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Introduction

Contracts can be complicated documents that require both business judgment and legal analysis. This guide is intended as primer and quick reference for those employees who are responsible for the development, negotiation and management of contracts. It provides information about applicable laws, regulations, policies and procedures that underpin the contracting process at the College. It also offer guidance in the practical aspects of reading, reviewing and negotiating contracts whether those contracts are initiated by the College or by an outside party.

The Handbook does not offer guidance or direction on the wisdom of entering into a contractual relationship, the business judgment weighing the costs and benefits, etc. This Handbook is intended to draw attention to certain legal issues in contracting. Early attention to the matters raised in this Handbook can both help to avoid delays in securing the appropriate approvals and signatures to finalize contracts, as well as minimize difficulties in the administration of a contract once executed.

This Handbook should only be used as a starting point, and is a work in progress. Check the website often to ensure that you are working with the most current guidance. As an initial matter, this Handbook focuses heavily on the procurement of goods and services. Over time, additional chapters will address other classes of university contracts.

Whether a contract appears simple or complex, all may contain traps for the unsuspecting party. Even the most basic of contracts can become more complex if outside parties require special alternative language. Any contract can become the object of serious disputes and expensive litigation. **No contract is too simple to seek advice and assistance.**
I. Introduction: What is a Contract?

A. Definition of a Contract

At its most basic, a contract is a legally enforceable agreement between two or more persons. The College is considered a “person” for this purpose. When the College enters into a contract, it does so through individuals who are employees or agents of the College. IMPORTANT: Not all employees or agents of the College are authorized to commit the College to a contract. It is imperative that the person binding the College to a contract be authorized to do so.

B. Legal Elements of a Contract

In order that an agreement between two or more persons be a legally binding contract, it must have certain fundamental elements:

1. Offer

An offer is a proposal to do a thing (or pay an amount), and usually includes the expectation of acceptance, a counter-offer, return promise, or act. An offer is, more or less, exactly what it seems:

“The College will pay $1000 for Vincent Van Gogh to paint the Wren Building.” OR “I, Vincent Van Gogh, will paint the Wren Building if the College will pay me $1000.”

2. Acceptance

Acceptance is a demonstration of assent to the offer. This could be by complying with the terms and conditions of the offer, but acceptance of an offer need not amount to much. A simple “OK” can do.

Actions can also demonstrate acceptance of an offer. Examples of this are using goods, or clicking “I accept”. Inaction can also demonstrate acceptance, as where goods are not returned.

The offer and acceptance must match. “The College accepts Van Gogh’s offer to paint the Wren Building, but will pay $750” is not acceptance, but a counter-offer.
3. **Mutual Consideration**

“Consideration” helps distinguish a legally binding contract from a mere (unenforceable) promise. Consideration exists when each party to a contract gives up something of legal value. Typically, this involves doing do something that the party is not otherwise required to do, or agreeing *not* to do something that the party could do. In the example above, the College does not have an obligation to pay Van Gogh any money. Van Gogh does not have to paint the Wren Building. When the College agrees to pay Van Gogh $1000 *and* Van Gogh agrees to paint the Wren Building, there is mutual consideration.

4. **In Writing – Not Necessarily**

In order to be enforceable, certain contracts must be in writing. In general, these are:

a. Contracts for the sale of goods over $500
b. Contracts for the sale of real property
c. Contracts that are incapable of being performed within a year
d. Promises to answer for or discharge the debts of another (guarantee)

Be aware: Although College practice demands that ALL contracts be in writing, courts can – and do – enforce contracts that are not in writing.

Be very aware: A written contract is presumed to contain *all* the terms of the contract. Any prior oral understanding will not be regarded as part of the contract. Other written understandings will not be part of the contract unless the contract expressly incorporates those writings. There are very limited exceptions to this requirement. The best approach is to make sure that: (1) there is a written contract signed by both parties; and (2) the contract contains *all* the terms. Anything not written in the contract (or incorporated by
reference to another specific, written document) will not likely be an enforceable term.

5. **Not Required: Any Special Name**

There is no requirement that a contract be designated as “Contract”. If there has been an offer and acceptance, if mutual consideration exists, and if the contract is in writing, it is a binding commitment, regardless of whether the document terms itself an “Agreement” or “Memorandum of Understanding”, etc. In addition to the foregoing, examples of several of the many names given to university contracts include:

- License
- Statement of Intent
- Covenant
- Lease
- Understanding
- Arrangement

**C. What Should a Contract Include?**

A contract defines the terms of the relationship. Anything and everything that matters should be included. The primary virtue of a good contract is its clarity: does the contract lay out, clearly and completely, the expectations of the parties? If there is a disagreement over what a contract says or means, courts look to what a reasonable, objective third party would understand the contract to say or mean. “Test” a contract by pretending to be a third party who knows nothing about your agreement, then read the contract. Can you understand what the end result is supposed to be, who is responsible for what and exactly how much it is going to cost?

