

University System of New Hampshire Financial and Administrative Procedures

CONTRACT GUIDANCE AND BOILERPLATE CLAUSES

Procedure 12-010

Issued By: USNH Senior Contract Officer

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(Paragraph numbers coincide with those used in the [Contract Review Checklist](#))

Paragraphs 1 and 2 of the Contract Checklist contain general information about whatever contract is being developed or reviewed and information about the review process. Therefore, this document begins with #3.

Contract Clauses—explanations and recommended wordings

3. Identification of the Parties: The first paragraph of any contract or agreement should identify the name of the parties (firms) to the agreement and the state or states in which they are incorporated. Also include the addresses of the parties and the “referred to as” statements (e.g., buyer and seller; USNH and seller; USNH and “nickname of firm”, etc.)

3.1 For contracts that will be signed by either the USNH Treasurer or the USNH Senior Contract Officer, use the following model for the introductory paragraph:

This [contract/agreement/lease] is entered into the _____ day of _____, 200_ by and between [company name], a [state in which incorporated] corporation, with its principal place of business at [street address/ mailing address—if different], in the City [or Town] of [name of town/city], State of [name of state], [zip code] (hereinafter [Lessor/Lessee/Contractor/Seller/“nickname”]) and UNIVERSITY SYSTEM OF NEW HAMPSHIRE, a New Hampshire corporation, with its principal mailing address at 27 Concord Road, in the Town of Durham, State of New Hampshire, 03824-3546 acting for [name of institution], a member institution of the University System of New Hampshire with its principal mailing address at [street address of institution], in the City [or Town] of [name of town/city], State of New Hampshire, [zip code] (hereinafter [Lessor/Lessee/Buyer/Client/USNH]).

3.2 For contracts that will be signed by an authorized individual at one of USNH's component institutions, use the following model for the introductory paragraph:

This [contract/agreement/lease] is entered into the _____ day of _____, 200_ by and between [company name], a [state in which incorporated] corporation, with its principal place of business at [street address/ mailing address—if different], in the City [or Town] of [name of town/city], State of [name of state], [zip code] (hereinafter [Lessor/Lessee/Contractor/Seller/Company Name]) and [name of institution] a member of the University System of New Hampshire, a New Hampshire corporation, located at [street address], in the City [or Town] of [name of town/city], State of New Hampshire, [zip code] (hereinafter [Lessor/Lessee/Buyer/Client/College/University/“initials”]).

4. Recitals

5. Term and Termination

5.1 Term of Contract: States the length of the agreement.

5.1.1 Contract should have a clearly stated **beginning date, ending date and effective date**

5.1.2 Things to consider when determining the length of a contract:

5.1.2.1 If what's being bought takes more than a year to manufacture, deliver and install, the contract must be long enough to cover all the events. There may be times when dealing with goods, the term of the contract should also be long enough to cover use and eventual reselling of the good(s).

5.1.2.2 Services—how long will it take for the service provider to complete the work (e.g., training staff at several locations) would help to determine the length of the contract

5.2 Always maintain the right to renew the agreement/contract.

5.2.1 It is **recommended** that any contract which provides for **automatic renewal** or renewal unless USNH takes affirmative action be modified to delete the automatic renewal. Use the following as a substitute paragraph:

This [contract/agreement/lease] may be renewed for an additional term by the mutual written consent of the parties. Notice of a desire to renew must be sent [list number of business days—the more complex the agreement, the longer the notice to renew period should be before the existing agreement expires.] before the current agreement expires.

6. Other Termination Provisions

6.1 *Comment:* There are two main types of termination: **for cause** and **for convenience**. A **for cause** termination can be a **remedy** for a breach of the contract by the other party. **For cause** gives the aggrieved party the right to terminate because the other party did something “wrong.” Proper notice must be given, and the party in the wrong must be given the opportunity to fix (cure) the problem before the termination will be effective. (n.b., it was strongly suggested that the sequence of events should follow this pattern: a.) first notification of breach be sent to the breaching party; b.) breaching party submits its plan to cure the problem; c.) breaching party is allowed to attempt a cure within a specified period of time; d.) if cure is successful, there is no termination; e.) if cure is unsuccessful, a second notice is served that the contract will be terminated; f.) termination occurs). **Termination for convenience** states that the contract can be canceled because “we” want to do so. A “reasonable” amount of notice must be given for **termination for convenience**—most contract writers use 30 days as that’s a billing cycle for most firms. (n.b., it’s recommended that **termination for convenience** clause be included in the term of the agreement section of the contract and not in the remedies section).

