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RE: Coronavirus (COVID19) Implications in University Contracts

The current coronavirus (COVID19) affects many University functions, including contracts that the University may have entered into either as a provider of goods or services or a purchaser of goods and services. For example, a conference hosted by the University that is cancelled or postponed due to COVID19 may require termination, postponement, or amendment to the contracts related to the conference, such as hotel or meeting space contracts, conference registration agreements, speaker agreements, and food and beverage contracts. Alternatively, the University, as a provider of goods or services, may need to amend a contract because it is no longer able to meet its contractual obligations due to COVID19. Lastly, the University may need to enter into a new contract to allow it to respond to a need resulting from COVID19.

This Fact Sheet is intended to address common questions and concerns regarding how to address University contracts due to COVID19. As the situation regarding COVID19 continues to evolve, the Office of the General Counsel may update its advice related to COVID19 and University contracts. Current versions of this document will be accessible at <https://nebraska.edu/offices-policies/general-counsel/resources>.

1. What terms should I be looking for when considering how to address a contract affected by COVID19?

- a. **Force Majeure** – a term that excuses a party from performing its contractual obligations, often without penalty, that becomes impossible or impracticable due to an event the parties could not have anticipated. It may only delay performance or it may excuse performance completely. Each provision is unique and should be read carefully to determine if and how it applies. See paragraph 6 of this Fact Sheet for sample force majeure language.
- b. **Termination** – a term that may allow one or both parties to end the contract before the date certain for which it otherwise would expire. There are generally two types of termination provisions: for cause and for convenience and a contract may include one or both.

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- i. For cause – this type of provision may be general and explain that a party may terminate if the other party breaches a term of the agreement and/or it may describe certain events that result in breach and would permit the non-breaching party to terminate for cause.
 - ii. For convenience – this type of provision allows one or both parties to terminate the contract for any reason (e.g., convenience). It may describe a process for how to terminate for convenience and/or require a certain amount of written notice. It may or may not allow for a refund of fees paid in advance.
- c. **Amendment** – this type of provision allows parties to modify, change or otherwise alter the terms of an existing agreement. It may proscribe a specific process for doing so, including often requiring amendments be executed by the authorized signer to the contract and that it be in writing.
- d. **Penalty/Liquidated Damages** – this type of provision explains any adverse consequences that would result in the event this provision is triggered. If this provision is present it should be reviewed carefully and a key consideration in determining how to address the contract issue resulting from COVID19.
- e. **Limitation of Liability** – this type of provision limits how much responsibility a party may have to pay damages as a result of a breach of contract. It may apply to one or both parties. It means that any amount of damages in excess of this limitation must be paid by the other, non-breaching party, unless a specific, applicable exclusion to the limitation of liability is included. It should be reviewed carefully and will be a key consideration in determining how to address the contract issue resulting from COVID19.

2. What if I am trying to terminate or amend an existing contract due to COVID19?

- a. If you are terminating or making changes to an existing contract due to COVID19, you will want to ensure the termination or any changes are documented in writing and signed by an authorized University signer pursuant to your campus' signature authority matrix. You should continue to follow your campus processes regarding contracting. See the response to question 3 below for factors to consider regarding termination of an existing contract.

3. What factors should I consider when amending or terminating a contract because of COVID19?

- a. **Read the contract** and determine what provisions are applicable to the facts and circumstances of your situation. Please seek legal advice through your normal campus contracting process for assistance in interpreting contract terms and their implications.
- b. **Analyze all options** based on the applicable contract terms and the facts and circumstances of your situation. See the response to question 1 for an overview of likely applicable contract terms. In certain circumstances, there may be a breach of contract by the University or by the other party. Please seek legal advice through your normal campus contracting process if faced with a breach of contract situation.

