



Office of Sponsored Programs

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Dear Corporate Sponsor:

At George Mason University, we are always interested in facilitating mutually beneficial relationships with industrial partners, and we recognize, that because of our different cultures, private industry and universities sometimes approach contract negotiation from very different perspectives. To that end, and in an effort to make the negotiation process easier, we are forwarding the attached brief summary of the University's perspective on standard contract clauses to you as a potential corporate sponsor of university research. Because these clauses cause varying degrees of difficulty for George Mason University when entering into sponsored project agreements, we hope that a preview of the University's position regarding these issues will streamline our future negotiations. While these may not be the only items we might identify during negotiations, these are issues that routinely arise in our negotiations with private industry.

The items listed below provide an overview of George Mason University's positions on a number of standard contract terms and conditions. They reflect core University values and include a brief discussion of some of the elements influencing Mason's position on standard contract terms and conditions. They are intended to serve as a general overview to provide a foundation prior to entering into specific contract discussions.

1. **Assignment** - The Commonwealth Attorney General's office will not support contracts that allow for the assignment of the contract to another party unless Mason agrees to the assignment in writing.
2. **Confidential/Proprietary Information** - Because the culture of a university is collegial where faculty and students are expected to share new knowledge with each other and the public, confidentiality clauses along with non-disclosure agreements need to be as limiting as possible. The name of the person to receive the information must be designated in the agreement AND the person named must sign the agreement. It is also important that the agreement state that all confidential or proprietary information be labeled as such, that it be given to the individual in writing, and that there is a signature of receipt by the receiver of the information.

It should be noted here that because the work of graduate students on sponsored projects is supposed to contribute to their theses and dissertations, it is only under the rarest of circumstances that they are given confidential or proprietary information. Such cases require special approval by a faculty committee.

3. **Contract Type** - We have a *very strong preference* for cost reimbursable contracts. Occasionally, we will agree to a firm fixed price or level of effort contract; however, because faculty do not account for time through a time-keeping system, the documentation required for level of effort contracts is extremely difficult and cumbersome to produce.

A Time and Materials contract, where the billing for individual effort is grouped by government defined labor categories, is not an appropriate contracting vehicle for universities, especially because they risk putting the University into non-compliance with federally required cost accounting standards. Our difficulty with labor categories stems from the fact that the variation in faculty salaries cannot be accounted for in terms of standard industrial job classifications. Rather, salaries are related to teaching expertise, scholarly publications, and other measures that have no equivalencies in the corporate or government world. It is therefore impossible for us to make a reasonable mapping of a number of individuals to one labor category without the possibility that the variation in salary range might be well over \$50,000, thereby creating a potential financial risk to the University. It should be noted that in the rare circumstance, where only one faculty member occupies one labor category, we could handle the Time and Materials mechanism.

4. **Disputes Resolution** - The Commonwealth Attorney General's Office prohibits its state agencies from committing the Commonwealth to third party arbitration, even non-binding arbitration. If a contract dispute cannot be resolved through good faith negotiations of the parties, legal remedy must be an option.
5. **Governing Law** - As a state agency, the University cannot enter into a contract where the governing law is that of another state. Our preference is to cite Virginia law as the governing law of the contract.
6. **Attorney's Fees** - The Commonwealth's Attorney General does not permit its state agencies to accept provisions which authorize the payment attorney's fees.
7. **Indemnity/Hold Harmless** - Because of the self-insurance plan that the Virginia General Assembly has authorized for state agencies, those agencies cannot enter into indemnification or hold harmless agreements. The Va. Code that underlies this restriction is §2.2-1837.A.1(c). Exceptions can be made only by the Governor and even in that circumstance, it must be for the public interest and there must be a ceiling put on the liability. It is important to note that this restriction applies to *any and all* references to indemnity or hold harmless.

As an alternative, we can offer the following language, which has been approved by the Commonwealth Attorney General's Office:

To the extent provided by the laws of the Commonwealth of Virginia, George Mason University shall be responsible for the ordinary negligent acts or omissions of its agents and employees causing harm to persons not a party to this agreement. The (contractor, vendor, donor, agency, etc.) agrees that it shall be responsible for the ordinary negligent acts or omissions of its agents and employees causing injury to persons not a party to this agreement. Nothing herein shall be deemed as a waiver of the sovereign immunity of the Commonwealth of Virginia. If requested, the University will provide a certificate of liability insurance coverage under the Commonwealth of Virginia Risk Management Plan.