7. Consideration

7.1 *Comment:* A contract consists of three items: offer, acceptance and consideration. A contract is considered valid even when there is no specific amount for the consideration stated in the contract, if the phrase “other valuable consideration the sufficiency and receipt of which is acknowledged” is used. However, it is strongly recommended that the amount of consideration (i.e., the ‘price’) be stated in any USNH contract. NOTE: Any benefit conferred or agreed to be conferred to which a party is already legally entitled does not constitute consideration for a contract.

7.2 Price may be computed in several different ways (e.g., cost plus, market price, bid price, etc.) However, any price agreed to by the parties should be all-inclusive (e.g., cost of goods, packaging, shipping charges, installation, etc.) and the contract should state that the price/consideration is all-inclusive.

7.3 In addition to stating when and where cash payments are to be made (item 7.3 on check-list), the method of payment (e.g., check, ACH, EFT) should also be stated.

7.4 Any price escalation methods for multi-year agreements should be clearly stated (e.g., pricing for the second year of the agreement shall be increased by the U.S. Consumer Price Index For All Urban Consumers (CPI-U), U.S. City Average or 3%--whichever is less).

7.5 *Comment:* Whichever party is the buyer will be in breach if that party fails to pay in the time stated in the agreement. In other words, if the agreement says payment net 15 from date of invoice, that’s what’s expected. USNH prefers to use net 30 in its agreements unless there is a compelling reason to pay sooner.

- 7.6 Any common area maintenance (CAM) charges in a real estate lease should also be included in the price and not be an add-on to be billed separately. If this can't be agreed to, then add a statement to the agreement that the CAM charges will not exceed "X"% of the annual lease price.

8. Duties and Obligations

- 8.1 In addition to the items listed in the Contract Check-list, it's recommended that this section include information on who will execute the contract for each party and in what capacity. Names, addresses (physical and e-mail), telephone and fax numbers of each party's point of contact should be included.

9. Indemnification and Limitation of Liability

- 9.1 **CAUTION:** Does the Contract provide for USNH to "**hold harmless**," or "**save harmless**," or "**indemnify**" the contractor, or otherwise assume responsibility for paying the contractor's liabilities? These terms are 'red flags'. USNH does have insurance but prefers to keep such requirements to a minimum or not have them in a contract at all.

- 9.1.1 It is **recommended** that any contract which provides for USNH to hold the other party harmless or indemnify the other party be modified to delete the requirement. If the requirement cannot be deleted, use the first of the following paragraphs as a substitute; for indemnification *and* limitation of liability use the first three paragraphs; and when applicable, in addition to the using the first or the first three paragraphs also use the fourth paragraph:

Each party will indemnify the other from all claims, damages, losses and liabilities, including the costs of defending the same including reasonable attorney's fees, which arise solely from the indemnifying party's own negligence, gross negligence, or willful misconduct. The parties further agree that if it is not possible to establish that such damages are within primarily either party's responsibilities under this Agreement, such damages will be shared equally by the parties.

The parties agree to limit their liabilities to each other to direct damages for negligent or willful misconduct in performing their respective responsibilities under this Agreement. Neither party shall be liable to the other party for any indirect, special, incidental or consequential damages, including but not limited to the loss of revenue, cost of capital, or loss of business reputation or opportunity whether such liability arises out of contract, tort (including negligence), strict liability or otherwise, even if the other party had advised that such damages are possible.

Each party agrees to mitigate its damages in a commercially responsible manner in the event the other party breaches this Agreement. Further, each party agrees to cooperate at all times so as to avoid having a dispute between them, or disrupt obligations to clients or otherwise affect Service agreements.

The parties agree to include in all agreements with third parties in connection with the Services, a provision excluding, to the extent permitted by law, liability for special, indirect, incidental or consequential damages.

- 9.2 *Comment:* There is no distinction between goods and services as far as indemnity is concerned. Indemnification works when indemnifier has insurance. The policy should be worth the potential loss and payment should be to both parties (indemnifier and indemnitee). Recipient of indemnification must be listed as a payee on the insurance policy. Indemnity allows recipient to go to the insurance policy to get the money. Proof of insurance is a must. Joint and severally portion of indemnification clause—any combination of funding sources may be tapped to make the settlement payment.
- 9.3 *Comment:* Buyer should maintain right to hire own counsel and to protect own interests.

