Memorandum

To: Georgia Gwinnett College Campus  
From: Office of Legal Affairs  
Date: August 28, 2019  
Re: Contract Process

Georgia Gwinnett College through the Office of Legal Affairs has developed and now publishes a manual for Contract Process and Procedures. The Office of Legal Affairs has taken the manual and broken it into specific links for your convenience. You may choose to download and review each link separately or the full manual in its entirety.

All the information can be found at: [http://www.ggc.edu/community/legal-affairs/contracts/](http://www.ggc.edu/community/legal-affairs/contracts/).

The manual will enable the person needing a contract, to find answers to such questions as who has to sign the contract, how is it routed for approval, what language should (or should not) be included and where can I find help.

The manual includes a “Contract Cheat Sheet” to ensure your contract meets all requirements.

The following documents, when used in the order listed, can prove to be the most efficient and helpful when writing, negotiating, reviewing and/or routing a contract for approval:

1. GGC Contract Procedures  
2. Contract Checklist

The document ‘Boilerplate Language’ also has helpful language that must be placed in each contract. It should be attached as an “addendum” to all contracts.

There are times when the other party states the contract is their standard contract and the language cannot be changed. The document titled ‘Letter to Vendors and Contractors’ (already signed by GGC general counsel) can be sent to the other party as it is written to explain why certain terms are not acceptable and why certain terms are necessary.

After reviewing the above three documents (four if you include the cheat sheet) and you still have questions regarding any process involved in the contract, please do not hesitate to contact the Office of Legal Affairs for further assistance at x5154.

Training regarding the new Contract Process & Procedures is forthcoming. Please contact the Office of Legal Affairs at x5154 for more information.
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Georgia Gwinnett College Procedures on Contract Review and Approval

General

This procedures handbook defines the general process by which a contract involving the Board of Regents of the University System of Georgia (“Board”) by and on behalf of Georgia Gwinnett College (“College”) might be (1) created; (2) reviewed and approved; (3) appropriately signed by an authorized College official; (4) administered and (5) retained for records retention purposes and to ensure the purpose of the contract is performed.

Contracts must satisfy three basic criteria in order to be approved by an authorized College official:

1. The contract must be appropriate to the mission and operation of the College.
2. The funds and other resources must be available to carry out the obligations of the contract.
3. The terms of the contract must comply with Board and College regulations, and applicable local, state, and federal laws.

Individuals having ultimate responsibility to oversee the performance for contracts should have signature authority for them. Prior to final signature, contracts need to pass through only those offices having direct oversight for the activities (or their funding) and those assuring administrative or regulatory compliance.

College Contract Defined

For the purposes of this policy, a “College Contract” is defined as an agreement between two (2) or more parties, one of which is the College or any of its subunits intended to have legal effect or be otherwise recognized at law. There must be a common understanding among the parties as to the essential terms, the mutual obligations, and the existence of valid and sufficient “legal consideration,” meaning that something of value is exchanged between the parties.

Examples of College contracts include, but are not limited to:

- Agreements to buy, sell, or rent goods;
- Agreements to provide, obtain, or rent services;
- Volunteer agreements;
- MOUs with government agencies and other organizations for the accomplishment of particular purposes;
- Grants and subgrants awarded by government agencies and private organizations;
- Affiliation/clinical agreements;
- Leases of movable property, such as tools, equipment, vehicles, etc.
- Leases, deeds, and other conveyances affecting interests in real property;
- Employment contracts;
- Waivers and releases;
- Nondisclosure agreements;
- Material transfer agreements;
- Student or faculty exchange agreements; and
- Software license agreements.
Administrative Review

A person initiating a College contract, also referred as “contract originator”, is responsible for the following:

1. Reading the contract entirely and determining that:
   a. the contract meets programmatic and College mission and operational requirements;
   b. the contract language accurately reflects the current state of negotiations;
   c. the contract is in the best interests of the College;
   d. he/she can ensure compliance with the obligations it places on the College;
   e. the contract is sufficiently clear, consistent, and fiscally prudent; and
   f. the contract language is proper and meets College requirements.

2. In addition, such person(s) must have the cooperation and approval of any College department/unit that may be directly or indirectly involved in the performance or funding of the contract. Accordingly, PRIOR TO BEING SIGNED BY THE APPROPRIATE COLLEGE OFFICIAL, all contracts must be reviewed and approved by: (1) the Office of Legal Affairs; (2) Director of Foundation Finance (applicable only if using Buildings D, E, F, G, I, Residence Life, Parking Deck, Tennis Complex, Athletic Fields, or Intramural Fields); (3) Chief Information Officer (applicable only if contract is technology related); (4) the College department Director, Dean and/or Division Head; and (5) the Director of Purchasing and/or VP of Business-Finance CFO & Facilities. The following outlines the responsibility of each of these reviewing offices:

Office of Legal Affairs
• Assures that the contract does not subject the College to undue liability or risk.
• Assures that the contract does not contain any prohibited clauses.
• Assures that the terms of the contract comply with Board and College regulations, and applicable local, state, and federal laws.