1. **Who – The Parties**

   a. One of the parties is, of course, “The College of William and Mary in Virginia.” That is the legal name of the College. The various Schools, Departments, Offices, Centers, etc., are not legal entities and do not
possess the authority to contract. Contracts should be in the name of the College. The full name is preferred, and a less cumbersome “nickname” can be used in the remainder of the contract. For example: “The College of William and Mary in Virginia (hereafter ‘the College’)…”. Other substitutions (Contractor, Licensee, Lessor, Customer, Owner, etc.) are acceptable, so long as the word or term chosen accurately reflects the College’s status.

b. There will, of course, be at least one other party to the contract. It is important to use the correct legal name of the person (or other legal entity) who is to fulfill the contract’s requirements. The following may assist your using a correct legal name:

i. Individual – Use the full legal name of the individual, not a nickname, e.g., Vincent W. van Gogh, not Vinny van Gogh.

ii. Sole proprietorship – Usually these are in the form of d/b/a, e.g., Vincent W. van Gogh d/b/a Sunflower Painting

iii. Partnership – These are unincorporated associations, where the partners share liability as well as profits. There is no distinct nomenclature to help identify partnerships.

iv. Limited liability partnership or limited liability company – These are partnerships that have incorporated under state laws, making them separate legal entities with their own names. Use the full legal name of the entity, which will include L.L.P. or L.L.C at the end, e.g., Sunflower Painting, L.L.C.

v. Corporation – This is another form of incorporated entity. The correct legal name can be checked through looking on the website of the Clerk of the State Corporation Commission. ttp://www.scc.virginia.gov/clk/bussrch.aspx). The name will often be followed by “Inc.”, as in Sunflower Painting, Inc.
vi. Governmental entity – The correct legal name will normally be as defined by statute.

2. What – The Rights and Duties of the Parties
   In some respects, this is the heart of the contract – what the parties will do. These should be:
   
   Clear – There should not be confusion about who is supposed to do what. “Van Gogh will paint the Wren Building” does not tell us whether the building is to be painted inside or outside.
   
   Complete – Everything that matters, everything that the College wants to be sure happens (or doesn’t happen) should be spelled out. This means thinking about what is not in the contract, but should be. “Van Gogh will paint the Wren Building” leaves the choice of color up to van Gogh.

3. When – The Duration of the Contract; Deadlines
   It is almost always important that the goods be delivered (or the service completed) by a deadline. The contract should be clear on the College’s expectation about timing. There are several ways for a contract to address deadlines: a window of time for performance (Van Gogh shall have 6 days to paint the Wren Building, beginning on April 1, 2013), or a deadline (Van Gogh’s painting of the Wren Building must be completed by Louise Kale’s birthday) are common. Develop the wording so that it meets the College’s needs and is reasonable for the vendor. Sometimes meeting the deadline is critical; if so, the contract should specify “Time is of the essence.”

4. Where – The Place of Performance; Be specific.
   While the place of performance may seem obvious, it should be included. Otherwise, Van Gogh might not paint the Wren Building (111 Jamestown Road, Williamsburg, Virginia), but the Wren Insurance Building (SimCity 4).
   
   Or, suppose the Van Gogh contract included painting of benches surrounding the building; would we require they be painted in place or off site?

5. Why – Any Relevant Background, Purpose
   Sometimes it is helpful for a contract to include any overarching goal, purpose, or context. This information can help the contractor – or a judge –
understand the larger objective of the College. Why is the College painting the Wren Building: is this a regular maintenance project or are we attempting to restore the Wren Building to its appearance in the 1700’s? The College might be pickier – understandably – about the materials or manner of performance if the latter.

6. **How – The Method of Performance**

Include any expectation of how the work must be performed. Is Van Gogh going to spray paint or use a brush? Will he prepare the surface? Will he use a ladder or a lift to reach the high points? Will he use drop cloths to protect the shrubs? If nothing is mentioned, Van Gogh can do the work however he wants, so long as he performs the task – and the College cannot compel differently.

7. **How much – The Amount and Terms of Payment**

Most College contracts will require the payment of money, and the contract should be both clear and specific about the amount, manner, and timing of payment. Is Van Gogh being paid by the hour or by the job? Is he responsible for securing the materials or is the College paying for the materials and his compensation is for labor only? Commonwealth payment terms are normally Net 30 upon completion of work and receipt of an invoice in Accounts Payable. Down payments and/or deposits are normally unacceptable.

8. **What if – Dealing with Performance Issues; Termination**

What if Van Gogh has an ear injury and cannot complete the work on time? What if it rains continually before the completion date? Problems can arise – and do. Sometimes a contractor will deliver a substandard performance. Occasionally there are external causes (such as weather) that interfere with performance. Contracts often include terms specifying how such problems will be handled, and can even provide for the termination of the contract. These terms should be clear, specific, and not burdensome; the parties will be required to comply with these provisions. Typically, termination clauses require the giving of a written notice to the other party of the problem, an
opportunity for the party to correct the problem, and the right to terminate if the problem is not corrected. It is in the College’s interest to have a means of terminating a contract if it is not satisfied.

9. **Says who – Signatures**

Van Gogh assumes that if you are signing the contract, you have the authority to commit the College to his services. That is only true if you have Signature authority for this type of contract (see Signature Authority). **Unauthorized individuals who sign contractual agreements on behalf of The College may be held personally liable for those contracts.**

The person signing on behalf of the contract must also be someone with authority to bind the contractor. If your contract is with Sunflower Painting, does Van Gogh the salesman have signature authority to bind them to a contract?

**D. Use of Form Contracts**

1. **College Form Contracts**

The College has a number of form contracts that can be used to handle common agreements. The use of a pre-approved form will help provide assurance that all needed terms have been included, and will also make any necessary reviews or approvals easier to obtain. Even when using a form contract, the responsible College employee should approach the contract thoughtfully, taking care that the form contract as completed clearly and completely describes the College’s expectations and commitments.

A list of form contracts is found below:


Additional forms will be developed to address other types of contracts. Should you regularly encounter a type of contract for which no appropriate form has been developed, but could prove useful, please contact either the Office of Procurement or the Office of University Counsel.

2. **Contractor Form Contracts**

Many contractors will provide their own contract forms, and will expect – or demand – the use of their contracts. Many of these contracts contain terms
that are not in the College’s best interests, or are unlawful for the College to agree to.