8. **Insurance** - The University is covered by insurance through the Commonwealth of Virginia's Risk Management Plan. Although we can neither agree to other levels of coverage, nor can we name the sponsor as a co-insured, we can provide a certificate of coverage to attach to the contract.
9. **Intellectual Property** - Our typical language regarding intellectual property rights states that intellectual property developed under an agreement belongs to the organization employing the inventor. From the University's perspective, this position protects the rights of the inventor; it protects the University's tax-exempt status; and it ensures that after protection, commercialization efforts will maximize the benefit to the public. We do, however, want to recognize the important role of our corporate sponsors and so will give the sponsor a first option to secure a royalty bearing exclusive license or non-royalty bearing non-exclusive license.

We realize that issues of intellectual property ownership are complex and often critical to the agreement. We therefore encourage a dialogue regarding this issue if the corporate sponsor is not comfortable with the University's base-line position.

10. **Invoicing** - There are so many variations in invoicing clauses that it is difficult to discuss all the potential problems. However, the University prefers to be able to invoice monthly with payment due in thirty days. In reviewing invoicing clauses, we are particularly mindful of requirements which include the provision of copies of documents other than a simple display of the expenses incurred the previous month. Often invoicing clauses contain information requirements, which are impossible for the University to meet.

In determining invoicing procedures, it is also important to remember that universities are not subject to the cost accounting principles set forth in the Federal Acquisition Regulations (FAR), Subpart 31.2, as these are *commercial* cost principles. The cost principles governing universities

are issued through the Office of Management and Budget Uniform Guidance, 2 C.F.R. Part 200. This document is referenced in FAR 31.3.

11. **Use of Mason Name and Logo** - In order to protect the University's name and logo, we require that its use be approved prior to use by any outside party, in every instance.
12. **Organizational Conflict of Interest** - When entering into subcontracts where the prime sponsor is the federal government, we are sometimes faced with the FAR's flow down requirement covering Organizational Conflict of Interest. (FAR, Part 9). However, we have a firm policy which precludes us from allowing the actions of one faculty member to restrict the activities of another. In the past, we have successfully used the alternative language below so that each faculty member agrees not to be in conflict, but the institution is not on the whole subject to this clause.

Each individual assigned by the Subcontractor to perform work shall certify that there are no relevant facts or circumstances relating to his or her activities that could give rise to an organizational conflict of interest, as defined in FAR Subpart 9.5, or that he or she has disclosed all relevant information.

The conditions specified under this clause shall not be deemed to restrict the subcontracting and consulting activities of the Subcontractor personnel who are not assigned to perform work for XXX. However, the Subcontractor shall notify XXX in the event that such other personnel are involved with any potential bidder for a contract to the YYY (federal agency).

13. **Publications** - We believe that faculty and students must be free to disseminate the results of their research; however, we also recognize that corporations need to protect the proprietary ideas, which will contribute to the monetary success of the firm. To resolve this apparent conflict, we do often give sponsors the right to review publications for a limited time (preferably 30 to 60 days, but no more than 90 days), but the review MUST be limited to the inclusion of proprietary or confidential information. In no case can we allow language, which might allow the sponsor to block publication or force a change of tone, opinion or results. The following is a typical clause we use for publications:

Sponsor recognizes that under University policy, the results of the project must be publishable and agrees that researchers engaged in the project shall be permitted to present at symposia, national or regional professional meetings and to publish in journals, theses or dissertations, or otherwise of their own choosing the methods and results of the project; provided however, that the Sponsor shall have been furnished copies of any proposed publication or presentation at least sixty (60) days in advance of the submission of such proposed publication or presentation to a journal, editor, or other third party. Sponsor shall have 60 days after receipt of said copies, to object to the publication or presentation because of the inclusion of patentable subject matter that needs protection and/or there is confidential information of Sponsor contained in the proposed publication or presentation. In the event that Sponsor makes such objection, the parties shall negotiate an acceptable version.

14. **Publicity** - We can agree not to publicize the fact that we are engaged in a particular project. However, we must restrict that limitation to external publicity so that we can circulate our awards lists, etc.
15. **Renewal** - As a matter of policy, Mason does not enter into agreements, which are automatically renewed at the end of their terms. Any renewals must be agreed to by Mason in writing.

If you would like to discuss these issues or would like additional information, please call Eileen Gallagher, Associate Director, Contracts, in the Office of Sponsored Programs at egallagh@gmu.edu or 703 993-2292.