

COMMON CONTRACT ISSUES

GGC's status as a state College imposes certain restrictions on its contracting activities that a private College or company does not face. Many standard clauses typically found in commercial contracts cannot be accepted by GGC. The restrictions are based on constitutional and statutory prohibitions. Contract issues also may arise from GGC in the performance of sponsored research through GGCRSF. Although GGCRSF is not a state agency, as a Cooperative Organization of GGC, it is GGCRSF's policy not to accept contract terms that GGC is prohibited from accepting, since obligations under GGCRSF research contracts are passed through to GGC.

Common Prohibited Contractual Provisions:

1. Indemnification and/or hold harmless - Any provision that requires GGC to pay all losses another party may incur.

State agencies are prohibited from agreeing to indemnify third parties. Indemnification provisions have been determined to violate the prohibition against pledges of the State's credit and the prohibition against gratuities by the State (Ga. Const. Art. VII, Sec. IV, Par. VIII; Ga. Const. Art. III, Sec. VI, Par. VI; 1980 Op. Att'y Gen. 80-67; Op. Att'y Gen. 74-115). Indemnification provisions have also been determined to be invalid as unauthorized attempts to contractually waive the State's sovereign immunity (1980 Op. Att'y Gen. 80-67).

The first constitutional provision provides that the credit of the State shall not be pledged or loaned to any individual, company or association. Debt as used in the constitution is defined in terms of an annual budget cycle that relies on annual appropriations of the legislature. Under this definition, a "pledge" would include agreeing to obligations of funds beyond the current fiscal year. The second constitutional provision relates to the "gratuities clause" which prohibits state entities from granting any donation or gratuity (gift) to a third party or forgiving any debt or obligation owed to the public. The gratuities clause essentially requires that the state entity receive a substantial benefit for the grant or use of its assets (whether using property or personnel). Finally, by virtue of the doctrine of sovereign immunity, suit may not be maintained in the courts against a state entity without the express consent of the State.

Patent and Copyright Indemnification - The Attorney General has taken the position that it is the sole legal advisor for the state and state entities may not agree to be represented by third parties, even when the matter involves the third party defending its patent rights.

2. Warranty/Guarantee - Any provision that unconditionally assures or promises a certain result or outcome, including such terms as acceptance testing.

The Attorney General has advised that warranty provisions violate the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. The reason is that resources may have to be expended to satisfy such warranty or guarantee.

3. Governing law of or venue in any state other than Georgia. Contracts with state entities must be governed by the laws of the State of Georgia.

State law provides that the Attorney General has exclusive authority and control over all matters of litigation or potential litigation involving State agencies. As a result, GGC does not have statutory authority to accept the governing laws of another state. There is also a practical aspect to this position: the Attorney

General's staff does not want to agree to obey laws for which they are unfamiliar.

4. Requirements that GGC pay taxes, interest, liquidated damages, penalty fees or cancellation charges, litigation costs, or attorney's fees.

ATTORNEY'S FEES/COSTS. We do not agree to pay these costs. The rationale is that such a payment would be a violation of the constitutional gratuities clause.

DAMAGES. Damage clauses that are limited to consequential damages or special damages are generally acceptable since they are so ill-defined and speculative that most courts refuse to award them (i.e., lost profits). However, adding indirect or incidental as additional types of damages payable by GGC is not acceptable. The UCC regards these as distinguishable from consequential damages because they are usually meant to include out of pocket expenses directly attributable to the breach (i.e., travel expenses).

INTEREST. With the exception of the Standard MULTI-YEAR Agreement (which is an installment purchase agreement), GGC will not agree to pay interest. The Attorney General has advised us that payment of interest would be prohibited by the gratuities clause of the constitution and that GGC lacks statutory authority to agree to the payment of interest. Atty. Gen. Position Paper dated August 8, 1978; *Bently v. State Board of Examiners*, 152 Ga. 836 (1922).

LATE PAYMENT/CANCELLATION CHARGES. GGC does not agree to pay late payment charges. This policy stems from an opinion of the Attorney General that late payment charges are in the nature of penalty/gratuity which the State is constitutionally prohibited from paying.

TAXES. The State is exempt from most taxes and generally will not agree to contract language which requires the payment of taxes. We will not agree to reimburse the vendor for the payment of taxes. We will agree to language that says "GGC will pay taxes lawfully imposed upon it".

5. Binding arbitration. GGC does not agree to binding arbitration.

The rationale is that there is no specific statutory authority allowing us to do so. Attorney General has exclusive authority and control over all matters of litigation or potential litigation involving State agencies, thus GGC has no authority to limit the type or scope of judicial action, or the result obtainable therefrom by the State. Provisions which effectively waive the right of the Attorney General to bring actions on behalf of the state are prohibited.

6. Restrictions on publication that prevent publication or delay publication for an unreasonable amount of time.

As non-profit educational institutions, GGC and its cooperative research foundation, the GGC Research and Service Corporation, are subject to the provisions of the Bayh Dole Act and Internal Revenue Procedure 97-14, Guidelines for Research Agreements, which require that we ensure new intellectual property is made available for public use. An agreement not to publish may impact GGC and GGCRSF in a variety of ways. It may cause the research to be considered commercial research, thereby affecting tax-exempt status of the organization; the tax exempt status of bonds used to fund a facility, the use of facilities may be considered a private business and/or may cause the institute to lose an exemption under export regulations where the sponsor is a foreign entity. We may agree to reasonable delays that are needed to preserve potential patent rights. In addition, in contracts with foreign entities, the failure to publish may affect GGC's ability to rely on the public domain and fundamental research exceptions in the export laws and regulations.

7. Any provision requiring GGC to be bound by terms and conditions that are unknown at the time of signing the agreement.