10. Arbitration Clause/Alternative Dispute Resolution

- 10.1 **CAUTION:** Does the Contract require **binding arbitration** or any **mandatory dispute resolution** other than legal action in New Hampshire courts? (A mediation clause is acceptable.) These terms are 'red flags'.
- 10.2 *Comment:* If the amount of the contract is large, and there is a possibility of a dispute between the parties, binding arbitration should be avoided; **AVOID** binding arbitration in any construction contract regardless of the dollar value; if the dollar value of the contract is low, binding arbitration may be considered. Consult with the Office of the General Counsel before consenting to having a binding arbitration clause in the contract.
- 10.3 Definitions for Types of Alternative Dispute Resolution:
- 10.3.1 Negotiation—between the two disputing parties with no guidance by a third party
- 10.3.2 Mediation—between the two disputing parties but with an independent third party whose job is to try to bring the parties to an agreement
- 10.3.3 Arbitration—whether binding or non-binding, the decision of an arbitrator is final. Both parties present their 'case' to the arbitrator who then makes a decision. Arbitrator is not obligated to follow any laws nor to give a reason for the decision.

11. Force Majeure Clause

- 11.1 *Comment:* Such a clause excuses a party to the agreement from performing because a situation beyond the party's control occurred.
- 11.2 *Comment:* If the contract does not contain a force majeure clause, consider whether one is necessary (i.e., how will an 'act of God' impact the contract). If it is determined one should be included, it is **recommended** that the following paragraph be used:
- If either party's performance of obligations under this [Contract/Agreement] is materially hampered, interrupted, or interfered with by reason of any fire, casualty, lockout, strike, labor conditions, unavoidable accident, riot, war, or act of God, or by the enactment, issuance, or operation of any municipal, county, State, or federal law, ordinance or executive, administrative, or judicial regulation, order or decree, or by any local or national emergency, the affected party shall be excused from performance of this Agreement.
- 11.3 *Comment:* it might be worthwhile to add **terrorism** to the list of acceptable reasons for non-performance under force majeure.

12. Insurance [All amounts need to be reviewed]

- 12.1 If the contract requires USNH to obtain insurance or a bond or provide proof of insurance, contact the USNH Risk Manager for assistance. Do not sign the contract until the insurance is in place.
- 12.2 If the contract requires the other party to obtain insurance protecting USNH or to provide proof of insurance, the documents should be sent to the campus purchasing office for review and filing. These documents **must be in place** before the contract effective date.
- 12.2.1 Documents are to be the standard form employed by the State of New Hampshire
- 12.2.2 Insurance is to be issued by underwriters acceptable to USNH, and authorized to do business in the State of New Hampshire.
- 12.2.3 Each policy shall contain a clause prohibiting cancellation or modification of the policy earlier than ten (10) days after written notice thereof has been received by USNH.
- 12.3 USNH insurance requirements:
- 12.3.1 Comprehensive general liability insurance against all claims of bodily injury, death or property damage, in the amount of not less than \$250,000 per claim and \$2,000,000 per incident

12.3.2 Professional liability insurance in the amount of \$1,000,000 (one million dollars) per incident and \$3,000,000 (three million dollars) annual aggregate limit

12.3.3 Workers compensation to the extent required by New Hampshire law

13. Confidentiality Clause

13.1 If the contract requires USNH to maintain some or all items in confidence, the paragraph must have this statement at the end of it: "...to the extent allowed by New Hampshire law."

13.2 It is **recommended** that if the confidentiality clause requires USNH to 'ensure', use 'best efforts' or 'warrant' or otherwise guarantee that confidentiality will be maintained, the word(s) be replaced with '**reasonable efforts**'.

13.3 The length of the confidentiality agreement is usually five years beyond the life of the agreement.

13.4 *Comments:*

13.4.1 *What's confidential?* Everything that's not public. Items are not confidential if party learns of it independently or from another source or already knew it before the agreement was signed. All documents that are confidential should be clearly marked as confidential. As a **general rule**, do not send confidential materials as e-mail attachments. Either hand-carry them or send them via a courier service (e.g., FedEx, UPS, etc.).

13.4.2 *Who's to keep things confidential?* The company, its employees, independent contractors and those parties' successors, agents and assigns (i.e., everybody else).