Wherever possible, do not use a contractor’s form; the College-approved form should suffice. In some instances, a contractor will insist upon the use of its form. In such cases, the College must insist upon the execution of an Addendum. The purpose of the Addendum is to modify the contractor’s form so as to remove or cancel terms that are unlawful or unacceptable to the College. The College has developed form Addenda. These should be signed by both the contractor and the College.

http://www.wm.edu/offices/procurement/contracts/templates/index.php

Additional Addenda can be developed to address other situations. Contact the Office of Procurement or Office of University Counsel to explore whether such a form would be useful.

E. **Specific Contract Terms**

During contract development, questions regularly arise about specific contract terms. These might appear during negotiation with a prospective contractor, or when a contractor offers his form contract in lieu of the College’s. The following categories are designed to help you understand what contract terms are necessary, which terms are unlawful or improper, and which warrant a warning.

1. **Necessary contract terms**
2. **Unlawful or improper contract terms**
3. **Problematic contract terms**
Areas of Responsibility

Every contract entered into by the College should be drafted so as to accurately reflect the respective expectations and responsibilities of the parties in a manner that is clear and concise. The contract should contain no terms that are unlawful, improper, or unwise for the College. In addition, all contracts present potential problems in contract administration and enforcement. For this reason, certain types of contracts must undergo review by certain offices. This review ensures that university's contracts comply with the laws and regulations of the Commonwealth of Virginia and also protects The College and its employees from exposure to liability:

Office of Procurement

Procurement is responsible for ensuring that all contracts for the purchase of goods, equipment and/or services comply with the College’s contracting and procurement policies. All contracts that involve the purchase of goods, equipment and/or services valued at $5,000 or greater must go through Procurement. Contracts valued less than $5,000 must be made in accordance with the College’s contracting and signature authority policies. These policies can be found on the Office of Procurement’s website – www.wm.edu/procurement.

Employees with written delegation of contracting authority may submit contracts for less than $5,000 to Procurement for review at their discretion. For additional information, please consult the Procurement website or contact Procurement at 757-221-3952.

In addition to new contracts, Procurement should review any renewals of existing contracts. Occasional changes in the law will impact an active contract even if the parties have made no changes. Modifications made during the existing term of a contract should also be reviewed to determine how these changes affect the agreement and to ensure that the changes are in keeping with College and Commonwealth requirements.
**Office of Sponsored Programs**

All proposals and agreements involving sponsored funding must go through the Office of Sponsored Programs (“OSP”). Proposals and Institutional Representations, Certifications and Assurances associated with applications must be reviewed and approved by OSP. Further OSP is the designated signatory authority for agreements related to external funding and research collaborations, including unfunded agreements. Examples of these agreements include, but are not limited to:

<table>
<thead>
<tr>
<th>Collaboration Agreements</th>
<th>Information Transfer Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cooperative Agreements</td>
<td>Interagency Personnel Agreements (IPA)</td>
</tr>
<tr>
<td>Cooperative Research and Developmental Agreements (CRADAs)</td>
<td>Letters of Commitment</td>
</tr>
<tr>
<td>Data Use Agreements</td>
<td>Nondisclosure Agreements (NDAs)</td>
</tr>
<tr>
<td>Grants</td>
<td>Teaming Agreements</td>
</tr>
</tbody>
</table>

Please direct any questions to Jane Lopez, Director of OSP, 757-221-3965, jalope@wm.edu.

Jason McDevitt in the Technology Transfer office, 757-221-1751 has signature authority on all NDAs and most data transfer agreements.

**Office of University Counsel**

All other contracts must be reviewed by the Office of University Counsel before being signed. In many cases, University Counsel has developed (or will develop) a form contract for a particular area. So long as the form contract is completed in accordance within the advice provided by University Counsel, an “eyes on” review of a contract is not required. Of course, College employees are always encouraged to seek the advice of counsel for any questions or concerns that may arise.

Please note that University Counsel will review contracts only for potential legal problems and not for business judgments. Accordingly, terms such as pricing, payment or the credibility of an
organization will not be evaluated. The department developing and administering the contract is responsible for ensuring that the contract terms and conditions are fair and acceptable to the College.

Once University Counsel has reviewed a contract and suggested modifications, the other party may decide that some of the College’s terms are unacceptable or insist on terms that may be unacceptable to the College. If so, University Counsel may be able to provide suitable alternative language.

To have a contract reviewed, forward a copy of the contract to University Counsel. Be sure to: (1) indicate the individual responsible for negotiating the contract; and (2) the date by which the review should be concluded. Include any specific questions or problems and any comments or suggestions that would help our staff to understand the purpose of the contract. Please send the request to the Office of University Counsel, c/o Charles Crimmins at cjcrimmins@wm.edu.

**Signature Authority**

Only those individuals who have a written delegation of signature authority may sign contractual agreements on behalf of The College of William & Mary. Otherwise, no faculty member, employee, or student has legal authority to bind The College. **Unauthorized individuals who sign contractual agreements on behalf of The College may be held personally liable for those contracts.**

The liability for an unauthorized person who signs documents not only applies to contracts, but to other documents regardless of the form or purpose. Such documents include, but are not limited to, letters of intent, deeds, leases, certificates, receipts, deeds of trust, promissory notes, bonds, checks, tax returns and reports, claims for refund, releases, waivers, bills of sale, stock certificates, proxies, security agreements, financing statements, affidavits, pleadings, and responses to interrogatories.
The system of signature delegation must be strictly observed. The Contracting and Signature Authority policy is available on the Procurement website.
Specific Contract Terms

This section of the Guidelines addresses specific contract terms.

Required Clauses

All contracts entered into by The College of William & Mary must include the following language to protect The College. If the body of the agreement does not contain the following clauses, they can be added using the Procurement Addendum (see Appendix A).

The following section provides sample wording and a brief description of why each clause is needed.

Entire Agreement. This Agreement constitutes the entire understanding of the parties and supersedes all prior oral or written agreements.