Unknown obligations may violate various laws such as the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. As a practical matter, entering into contracts that call for an unspecified sum of money to change hands make it extremely difficult to budget. Such provisions in a contract would be void as a matter of law, and should be avoided at the time the contract is entered.

8. Requirements that provide for endorsement or marketing of a private entity by GGC.

The mission of GGC is to contribute to the fulfillment of the scientific and technical needs of the State of Georgia through education, research and service. Endorsing a particular entity's product may be counter to the mission. The faculty must be free to reach independent conclusions and publish opinions which are free from corporate influence.

9. Any provision requiring exclusivity in a contractual arrangement that was not competitively bid.

Certain sponsored research agreements, such as teaming agreements may have limited exclusivity provisions, provided that exclusivity is restricted to the lowest possible level (i.e., Project Director, Lab, School, etc.). State agencies must comply with the competitive bidding/purchasing statutes and the Georgia Vendor's Manual with regard to items that must be purchased by competitive bidding vs. sole source. For more information, review the GGC Purchasing Department's web site or contact a Purchasing Officer for more information regarding specific requirements.

10. Multi-year terms or automatic renewals for agreements obligating state appropriated funds.

All contracts must expire at the end of the fiscal year (July 1 - June 30). (O.C.G.A. § 50-5-64; Attorney General Op. 74-115). Pursuant to O.C.G.A. § 50-5-64, agreements that cross the fiscal year boundary must be on the Department of Administrative Services' Installment Purchase Form. Payment of interest is generally prohibited, but use of the Standard Installment Purchase Agreement Form allows for the payment of interest (note that this is the only statutory authority for payment of interest - GGC may not otherwise agree to pay interest). The state statute requires use of specific clauses like the renewal clause above and specific funding language which allows for instantaneous termination in the event funds are not appropriated in subsequent years. (See O.C.G.A. § 50-5-64 for specific language required).

Sample Language:

"Renewal - GGC may renew this Agreement for additional periods of one year each. Services under this Agreement are subject to the needs of GGC in its sole discretion and are specifically subject to appropriations of adequate and sufficient funds in the fiscal year services are purchased, failure of which shall render this Agreement void."

OR

"This agreement begins on __, 20__ and expires on June 30, 20__. With the mutual written consent of the parties, this agreement may be renewed times with each additional term expiring at the end of GGC's fiscal year."

OR

"Funding - Notwithstanding any provision of this Agreement, the parties hereto agree that the charges hereunder are payable by GGC from appropriations received from the General Assembly of the State of Georgia. In the event that the source of payment for the total obligation no longer exists or is insufficient with respect to the services, in the sole discretion of GGC, then this Agreement as to all services, or as the case may be, as to any service(s) included under this Agreement, shall terminate without further obligation of GGC as of that moment. The certification of GGC of the events stated above shall be conclusive."

Contracts may not allow for automatic renewals when state funds are/would be obligated in subsequent fiscal years. Atty. Gen. Op. 74-115. Contracts may be renewed at the sole discretion of GGC. The AG ruled that the contract may be renewed prior to the end of the fiscal year if all of the funds are available and are unencumbered during that same fiscal year. Atty. Gen. Op.

80-163.

Sample Language:

"This Agreement shall commence on and shall continue until the close of the then current fiscal year of the State of Georgia (July 1 through June 30). GGC shall have the option, exercisable in its sole discretion, to renew this Agreement upon the same terms and conditions for additional periods of one fiscal year each. GGC may, in its sole discretion, renew as to all goods and services to be provided hereunder, or as to only select goods and services. In the event GGC elects as to less than all of the goods and services to be provided hereunder, it shall specify those goods and services to be deleted..."

OR

"GGC may renew the Agreement for additional periods of one year each. Services under this Agreement are subject to the needs to GGC in its sole discretion and are specifically subject to appropriations of adequate and sufficient funds in the fiscal year services are purchased, failure of which shall render this Agreement void."

11. Best efforts provisions that require the expenditure of any funds or efforts necessary to meet the obligations of a contract, even if such efforts exceed the dollar amount of the contract.

Best efforts provisions have been held to be warranties and/or guarantees. Such provisions violate the prohibition against pledging the State's credit. (Refer to discussion of warranties above for more information).

12. Contractual provisions that require GGC to waive potential claims against a third party or otherwise limit the liability of such party.

GGC does not have the authority to prejudice the rights of the State to sue or otherwise enforce a contract by agreeing to a limit on or a waiver of liability. (Refer to discussion of arbitration, above, for more information).

13. Contractual provisions which require GGC to accept the risk of loss of an item during delivery.

Generally we want delivery F.O.B. GGC's facility so that the risk of loss is on the seller until such delivery. As a rule, we do not accept risk of loss until title actually passes to GGC because we have no way to cover the item under the state self-insurance policy.

14. If the agreement is a result of an ITB or an RFP, we do not allow vendors to disclaim warranties.

The rationale is that a purchase resulting from a competitive process should provide for specific products or services to be provided to us to fit a particular need/purpose. To allow a vendor to disclaim a warranty of fitness in such a case would defeat the competitive process.

15. Contractual clauses that require GGC to purchase insurance policies or provide coverage for third parties.

GGC, as a state agency, does not have authority to purchase commercial insurance. State law provides for the Department of Administrative Services to procure insurance for State entities. GGC is covered by the Tort Claims Act and the State of Georgia Broad Form Insurance that is administered by the Department of Administrative Services.

16. Provisions that prohibit a contractor's employee from accepting a position with GGC or provisions which require GGC to comply with contractor regulations (including union rules).

The State of Georgia is a right to work state which allows individuals to refuse to participate in labor organizations or refrain from certain affiliations. (O.C.G.A. § 34-6-21). This also means that the State will not prohibit anyone from applying for a job with any State Agency.