13.4.3 *How are the parties to the agreement to keep things confidential?* Those receiving confidential materials must have policies and procedures in place to ensure that the other party's materials are not mishandled by its employees. Receiving party should warrant that such policies/procedures are in place [See: ¶13.2 **recommendation** for wording in agreement.]; sending party should reserve the right to audit such policies/procedures. (n.b., receiving party should not put sending party's confidential materials on computers that are on 24/7 or are not pass-word protected. Also, any discussions by the receiving party's employees about sending party's confidential materials that are held in office cubicles are a breach of confidentiality).

13.4.4 *What happens at the end of the agreement?* Any materials, specifications, trade secrets, etc. are to be returned to the supplying party. Both parties should keep accurate lists of what has been provided to the other party.

13.4.5 The remedy for breaking a confidentiality agreement is an **injunction**. Therefore, need to reserve the right in the confidentiality agreement to obtain either a temporary or permanent injunction if confidentiality is breached.

13.4.5.1 An injunction is a court order which stops a party from doing something that it is not supposed to do.

13.4.5.2 There are two types of injunctions: temporary and permanent.

13.4.5.3 The possibility to seek an injunction if necessary must be stated in the contract or the court will not award one—aggrieved party will receive damages instead.

14. Remedies Clause

14.1 *Definition: Remedy:* What a party gets when the other party to the contract fails to perform (breaches the contract).

14.2 *Comment:* A remedy 'fixes' or 'cures' damage. It is **recommended** that the following be used when writing a remedy/damage clause: "USNH maintains the right to seek any appropriate remedy whether in law or in equity."

14.3 Types of damages:

14.3.1 **Actual**—buyer can prove true injury, suffering, etc.

14.3.2 **Incidental**—Extra damages party is suffering because of breach (e.g., the cost of filing a law suit).

14.3.3 **Consequential**—any lost profits caused by breach or any money lost because of failure to perform

14.3.4 **Liquidated**—for every [period of time] seller is late, seller must pay buyer a sum of money.

14.3.4.1 *Comment:* it's very difficult to get liquidated damages as courts will not award liquidated damages as a penalty.

14.3.4.2 Contract must note that time is of the essence and should also include a statement similar to the following:

The parties agree this amount [the liquidated damages amount] is fair and has a reasonable basis in fact (e.g., if contractor is late finishing a residence hall, it will cost USNH “X”/day to house students elsewhere until the hall is completed) and also agree that this amount shall not operate as a penalty.

14.3.4.3 **Recommendation:** If there is a liquidated damages clause in the contract, there should also be a **bonus** clause for early completion of the work.

Recommendation: Include the **bonus** clause in the **payments** section of the contract.

Recommendation: If early completion would be a burden to the buyer, there should be a “**no bonus**” statement in the contract and explain why the early completion would be a burden.

15. Public Institutions

15.1 **Requirement:** if the contract creates a procurement relationship with a USNH employee or an employee's immediate family or if the contractor is hiring a USNH employee who will remain in USNH's employ during the term of the agreement (Checklist item 15.1.2), written approval must be granted by the USNH Purchasing and Contract Services office prior to executing the contract. See also, USNH Financial and Administrative Procedure 6-001, ¶B.12. (n.b., approval is not automatic; each contract is reviewed on a case-by-case basis.)

15.2 *Comment:* The Freedom of Information Act (FOIA) noted in Checklist item 15.1.3 may supersede any confidentiality clauses that are in the contract.

16. Merger or Entire Agreement Clause

16.1 *Definition:* Merger Clause:—The [contract/agreement/lease] constitutes the final agreement.

16.2 *Comment:* When used properly, the merger clause should prevent drafts of the agreement from ever being allowed as evidence in court when there's a disagreement.

16.3 **Recommended** statement:

This agreement, signed by both parties and so initiated by both parties, constitutes a final written expression of all the terms of this agreement and is a complete and exclusive statement of those terms.

Any and all representations, promises, warranties or statements by seller's agents that differ in any way from the terms of this written agreement shall be given no force or effect.

17. Severability Clause

- 17.1 *Meaning of term:* Statement that any paragraph that's deemed to be unenforceable will be cut (severed) from the contract, but the remaining paragraphs within the contract are still in effect and valid and may be enforced.