- The “entire agreement” clause protects both parties from claims that oral statements made contrary to or in addition to the contract are applicable.

Sovereign Immunity. Nothing in this Agreement shall be deemed a waiver of the sovereign immunity of the Commonwealth of Virginia and of The College of William & Mary.

- The College may only be sued under circumstances where the Commonwealth of Virginia has expressly waived sovereign immunity. The College has no authority to waive the sovereign immunity of the Commonwealth, and all contracts should include the above clause in order to prevent any confusion that immunity may have been waived.

Modification. This Agreement may only be modified or amended in writing and must signed by all of the parties.
• The “modification” clause protects both parties from a claim that something said in a conversation or written in other documents is a modification of the contract terms.

**Applicable Law and Choice of Forum.** This Agreement shall be construed, governed, and interpreted pursuant to the laws of the Commonwealth of Virginia. All disputes arising under this Agreement shall be brought before an appropriate court in the Commonwealth of Virginia.

• The “applicable law and choice of forum” clause ensures that any dispute is settled using Virginia law, and in a Virginia court.

**Force Majeure.** The College of William & Mary will not be responsible for any losses resulting from delay or failure in performance resulting from any cause beyond the university’s control, including without limitation: war, strikes or labor disputes, civil disturbances, fires, natural disasters, and acts of God.

• The “Force Majeure” clause ensures that if anything happens that is out of the university’s control, such as a fire or an airline strike, and the university is unable to provide the services contracted for, it will not be responsible for losses.

**Remedies.** If (insert contracting party) breaches this Agreement, in addition to any other rights or remedies, The College of William & Mary may terminate this Agreement without prior notice.

• The "remedies" clause provides the university an option to terminate the agreement if the other party breaches the contract, while also preserving the university’s right to seek damages.

**Collection and Attorneys Fees.** (insert contracting party) shall pay to The College of William & Mary any reasonable attorney’s fees or collection fees, at the maximum
allowable rate permitted under Virginia law, incurred in enforcing this Agreement or pursuing and collecting past-due amounts under this Agreement

- The “collections and attorneys fees” clause provides notice to those contracting with The College that they will be responsible for any fees associated with collecting debts or services owed under a contract that has been breached.
Prohibited Clauses

As an agency of the Commonwealth of Virginia, The College is prohibited by state laws, regulations and policies from acknowledging certain terms. As a general matter, clauses that The College must avoid include the following:

**Indemnification/Hold Harmless.** Any clause requiring The College of William & Mary to indemnify, save, or hold harmless the other party must not be used. The purpose and effect of such clauses are to transfer to the College the risk of damage, loss, or claims of third parties against the contracting party.

Most of the time these clauses will use straightforward language, such as “The College of William & Mary agrees to indemnify (or hold harmless) ______ for ______.” However, on occasion, the provision may say, “The College shall be responsible for ______” or “The College will reimburse ______ for ______.” If in doubt, please contact Procurement or University Counsel.

Note that clauses stating the party contracting with the College will indemnify or hold harmless The College are allowed and in fact preferred.

**Insurance.** The College of William & Mary is insured by the Commonwealth of Virginia Risk Management Plan. You must avoid any clause that requires The College to carry any additional types of insurance. This includes clauses which would require maintenance of additional insurance, special insurance, or insurance under which The College would have to name a contracting party as an additional insured. This does not include clauses requiring The College to maintain insurance, and clauses requesting that a certificate of insurance be furnished. Any questions regarding insurance language should be addressed to the Office of Administration’s Risk Manager.

**Automatic Renewal.** Any clause renewing or extending the agreement beyond the initial term, or automatically continuing the contract period from term to term, is unacceptable.
**Interest Rates.** Any clause that appears to require the Commonwealth to pay usury interest rates (rates that exceed the legal rate of interest) is unacceptable. To ascertain interest rate information, contact the Office of the Vice President for Finance.

**Liquidated Damages.** Any clause requiring the Commonwealth to pay total or partial compensation for lost profits or liquidated damages (amounts agreed to beforehand) if the contract is terminated before its ordinary period is unacceptable.

**Effective date beyond execution date.** Any clause delaying the acceptance of the contract or its effective date beyond the date of execution is unacceptable.

**Timing of action.** Any clause limiting or adding to the time period within which claims can be made or actions can be brought is unacceptable. Any example of a clause like this is: “No claim shall be brought more than two years from the date of the injury.”

**Limited liability.** Any clause limiting the liability of the contractor for property damage or personal injury is unacceptable. An example of a clause like this is: “In no event shall the contractor be liable for damages in excess of $10,000.”

**Modification.** Any clause permitting the contractor to modify the contract without the written approval of the University is unacceptable.

**ADR (Alternative Dispute Resolution) or Arbitration.** Any clause requiring the Commonwealth to submit disputes to binding arbitration or to the decision of any arbitration board, commission, panel, or other entity associated with alternative dispute resolution is unacceptable.

**Attorney’s fees.** Any clause obligating the Commonwealth to pay costs of collections or attorney's fees is unacceptable.

**Security interest.** Any clause granting the contractor a security interest in the property of the Commonwealth is unacceptable. This includes clauses such as the following found in a lease: “If this lease is construed as a security agreement, the Lessor holds a secured
interest in the property and may file papers on behalf of the Lessee to secure this interest.”

**Confidentiality.** Any clause that expands confidentiality beyond the scope of the Freedom of Information Act is unacceptable.

**Applicable laws.** Any clause that provides for the laws of another state to govern the contract is unacceptable.

The simple rule is *never agree to such provisions.* If the other party rejects this provision, contact the Office of University Counsel or Procurement.

### Optional Clauses

The following are “boiler-plate” contracting clauses that may be used to write a contract, replace and/or add to terms of a pre-existing contract. Other terms may be appropriate depending on the type of contract and the complexity of the transaction. Ideally, these clauses should be used in every contract the University enters into.

