE TO LOOK FOR	EXPLANATION FOR PROHIBITION	REQUIRED MODIFICATION
Hold Harmless/Indemnification Clause	"Hold harmless," or "save harmless," or "indemnify" or "assume responsibility"	Language implicates the State's sovereign immunity exposing the State to liability for: (1) acts of persons who are not State agents, employees or involuntary servants; (2) amounts greater than the Tort Claims Act provides; (3) actions other than negligence of State employees or agents; (4) a forum other than the Industrial Commission; (5) relief for which the Tort Claims Act does not allow (i.e., attorney's fees outside the Industrial Commission); and/or (6) potential liability in excess of amounts provided in the State budget.	Request the addition of the following language, "Only in the manner and to the extent permitted under North Carolina law, including but not limited to the NC Tort Claims Act, GS §143-291, et seq., and without waiver of its sovereign immunity."
Tort Liability (Beyond the Limits of the Tort Claims Act)	Any wording that provides for University liability or "assumption of risk" or "responsibility" for damages, accidents, claims, etc. may violate this prohibition	Tort liability under the Tort Claims Act has a \$1,000,000 cap for negligence of a State employee/agent acting within scope of their employment.	Request the addition of the following language, "Only in the manner and to the extent permitted under North Carolina law, including but not limited to the NC Tort Claims Act, GS §143-291, et seq., and without waiver of its sovereign immunity."
Irreparable Harm/Injunctive Relief	"Breach of contract would cause irreparable harm and justify injunctive relief"	Language may implicate the Attorney General's obligation to exercise duties regarding civil litigation.	Request the removal of the provision.
Acceleration, Late Fees, Payment Penalties, etc.	"Finance charges" or "Payment due upon breach of contract"	Acceleration, late fee or payment penalty clauses may implicate the State's obligation to operate within a fixed budget, forcing the State to make payments for which no money has been appropriated or budgeted and are not due in a particular fiscal year.	Request the removal of the provision.

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Liquidated Damages or Cancellation Fees	Contract subjects the University to payment of liquidated damages or cancellation fees to the other party	Language may implicate the Attorney General's obligation to exercise duties regarding civil litigation.	Request the removal of the provision.
Payment of Attorney's Fees, Court Costs, or Other Litigation Expenses of Other Parties	Contract references the payment of attorney's fees, court costs or the payment of litigation expenses for the other party by the University	A State agency cannot waive the State's sovereign immunity and assume liability for actions not covered by the Tort Claims Act, in a forum other than the Industrial Commission or for an amount greater than the Tort Claims Act or different from the tort claim liability	Request the removal of the provision.
Non-compete Clause	Contract restricts or prohibits the University from entering into other contracts for the procurement of goods or services from another party that are the subject of the contract	State agencies must comply with competitive bidding requirements under State law. Thus, if the University decides it needs a particular service, it is required to bid competitively for that service, and therefore cannot agree to non-compete clauses that prohibit such bidding.	Request the removal of the provision.
Clause that Prohibits University from Hiring Service Provider's Employees	Contract prohibits the University from hiring any of the other party's employees for a specified period of time, including employees who are assigned to administer the contract between the University and the other party	The public policy of the State of North Carolina is to hire into each position the individual whose education and experience make him or her the best able to perform the specific requirements of the job. The University cannot be restricted in its ability to comply with the public policy of the State.	Request the removal of the provision.
Arbitration	Contract requires the University to participate in binding arbitration in the event of a contract dispute	Such provisions change the law under which sovereign immunity for breach of contract was waived and exposes the State to binding adjudications in a forum other than the courts of the State of North Carolina.	Request the removal of the provision. As an alternative to participating in arbitration, the University can agree to the addition of the following: "Any dispute arising under this Agreement may be settled by mediation in the State of North Carolina in accord with such procedures as may be mutually agreed upon by the parties."

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Venue or Forum Selection Clause	"Subject to either the substantive law or the jurisdiction (also referred to "forum" or "venue")" of another state	Choice of forum clauses requiring breaches of contract to be litigated in a foreign jurisdiction (i.e., another state) are prohibited under N.C. General Statute § 22B-3.	Alter the provision to reflect the application of the laws of the State of North Carolina , i.e., "This Agreement shall be governed by and construed under the laws of the State of North Carolina, which shall also be the forum for any lawsuits arising from or incident to this Agreement." OR In the alternative , remove the provision in its entirety to allow the contract to remain silent on the applicable state law.
Statute of Limitations	Contract restricts the period of time in which the University may file a lawsuit against the party	Any contract between the University and another party includes by implication the existing law of the State of North Carolina. The statutory minimum in North Carolina for filing legal claims on a contract or suing for breach of contract is three years. Therefore, the University, as a State agency, cannot agree to a clause providing less than the statutory minimum of three years for the University to file a legal claim or sue for breach of contract.	Request the removal of the provision.
Limitation of Liability or Waiver/Expansion of University Liability	Contract includes language that: (1) limits the other party's liability for failing to fulfill its contractual obligations or causing damage to the University, or (2) provides that the University will bear the responsibility for damage that may result from the other party's actions	Nothing shall act to limit the contractual and tort obligations or liabilities of a person or entity when contracting with a State of North Carolina entity, or be construed as a waiver of any statutory, contractual, or tort defense, remedy, or limitation on liability, including a defense of sovereign immunity, to which NCCU would otherwise be entitled to.	Request the removal of the provision.
Defense or Settlement Provisions	Contract provides that other party will be responsible for providing a legal defense for any lawsuits that may arise from the contract and that the	Limits the statutory rights, responsibilities, and obligations of the Governor or Attorney General of the State of North Carolina to exercise duties regarding civil litigation.	Request the removal of the provision. In the alternative, the University can agree to the addition of the following: "PARTY'S assertion of a right to exclusive control of any investigation, defense or settlement of any claim filed against NCCU is subject to

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	decision to settle a case is solely within the other party's control		the advance approval of the Attorney General of the State of North Carolina." **Insert the name of the vendor where the word "PARTY" appears.**
Exclusive control of any investigation, defense or settlement of any claims filed against the University	Contract provides that the other party will have sole or final decision-making authority regarding whether to proceed with an investigation, to choose the defense that will be followed in defending against a lawsuit, or to enter into a settlement agreement for the University.	Limits the statutory rights, responsibilities, and obligations of the Governor or Attorney General of the State of North Carolina to exercise duties regarding civil litigation.	Request the removal of the provision. In the alternative, the University can agree to the addition of the following: "PARTY'S assertion of a right to exclusive control of any investigation, defense or settlement of any claim filed against NCCU is subject to the advance approval of the Attorney General of the State of North Carolina." **Insert the name of the vendor where the word "PARTY" appears.**
Contains an automatic renewal clause.	The contract will "automatically renew" upon the expiration of the initial contract period successive periods of time (either a specific period of time or indefinitely).	A contract must be for a term specific and should not automatically renew unless some action is taken by the University.	Request that the provision be modified to reflect a specific term of up to 10 years in length.