18. Choice of Law (Jurisdiction) and Venue

- 18.1 *Definition: Jurisdiction:* which state's laws prevail.
- 18.1.1 **Recommendation:** In any USNH contract, New Hampshire should be the jurisdiction. If the other party to the contract will not agree to this, consult with the USNH General Counsel's Office before proceeding.
- 18.2 *Definition: Venue:* where litigation occurs; identified by state and county
- 18.2.1 **Recommendation:** [venue to be determined; add paragraph after discussing with Wayne Gehman and/or Ron Rodgers—it may vary from location to location]

19. Assignment Clause

- 19.1 *Comment:* USNH usually prefers NOT to allow assignment of contracts. The exceptions would be to a wholly-owned subsidiary or if the contracting company is bought out. In those cases the obligations of the original contractor would follow to the assuming contractor.

20. Notice

- 20.1 *Definition: Notice*--An official letter notifying other party of some change in the agreement or informing the other party that they have committed a breach to the contract.
- 20.1.1 Letter must be sent to the person/position identified in the contract as well as to any 'copies to' listed in the contract
- 20.1.2 Letter must be sent by the method(s) described in the agreement (e.g., certified mail; courier service, etc.).
- 20.1.3 Party sending notice must get proof the notice was received—therefore, request a return receipt or other delivery proof from carrier.
- 20.1.4 If USNH general counsel did not write notification, send a copy of the notification to that office.
- 20.1.5 If other party's general counsel was not listed in the "notices" section, a copy of any notice served to the other party should be sent to their general counsel.
- 20.2 *Definition: Attachment(s)*-- Items which are incorporated into the contract by reference (e.g., RFP response, blueprints, specifications, etc.). An attachment statement achieves the incorporation.
- 20.2.1 If specifications are too large (e.g. blueprints) or if there's a scale model or other three-dimensional object associated with the agreement, then the sentence should identify where the items are stored and whether they will be there permanently or only for the duration of the contract.
- 20.2.2 All other items incorporated by reference are attached after the contract and are identified as "Attachment A, B, C, etc." or as "Exhibit A, B, C, etc."

21. Gender Neutrality

22. No Personal Liability

- 22.1 **CAUTION:** This is a 'red flag' item. Personal liability means just that—if something goes wrong with the contract, the individual who signed it or who is named in the contract is responsible. There is no recourse to USNH's insurance or counsel
- 22.2 **Recommendation:** If the other party to the agreement will not remove the personal liability clause, the contract should be abandoned.

23. Non-discrimination by Both Parties

24. Other Party Qualified to do Business in the State

25. Record All Agreements Concerning Real Estate

26. Relationship of the Parties; Independent Contractor, not Partner, Agent, or Joint Venturer

26.1 **Recommended** statement: The parties agree that [name of contractor] will be an independent contractor to [name of institution]. Nothing herein will be construed to create a partnership, joint venture or agency relationship between the parties and neither will have the authority to bind the other in any respect.

26.2 **Recommendation:** Always review the IRS's Twenty Factor Test to ensure that contractor is truly an independent contractor before entering into an agreement. This 'test' can be found at _____.

27. No Use of Institution Name Without Written Permission

28. Time is of the Essence

28.1 *Comment:* The phrase means that any date in the contract or purchase order is the date the event is to occur and another date will not be acceptable.

29. Waiver

29.1 A waiver protects one's rights in the future.

29.2 Waiver notices must be sent as a formal **notice** [See item 20].

29.3 *Comment:* A waiver notice would be used in the following situation--the contract states one thing and the seller/independent contractor/service provider does another. As buyer you pay for that which was provided (even though it's not to contract). The same thing occurs a second time and again buyer pays. If it happens a third time, both parties have modified the contract by their behavior. To protect the buyer's interests, the buyer should notify the seller that buyer is paying this time, but buyer will not necessarily do so in the future.

30. Execution

30.1 Ensure that anyone signing for either party is authorized to do so.

30.1.1 **Recommended** sentence to be included: The persons signing this contract are authorized to do so.

30.1.2 For those who are authorized to sign for USNH or any of its constituencies see: Policy Statement on Signature Authority (cite location) and the USNH contractual authority list (cite location) or contact the USNH Treasurer's Office to verify authorization.