**Hold-Harmless.** _______ agrees to hold harmless The College of William & Mary, the Commonwealth of Virginia, and their officers, employees and agents from any claim, damage, liability, injury, expense or loss, including defense costs and attorney's fees, arising from activities under this Agreement. Accordingly, The College will promptly notify _______ of any claim or action brought against The College in connection with this agreement. On such notification, ______ will promptly take over and defend any such claim or action.

OR
**Indemnity.** ______ agrees to indemnify The College in the case of injury/illness to any participant for the loss of any personal property by participants or damage done to equipment or property of The College or the participants.

The “indemnity” or “hold-harmless” clauses are recommended to protect the University from certain liability.

**Assignment.** Neither party will assign or otherwise transfer its rights or obligations under this Agreement without both parties' prior written consent. Any attempted assignment, transfer, or delegation without such consent is void.

- The “assignment” clause prevents either party from assigning (giving away to another party) the contract without the other's permission.

**Severability.** Should any portion of this Agreement be declared invalid or unenforceable for any reason, such portion is deemed severable from the Agreement and the remainder of this Agreement shall remain fully valid and enforceable.

- The “severability” clause protects the entire contract in the event that a court finds a particular clause illegal or void. In such a case, only that clause is removed, but the rest of the contract remains in force.

**Waiver.** The failure of a party to enforce any provision in this Agreement shall not be deemed to be a waiver of such right.

- The “waiver” clause prevents a court from misconstruing the University’s actions as a waiver of a claim.

**Effective Date.** This agreement shall be binding on the parties on the ______ day of ________, 20____.

OR
**Effective Date.** This agreement shall be binding on the date that the {last or first} authorized signature is affixed.

- Every contract should clearly specify the time period between start and finish. The start date (the “effective date”) should be clearly specified. If the signature date is the date the contract becomes effective, include a provision that accounts for the parties signing it on different dates.

**Term.** This agreement shall be binding on the parties from the Effective Date for a term of ______ years.

- The “term” of the contract is from the effective date to the termination date. (Keep in mind however, that even thought the term of the contract may expire, it is possible for certain provisions of the contract to survive beyond the term of the contract with express survivorship clauses.)

**Independent Contractors.** The relationship between The College and ______ created by this Agreement is that of independent contractors. Nothing contained herein shall be construed as constituting any other relationship between the College and ______.

- In most university contracts, the relationship of the parties may be defined as independent contractors. (For purposes of writing a contract, even not-for-profit entities and foundations are considered “contractors”.) By defining the parties as independent contractors within the contract, the University closes off the possibility of the parties being mistakenly characterized as agents or employees of the University, and thereby limits the possibility of being held liable for the acts of such parties.

**Termination.** The College has the right to terminate this contract with or without cause with ________ days prior written notice to the other party.
• When drafting a contract, it is often good business judgment to leave an “out” so that the University may terminate the contract without breaching its terms.

**Required Endorsements.** The signatory for each party personally certifies and commits that he or she is an authorized agent to sign on behalf of such party, and commits to the accuracy of all information provided in this Agreement.

• The “endorsement” clause is an example of sound business judgment. It ensures that the person signing the agreement on behalf of the other organization has authority to do so. If the signer does not have appropriate authority, he/she cannot bind the organization and the contract will be unenforceable.
Fact Specific Clauses

Some clauses should be included depending on the nature of the contract. Below is sample wording. If in doubt about whether or not your contract requires any of the clauses listed below, contact University Counsel or Procurement.

Insurance. ________ shall maintain all insurance necessary with respect to the services provided to The College. ________ shall maintain an industry standard or equivalent Commercial General Liability insurance policy, including contractual liability coverage, with limits of liability for bodily injury and property damage of at least One Million ($1,000,000) Dollars per occurrence and Two Million ($2,000,000) Dollars annual aggregate. The Commonwealth of Virginia and The College of William & Mary shall be named as an additional insured. The policy shall cover ________, its agents and employees for acts, omissions and negligence. ________ will provide The College a Certificate of Coverage within 10 days prior to the start of performance under this Agreement if requested. ________ shall immediately notify the University of any changes to its insurance policy.

- When included, the “Insurance” clause must comply with state requirements under the Commonwealth's Risk Management Plan. These laws govern both the level of coverage held by The College, and coverage required by parties contracting with The College. The College’s Risk Manager in the Office of Administration administers the state program at The College. Appendix B contains a full version of the general insurance provisions required by the Risk Manager.

The College’s level of coverage:

The College of William & Mary is an agency of the Commonwealth of Virginia and is self-insured by the Commonwealth of Virginia Risk Management Plan for all claims up to the maximum provided by the Code of Virginia. The College will provide a Certificate of Insurance upon request.
The level of coverage the contractor is required to maintain is subject to change. Contact the College’s Risk Manager for the current amount required.

**Non-discrimination.** All parties to this agreement agree to not discriminate on the basis of race, color, religion, national origin, gender, sex, pregnancy, childbirth or related medical conditions, age (except where sex or age is a bona fide occupational qualification), marital status or disability.

**Publicity.** ______ shall not use, in its external advertising, marketing programs or promotional efforts, any data, pictures, trademarks or other representation of The College of William & Mary except on the specific written authorization in advance by The College’s designated representative.

- The “publicity” clause should be used to prohibit unauthorized use of The College’s name in advertising, event programs, or any other types of publications.
- Pictures or other information that appears on The College’s website may be used without prior permission, but must have appropriate attribution to The College.

**Use of Name.** ______ shall not use the name, insignia or trademark of The College of William & Mary nor any adaptation of those representations, or the names of any of its employees in any advertising or promotional efforts without the written consent of The College or employee, at least five days in advance of any use.