- c. **Consider further negotiations.** An agreement reflects the parties' mutual agreement at the time the contract is executed. The parties may change the agreement as circumstances change, so consider whether an alternative arrangement would benefit the University. The new terms of the arrangement are a business decision, however, please seek legal advice through your normal campus contracting process if desired. Such negotiations may include negotiating a reduction in penalties or fees, particularly if the University has an ongoing business relationship with the other party, revising dates of performance and other creative alternatives to address the implications of COVID19.
- d. **Consider the consequences of the action.** Does the desired action factor in other, related obligations the University may have? These may be separate from the agreement that is at issue but be affected by these changes. How will these consequences be addressed?
- e. **Ensure approval by the authorized University representative** prior to committing to a course of action. Do not agree to a course of action without ensuring the authorized University signer is in agreement because they are the individual who can act, based upon their position, on behalf of the University. Agreements entered into by University staff who are not authorized by their position to enter into agreements on behalf of the University risk assuming personal liability for performance of the contract.
- f. **Document the agreed upon action.** Any agreement reached between the parties must be documented in writing and signed by authorized representatives of the University and the other party.
- g. **Seek legal advice.** Please feel free to reach out for legal advice at any point in this process. Unless exigent circumstances exist, please follow your normal campus processes when contacting the Office of the General Counsel. This generally includes notifying your Vice Chancellor for Business and Finance.

4. What if I am entering into a new contract as a result of COVID19?

- a. You should continue to follow your campus processes regarding contracts. Regent Policy 6.2.1 (Purchasing Policy) includes provisions addressing emergency purchases. "Emergency" is defined as "any situation where it is necessary that the University enter into a contract of purchase to (a) avoid the loss of life, health, safety or property, (b) respond to time limits established by a person or agency external to the University, or (c) obtain cost savings for the University where the time constraints of competitive bidding would eliminate the cost savings. Campus leadership, in coordination with those processing contracts for your campus, will determine whether the definition of emergency applies to your situation. You should also consider inclusion of a force majeure provision in the contract. See response to question 6 below for a sample force majeure clause.

5. What questions should I ask myself when considering inclusion of a force majeure provision in a University contract?

- a. **Does it benefit both parties?** A force majeure provision should apply to both parties. In addition, it should benefit both parties. Consider whether the force majeure provision is drafted in a way to only contemplate one party's performance under the agreement.
- b. **Does it suspend performance or cancel performance?** Some force majeure provisions only suspend performance during the force majeure period and allow the party to perform after the force majeure event. It may also extend the term of the contract beyond the initial term for the amount of time the contract was suspended. Consider whether this is agreeable to the University. For example, this may not be a good option for the University when purchasing goods as the University may not be able to wait for delayed performance or may not need the contracted items after a certain date. Please evaluate all force majeure language and negotiate as necessary to prevent unintended consequences.
- c. **Is there a time limitation on suspension of performance?** Generally, in a purchase agreement a force majeure provision will benefit the performing party instead of the paying party (payment obligations may be excepted from the force majeure provision). If performance is suspended, language could be added that would terminate the contract after a certain number of days to ensure the contract obligations do not extend beyond what is reasonable under the circumstances.
- d. **Are there requirements to notify the other party?** Some provisions may require the party affected by the force majeure event to notify the other party within a certain number of days after the start of the force majeure event and/or when the force majeure event has concluded.

6. What is sample force majeure language?

- a. Force Majeure. Either party may cancel this Agreement and both parties will be released from any liability or damages hereunder if the terms of this Agreement cannot be fulfilled due to an Act of God or any other legitimate condition beyond the control and without the fault or negligence of either party ("Force Majeure Event"). For the purposes of this Agreement, a Force Majeure Event includes, without limitation, landslide, lightning, earthquake, hurricane, tornado, flood, blizzard, other adverse and inclement weather, fire, explosion, act of a public enemy, war, blockade, insurrection, riot, civil disturbance, labor dispute, strike, work slowdown, work stoppage, order or judgment of any governmental authority, adoption of or change in any applicable law, outbreak of serious life-threatening contagious disease, pandemic, epidemic, or any other similar cause or similar event beyond the control and without the fault or negligence of either party.

7. What if the other party is threatening legal action?

- a. Unless exigent circumstances exist, please follow your normal campus processes when contacting the Office of the General Counsel for legal advice. This generally includes reaching out to your Vice Chancellor for Business and Finance.

8. Who should I contact if I have legal questions about a contract and COVID19?

- a. Unless exigent circumstances exist, please follow your normal campus processes when contacting the Office of the General Counsel for legal advice. This generally includes reaching out to your campus procurement office and/or your Vice Chancellor for Business and Finance.