Other Clauses that may be Included in an Agreement or Contract

- **Amendment:** Contract may be modified if both parties agree to it and it's in writing. Both parties must sign the amendment or it will not be valid.
- **Assignment of Intellectual Property:** add to any independent contractor agreement--statement that anything developed while working for the buyer is the property of the buyer. Trademarks and copyrights can belong to companies, corporations, etc; patents are only awarded to the individual who invented the process, item, what-have-you. The inventor may assign patent rights to a company (e.g., patent-holder's employer or the buyer when patent-holder is an independent contractor). Based

upon this, I think I'd have something that says that anything developed while working for the buyer is the property of the buyer and the developer will assign any patent rights to the buyer.

- Bankruptcy: [include a clause in any contract]--any bankruptcy filed by either party is an immediate breach and the contract is terminated. Include a clause that you can get your "stuff" (e.g., dies; print negatives; tooling, castings, finished goods waiting for shipment, etc.) that's at the bankrupt firm's location. These would be *materials or goods identified to contract*.
- Breach: Failure to perform to the contract. Allows aggrieved party to go to remedies for relief.
- Cover: Right of the buyer to go elsewhere to buy goods when seller fails to deliver. Seller must pay any difference in price if the purchase price of the replacement goods is higher than the contract price.
- Cumulative Remedies: Statement that remedies are cumulative and not separate and individual. This allows the aggrieved party to get more than one remedy when a breach occurs.
- Cure: The right of the breaching party to fix the problem. **Cures** usually fall to the seller. Prior to breaking the contract, the aggrieved party must serve notice of the breach and allow the breaching party time to fix the problem. There are usually time parameters associated with cures (e.g., within 10 business days of receiving notice, etc.).
- Definitions: Paragraph that is used to define specific terms within the contract (e.g., form, fit and function; workmanlike manner, etc.)
- Delivery: When writing a delivery clause, err on the side of specificity. Buyer should have a means/mechanism for knowing when goods are delivered or a service performed.
- Federal, State and Local Laws: add statement--both parties shall comply with all federal, state and local laws when applicable.
- Headings: Headings are used in contracts to identify paragraphs—makes finding things within the contract easier. Statement should be included in the contract (under the heading "Headings"): Headings within this contract are for reference purposes only.
- Including, but not limited to: everything in the contract plus those items/things not thought of at the time the contract was written
- Injunction: Stops a party from doing something it's not supposed to do. There are two types: **temporary** and **permanent**. The possibility to seek an injunction if necessary must be stated in the contract or the court will not award—aggrieved party will receive damages instead.
- Limitation of Liability: puts a cap on how much one party is obligated to the other.
- No Obligation: a **no obligation** clause states that one party or the other is under no obligation to do something (e.g., buyer is not required to purchase either a minimum or a maximum amount). To have a valid contract, each party to the contract must give up something of value (e.g., the buyer gives up money and the seller gives up inventory); therefore, when using a **no obligation** clause a **consideration** clause should also be included in the agreement.
- Packaging and Packing: Usually the responsibility of the seller. In most cases add a statement that says that the standard packaging provided by the seller is acceptable. However, if the item(s) being bought are one-of-a-kind, fragile or special in some other manner, buyer may specify how the goods are to be packaged. When the buyer specifies the means of packing and packaging, the responsibility for damage transfers from the seller to the buyer regardless of the FOB point stated in the agreement.