- The College Of William & Mary has trademarked its name, insignias and other graphics associated with The College. The purpose of the trademark is to ensure that The College has control over the use of its name so that it is not used in advertising events that are not sponsored or supported by The College. When contracting with another party, The College will not relinquish control over its trademarks and allow unrestricted use of The College’s name. Contracts should therefore emphasize its ownership rights of The College’s name in the contract. For licensing questions, please contact the Office of Auxiliary Services at (757) 221-2500.
Warranty and Indemnities. ______ warrants and represents that it will not violate or infringe any intellectual property right or any other personal or proprietary right and shall indemnify and hold harmless against any claim of infringement of intellectual property rights which may arise under this Agreement.

- The “warranty” clause requires the contractor to warrant that it will not infringe any intellectual property rights and to protect the University from any suit by third party or by the contractor.
COMMONWEALTH OF VIRGINIA AGENCY

CONTRACT FORM ADDENDUM TO CONTRACTOR’S FORM

AGENCY NAME: COLLEGE OF WILLIAM AND MARY

CONTRACTOR: ____________________________

The Commonwealth and the Contractor are this day entering into a contract and, for their mutual convenience; the parties are using the standard form agreement provided by the Contractor, __________This addendum, duly executed by the parties, is attached to and hereby made a part of the contract.

The Contractor represents and warrants that it is a(n) / / individual proprietorship / / association / / partnership / / corporation / / governmental agency or authority authorized to do in Virginia the business provided for in this contract.

Notwithstanding anything in the Contractor's form to which this Addendum is attached, the payments to be made by the Commonwealth for all goods, services and other deliverables under this contract shall not exceed $______; payments will be made only upon receipt of a proper invoice, detailing the goods/services provided and submitted to the College. The total cumulative liability of the Commonwealth, its officers, employees and agents in connection with this contract or in connection with any goods, services, actions or omissions relating to the contract, shall not under any circumstance exceed payment of the above maximum purchase price plus liability for an additional amount equal to such maximum purchase price. In its performance under this contract, the Contractor acts and will act as an independent contractor and not as an agent or employee of the Commonwealth.

SECTION I

The Contractor's form contract is, with the exceptions noted herein, acceptable to the Commonwealth. Nonetheless, because certain standard clauses that may appear in the Contractor’s form agreement cannot be accepted by the Commonwealth, and in consideration of the convenience of using that form, and this form, without the necessity of specifically negotiating a separate contract document, the parties hereto specifically agree
that, notwithstanding any provisions appearing in the attached Contractor's form contract, none of the following shall have any effect or be enforceable against the Commonwealth:

1. Requiring the Commonwealth to maintain any type of insurance either for the Commonwealth's benefit or for the contractor's benefit;

2. Renewing or extending the agreement beyond the initial term or automatically continuing the contract period from term to term;

3. Requiring or stating that the terms of the attached Contractor's form agreement shall prevail over the terms of this addendum in the event of conflict;

4. Requiring the Commonwealth to indemnify or to hold harmless the Contractor for any act or omission;
5. Imposing interest charges contrary to that specified by the Code of Virginia, Section 2.2-4355, Prompt Payment;

6. Requiring any total or partial compensation or payment for lost profit or liquidated damages by the Commonwealth if the contract is terminated before its ordinary period;

7. Requiring the application of the law of any state other than Virginia in interpreting or enforcing the contract or requiring that any dispute under the contract be resolved in the courts of any state other than Virginia;

8. Requiring that the contract be "accepted" or endorsed by the home office or by any other officer subsequent to execution by an official of the Commonwealth before the contract is considered in effect;

9. Delaying the acceptance of this contract or its effective date beyond the date of execution;

10. Limiting or adding to the time period within which claims can be made or actions can be brought;

11. Limiting the liability of the Contractor for property damage or personal injury;

12. Permitting unilateral modification of this contract by the Contractor;

13. Binding the Commonwealth to any arbitration or to the decision of any arbitration board, commission, panel or other entity;

14. Obligating the Commonwealth to pay costs of collection or attorney's fees;

15. Granting the Contractor a security interest in property of the Commonwealth;

16. Bestowing any right or incurring any obligation that is beyond the duly granted authority of the undersigned agency representative to bestow or incur on behalf of the Commonwealth.

17. Requiring the Commonwealth to keep the price paid by the Commonwealth confidential or designating the price paid by the Commonwealth as proprietary information.
SECTION II

The following clauses shall be incorporated as part of the agreement:

A. PURCHASING MANUAL; This Agreement is subject to the provisions of the Commonwealth of Virginia Purchasing Manual for Institutions of Higher Education and their Vendors and any revisions thereto, which are hereby incorporated into this contract in their entirety. A copy of the manual is normally available for review at www.wm.edu/procurement.

B. CANCELLATION OF CONTRACT: The purchasing agency reserves the right to cancel and terminate any resulting contract, in part or in whole, without penalty, upon 30 days written notice to the contractor. In the event the initial contract period is for more than 12 months, the resulting contract may be terminated by either party, without penalty, after the initial 12 months of the contract period upon 60 days written notice to the other party. Any contract cancellation notice shall not relieve the contractor of the obligation to deliver and/or perform on all outstanding orders issued prior to the effective date of cancellation.

C. CONFIDENTIALITY: Trade secrets or proprietary information shall not be subject to public disclosure under the Virginia Freedom of Information Act. However, to prevent disclosure you must invoke the protections of Section 34, Rules Governing Procurement, in writing. The written request must specifically identify the data or other materials to be protected and state the reasons why protection is necessary. The proprietary or trade secret material submitted must be identified by some distinct method such as highlighting or underlining and must indicate only the specific words, figures, or paragraphs that constitute trade secret or proprietary information. The classification of an entire document, line item prices and/or total prices or fees as proprietary or trade secrets is not acceptable. The parties agree that Confidential Information may be disclosed in response to a Virginia Freedom of Information request.