- Patent Indemnity: an **indemnification** (promise/warrant) that seller holds the patent rights for the goods to be provided to the buyer. Add a patent indemnity statement to warrant that if buyer is sued for patent infringement seller will “protect” buyer in any suit, court-ordered payment, etc.
- Perfect Tender Rule: “I want what I want when I want it.” Very useful in just-in-time manufacturing processes when delivery of goods must be in a specific timeframe (e.g., every Tuesday at 11:10 a.m.—no exceptions).
- Property Taxes: The parties acknowledge that under the terms of RSA 187-A:25, property owned by the Lessor, including the Premises, is exempt from taxation. The Lessee shall make payments in lieu of taxes to the local property tax authority at such times and in such amounts as the authority would be entitled to assess in property taxes on the value of Lessee’s improvements if the Premises were not tax exempt. Lessor agrees to provide Lessee with copies of property assessments Lessor receives from the local authority and information needed to determine the extent to which that assessment is attributable to the Lessee’s improvements. Lessee shall request the local authority to make its assessments against Lessee’s improvements and send the related notices to directly to the Lessee. Lessee reserves the right to challenge any such assessment with the local authority.
- Quality: (for services) “I’ll know it when I see it.” As soon as a service is bad, everyone will let you know. Contract should refer to any quality standards that may have been outlined in an RFP (if one was done). In the contract, assign sole discretion to identify quality issues to one individual (use title, not name). Make acceptance of remedial steps (by seller to improve quality) fairly broad; also agree that approval will not be unduly withheld.
- Quantity: The UCC does not require that a quantity be listed when buying goods; however, buyer should attempt to “lock down” quantity as close as possible. If forecasts are listed in the agreement, courts are now holding buyers responsible for the amount forecasted in the agreement. If forecasts are provided, buyer should add a clause that buyer is not responsible for what seller does with forecast information in anticipation of producing goods, etc. for buyer’s consumption.
- Quantum Meruit: (more a concept than a clause that should be in a contract). Latin: “So much money as the plaintiff reasonably deserves to have.” Also, “as much as is deserved.” Quantum Meruit is the legal principle under which a person should not be obligated to pay, nor should another be allowed to receive, more than the value of the goods or services exchanged. Basically, it’s the concept that one has to pay for what one gets. (e.g., specifications for a new building state that all the floors are to be finished concrete and owner will install the final flooring at a later date and under a separate contract. The contractor for the building installs marble flooring in the main lobby. Does the owner have to pay for the marble? Answer: yes, under the concept of Quantum Meruit. If the owner doesn’t want to pay for the marble, the contractor is obliged to remove the marble and restore the floors to the specified finished concrete. The owner is not obligated to pay the contractor for the work involved in installing and removing the marble nor is the owner obligated to pay for the marble itself in this case.)
- Record Keeping: Itemize what documents are to be maintained by each party to the agreement (e.g., inspection reports, janitorial check-lists; maintenance reports on equipment, etc.). Maintaining such records as part of the ordinary course of business allows for the “refreshment of memory” in case of litigation at a later date. Records should be maintained for three to five years beyond the last activity of the contract. [n.b., it’s recommended that a firm’s internal policies and procedures state what records are to be kept and by what office and where they should be located (e.g.—off site; on-site, etc.)].
- Release: Special clause that’s used when there have been problems between the parties in the past and they have gone to court to get settlement. It releases “...from now until the end of time any obligations that may have arisen in a previous agreement...” If a new agreement is established, the **release** clause would be included in the new contract. It establishes that the parties to the agreement are now “friends” from this day forward. It also closes the door on the supplier’s ability to sue for a previous problem (in a previous agreement) if a new problem should arise. It’s recommended the buyer get a release when “something bad happens and the buyer doesn’t pay.”

- Resell: Right of seller to sell goods when buyer refuses delivery. Seller may require buyer to pay any difference in price if the resold goods are sold at a price lower than the contract price.
- Return of Materials: is a **remedy** that may be invoked by the buyer.
- Right to Audit: Conditions for auditing—must give reasonable notice; must be conducted during normal business hours; buyer must pay and agreement must list what's to be audited (e.g., financial records pertaining to the contract, proof of insurance, record-keeping, etc.)--can't go on a fishing expedition. Buyer should actually conduct an audit—especially on long-term contracts.
- Right of Inspection: Always reserve the right to inspect the goods being purchased without any time limit. If such a clause is not added, the UCC states that inspection of goods must occur at the time of delivery. In this case, the UCC operates as if everything occurs at once: receipt, inspection and payment [think buying something at a local store—you choose the goods (the inspection), make the payment (the payment), and take the goods home (the receipt/delivery)]. Without reserving the right to inspect without a time limit, everything else is dealt with under warranties.
- Right to Set-off: (a **remedy**; should be included in the **remedies** section of the agreement)—Is invoked when the seller owes the buyer money; reserves the right of the buyer to take what money the seller owes buyer from payments owed by buyer to seller and pay a net amount to the seller.
- Survival: a paragraph in a contract that identifies which paragraphs within the overall contract that should survive (exist after) the contract once it has ended.
- Understanding: Prevents a party from ever being able to say a mistake has been made in a contract. Suggested wording for paragraph: “I have read and understand the contract, and I have had a chance to seek legal advice about this contract.”
- Warranty: It's a list of promises. If seller doesn't provide as promised, it's a breach of the contract. Warranties can be extended beyond the life of the contract. (n.b., definition distinction: **represents** means a one-time occurrence; **warranty** implies future events as well).
- Warranty: (again): Suggested wording: “Seller warrants that [goods] conform to all specifications provided by buyer. Said specifications are incorporated in the agreement by reference and are attached as Exhibit “X”.”