D. ASSIGNMENT OF CONTRACT: A contract shall not be assignable by the Contractor in whole or in part without the written consent of the College.

E. MODIFICATIONS: This Contract may be modified in accordance with §8.-4774 of the Rules Governing Procurement. The representatives noted below may only make such modifications. No modifications to this Contract shall be effective unless it is in writing and signed by the duly authorized representative of both parties. No term or provision hereof shall be deemed waived and no breach excused unless such waiver or consent to breach is in writing.

Any Contract issued on a firm fixed price basis may not be increased more than twenty five percent (25%) or $50,000.00 whichever is greater, without the approval of the Governor of the Commonwealth of Virginia or his authorized designee.

F. DEFAULT: In case of failure to deliver goods or services in accordance with the contract terms and
conditions, the College, after due oral or written notice, may procure them from other sources and hold the Contractor responsible for any resulting additional purchase and administrative costs. This remedy shall be in addition to any other remedies which the College may have.

G. INSURANCE: Contractor certifies that if awarded the contract, it will have the following insurance coverages at the time the contract is awarded. For construction contracts, if any subcontractors are involved, the subcontractor will have workers' compensation insurance in accordance with §25-5007 of the Rules Governing Procurement. The Contractor further certifies that the Contractor and any subcontractors will maintain these insurance coverages during the entire term of the contract and that all insurance coverages will be provided by insurance companies authorized to sell insurance in Virginia by the Virginia State Corporation Commission.

In instances where a resulting contract award requires the contractor’s employees presence on state property at any time, the contractor shall issue a Certificate of Liability Insurance (COL) prior to the beginning of the project. It shall be understood that the College of William and Mary and the Virginia Institute of Marine Science (College), are deemed to be one agency of the Commonwealth.

INSURANCE COVERAGE AND LIMITS REQUIRED:

1. Workers’ Compensation - Statutory requirements and benefits. Coverage is compulsory for employers of three or more employees, to include the employer. Contractors who fail to notify the Commonwealth of increases in the number of employees that change their workers’ compensation requirements under the Rules Governing Procurement during the course of the contract shall be in noncompliance with the contract.

2. Employer's Liability - $100,000.

3. Commercial General Liability - $1,000,000 per occurrence. Commercial General Liability is to include bodily injury and property damage, personal injury and advertising injury, products and completed operations coverage. The College of William and Mary must be named as an additional insured and so endorsed on the policy.

4. Automobile Liability- $1,000,000 – per occurrence.

H. TAXES: Sales to the College are normally exempt from State sales tax. State sales and use tax certificates of exemption, Form ST-12, will be issued upon request. Deliveries against this contract shall usually be free of Federal excise and transportation taxes. The Commonwealth’s excise tax exemption registration number is 10-546001718F.
I. **CLAIMS PROCEDURE:** Contractual claims for payment under the Agreement shall be submitted in writing no later than sixty (60) days after the College states in a writing delivered to the Contractor that it has made its final payment to the contractor under the Agreement and that Contractor must submit any claim within 60 days thereafter. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

The College’s procedure for deciding such contractual claims is:

The Contractor must provide the written claim to:

Director of Procurement
Grigsby Drive, Facilities Management Bldg, Lower Level
College of William and Mary
P.O. Box 8795
Williamsburg, Virginia 23187-8795

- Although the Contractor may, if it chooses, attempt to resolve its claim directly with the College department using the product or services rather than the one stated in the above paragraph, the Contractor must submit any unresolved claim in writing, no later than sixty (60) days after notice of final payment is delivered to the Contractor in accordance with the opening paragraph of this subsection (w), to the Director of Procurement if it wishes to pursue its claim.

- Upon receiving the written claim, the Director of Procurement will review the written materials relating to the claim and decide whether to discuss the merits of the claim with the contractor. If such discussion is to be held, the Director of Procurement will contact the Contractor and arrange such discussion.

- The Director of Procurement will mail his or her decision to the Contractor within sixty (60) days after receipt of the claim. The decision will state the reason for granting or denying the claim.

- The Contractor may appeal the Director of Procurement’s decision to:
  Vice President for Administration
  College Apartments
  College of William and Mary
  P.O. Box 8795
  Williamsburg, Virginia 23187-8795

Upon receiving the written appeal, the Vice President for Administration will review the written materials relating to the claim and decide whether to discuss the merits of the
claim with the Contractor. If such discussion is to be held, Vice President for Administration will contact the Contractor and arrange such discussion.

The Vice President for Administration will mail his or her decision to the Contractor within thirty (30) days after the Vice President for Administration’s receipt of the appeal. The decision will state the reasons for granting or denying the appeal.

Nothing set forth in this section shall limit, delay or reduce the Contractor’s ability to seek equitable relief from a court of competent jurisdiction in the Commonwealth of Virginia to the extent permitted by Virginia law. In addition, to the extent the College brings a claim against the Contractor, then the Contractor shall in no event be precluded from asserting a counterclaim for payments due under the Agreement regardless of whether such counterclaim is raised within the 60 day period specified above.

This Agency contract consisting of this Agency addendum and the attached Contractor's form contract constitute the entire agreement between the parties and may not be waived or modified except by written agreement between the parties.

IN WITNESS WHEREOF, the parties have caused this contract to be duly executed, intending thereby to be legally bound.

COLLEGE OF WILLIAM AND MARY

CONTRACTOR by ________________________

Title ________________________

Date of Signature ________________________

AGENCY by ________________________

Title ________________________

Date of Signature ________________________

Appendix B – Insurance Requirements

The College of William & Mary

Generic Insurance Requirements

NOT to be used in construction, repair or maintenance contracts
Notwithstanding anything to the contrary in this document or elsewhere, Contractor shall comply with the following insurance requirements:

**Insurance**

It shall be the Contractor’s obligation to maintain all insurance necessary with respect to the services provided to The College of William & Mary. In any and all trade contracts and agreements between Contractor and any subcontractors, Contractor shall require that appropriate liability and Workers Compensation insurance be provided by those parties, and shall require that both The Commonwealth of Virginia and The College of William & Mary be named as additional insured under all such general liability insurance policies. The insurance to be maintained by Contractor itself shall include, but not be limited to:

a) An industry standard or equivalent Commercial General Liability insurance policy, including contractual liability coverage, with limits of liability for bodily injury and property damage of at least One Million ($1,000,000) Dollars per occurrence and Two Million ($2,000,000) Dollars annual aggregate. The Commonwealth of Virginia and The College of William & Mary shall be named as an additional insured.

b) Workers’ Compensation insurance for statutory benefits and Employers’ Liability with limits of at $100,000 Ea Accident - Bodily Injury by Accident, $500,000 Policy Limit - Bodily Injury by Disease and $100,000 Ea Employee - Bodily Injury by Disease. Policy shall be endorsed to specifically waive the insurer’s right of recovery against The Commonwealth of Virginia and The College of William & Mary.

c) Automobile Liability insurance policy (or policies) with limits of liability for bodily injury and property damage of at least One Million ($1,000,000) Dollars per occurrence.

d) An Umbrella Liability policy with a minimum limit of Ten Million ($10,000,000) dollars in excess of a), b) and c) above. The Additional Insured and Products and Completed Operations requirements in a) above apply to the Umbrella coverage also.

e) Professional Liability insurance in an amount not less than $2,000,000 per occurrence.

f) Insurance on Contractor’s own property, property of employees and any rented or leased equipment.

Each of these policies shall be primary and non-contributory with any insurance (including any self-insurance, deductible or retention) program maintained by The Commonwealth of Virginia and The College of William & Mary and shall be endorsed to provide the policy shall not be canceled unless at least thirty (30) days’ prior written notice has been given to The Commonwealth of Virginia and The College of William & Mary.

To the extent of any insurance carried or required to be carried by Contractor under the terms of this agreement, Contractor waives any right of recovery against The Commonwealth of Virginia and The College of William & Mary. Wherever necessary Contractor shall have insurance policies endorsed to effect insurer’s waiver of such rights in accordance with this agreement.

All such insurance will be placed with an insurer maintaining an A.M. Best rating of A or better and authorized to do business in Virginia.

Contractor is required to furnish a certificate evidencing the insurance outlined above along with a copy of the additional insured endorsement ten (10) days prior to the start of performance. Continued evidence
of insurance shall be provided at each renewal or replacement of coverage until no longer required by this agreement.

APPENDIX C

Prohibited Clauses – Quick Checklist

As the College of William & Mary is an institution of higher education and agency of the Commonwealth of Virginia, it cannot agree to any of the following terms:

- Indemnifying, saving, or holding harmless the contractor or third parties.
- Insurance amounts beyond what the University currently maintains; however, clauses requiring Mason to furnish a certificate of insurance are acceptable. To ascertain those limits, please contact the Risk Manager in the Office of Administration at 757-221-2742.
- Automatic renewal.
- Requiring payment of rates that exceed the legal rate of interest.
- Paying another party’s lost profits or liquidated damages.
- Extending or limiting the time period within which claims or actions may be brought.
- Limiting the contractor’s liabilities.
- Modification of the contract without express written approval.
- Binding arbitration or binding mediation.
- Paying another party’s attorneys fees.
- Granting a security interest in property of the Commonwealth.
- Application of laws, or the designation of a litigation forum, of any jurisdiction other than Virginia.
- Confidentiality agreements that violate the Virginia Freedom of Information Act.

If any of these terms are present in the contract, they must be stricken from the document.
Appendix D – CONTACTS

OFFICE OF UNIVERSITY COUNSEL
The College of William & Mary
Room _______ Blow Hall
P.O. Box 8795
Williamsburg, Virginia 23197-8795
Phone: (757-221-
Fax: (757 – 221

Staff
Deborah Love          Charles Crimmins
University Counsel     Coordinator of Legal Services
dlove@wm.edu          cjcrimmins@wm.edu
Phone: 757-221-1306     Phone: 757-221-2271

OFFICE OF PROCUREMENT SERVICES
The College of William & Mary
Facilities Mgmt Bldg, Lower Level
P.O. Box 8795
Williamsburg, Virginia 23187-8795
Phone: (757) 221-3952
Fax: (757) 221-3959
Website: http://wm.edu/procurement

Staff
Gregory Johnson       Staci Longest
Director              Associate Director
gwjohnson@wm.edu      smlongest@wm.edu
Phone: (757) 221-3954   Phone: (757) 221-3960

OFFICE OF SPONSORED PROGRAMS
The College of William and Mary
1308 Mount Vernon Avenue
Williamsburg, VA 23185

Phone: 757-221-3965
FAX: 757-221-4910

Website: http://www.wm.edu/offices/sponsoredprograms/index.php

**Staff**

Jane Lopez
Director
jalope@wm.edu
Phone: (757) 221-3965

**OFFICE OF ADMINISTRATION RISK MANAGER**

Kristen Fagan, Risk Manager
kdfaga@wm.edu
Phone: (757) 221-2742

**OFFICE OF TECHNOLOGY TRANSFER**

Jason McDevitt, Director
jpmcde@wm.edu
(757)2211751

**OFFICE OF AUXILIARY SERVICES**

Diana Tennis, Business Manager & Licensing
drtenn@wm.edu
(757) 221-2500