Director of Foundation Finance (Only if contract involves Foundation owned property.)
• Assures the contract doesn’t interfere with the bonds.

Chief Information Officer (Only if contract involves software, hardware, or other IT matters.)
• Assures that the technology will be compatible and doesn’t interfere with current GGC infrastructure and systems.

Department Director and/or Dean
• Assures that the contract is appropriate and necessary to the department’s missions and priorities.
• Guarantees that the department or unit can furnish services, materials, and/or funds provided for in the contract.
• Assures that alternative activities, actions and/or providers have been considered, and that those stipulated in the contract or agreement represent the most feasible, reasonable, and fiscally prudent arrangements for the department.

Appropriate Vice President
• Assures the Vice President is informed of the various moving parts in his or her areas.
• Ensures that duplication of goods or services does not occur.
**Director of Purchasing and/or VP Business and Finance/CBO**

- Assures that the contract is appropriate and necessary to the College’s mission and priorities, and is not in conflict with the needs, mission, or priorities of any other division within the College.
- Verifies that all appropriate signatures are intact, including Legal Affairs approval and Accounting Services/Grants and Contracts approval as necessary.
- Obligates the College and the Board of Regents to the terms of the contract.

*Approvals from the above departments and/or units are to be endorsed through the GGC Cobblestone Contract Management System.*

Information about the GGC Cobblestone Contract Management System can be found at: [www.ggc.edu/contracts](http://www.ggc.edu/contracts). These approvals assure the authorized signatory that the terms of the contract have been appropriately reviewed and approved.

**NOTE:** Approving the contract in the system indicates each approver has followed the GGC contract review procedures.

### Contract Requirements

Prior to final College approval, every contract must go through proper approval workflow. Please review the document titled “Contract Requirements for Approval” for additional information regarding the requirements for contracts seeking approval. If an agreement requires the signature of a member of the executive level and there is NOT a signature line already in place do the following:

1. State in the signature line on the original contract “Please see the attached signature line document for all College signatures pertaining to this contract”
2. Print the signature line associated with the College department that is originating the contract and attach it to contract. You may delete any name that is not needed for your specific contract.

However, if a contract is written correctly there will be a signature line already in place for each signatory at Georgia Gwinnett College therefore the signature line inserts will not be needed.

Every contract that is approved on behalf of Georgia Gwinnett College must contain the correct contract language. The Office of Legal Affairs will return the contract to the originator due to incorrect language used in the contract along with an explanation as to why the language will need to be changed. The contract originator should be aware of the ramifications this may cause between the originator and the other party listed on the contract. In order to avoid this, please review the documents titled “Contract Cheat Sheet” and “Boilerplate Language” contained on pages 10 and 16. The Office of Legal Affairs is available to assist any person with contracts, contract language and, if necessary, contract negotiations as to necessary legal requirements.

The Office of Legal Affairs has drafted a letter that may be sent to outside vendors for clarification regarding common required and prohibited contract language. The title of this letter is “Letter to Contractors and Vendors” and can be found on page 18.
By utilizing these documents, the contract can be issued by the originator correctly the first time thus avoiding any issues regarding language and signature lines. Should you have any questions please contact the Office of Legal Affairs.

**Authorizing Signatures**

All contracts involving the College must be signed by an authorized College official. The President must sign certain types of contracts, such as Joint Staffing Agreements. The President may sign any other type of contract for the on-going operations of the College. All other contracts may only be signed by those designated by the President as having signature authority.

The following persons have signature authority to commit the College on a contract.

1. **President:** The President has delegated authority to sign contracts to the following persons. If there are any questions as to whether the President needs to sign the agreement, contact the Office of Legal Affairs prior to routing the contract for signature.
2. **Provost and VP for Student Affairs:** T.J. Arant (for nonmonetary contracts related to academics.)
3. **VP for Business and Finance:** Frank Hardymon
4. **Director of Purchasing:** Bruce Burbank

Vice Presidents may **NOT** delegate final signature authority for contracts.

**Contracts and agreements signed by other than authorized officials will be rejected and returned to the originating department. Failure to follow College policies and procedures regarding signature authority may result in an employee’s loss of insurance coverage, personal liability for all contractual obligations, and/or disciplinary action.**

Vice Presidents may authorize their direct reports to "recommend" contracts be approved to the President or delegated Vice President after the contract has been reviewed by the Office of Legal Affairs. This authority would be specifically in lieu of the Vice President reviewing and approving the contract prior to it being sent to a signatory for approval. Prior to this authority taking effect, the Vice President will notify the Office of Legal Affairs in writing or by electronic mail for records purposes. Absent such written signed approval, the Office of Legal Affairs will return the contract for proper review and signature. The Vice President authorizing their direct reports to directly recommend contracts be approved as previously set forth in this paragraph shall, nonetheless, retain full responsibility for the contract.

**Approval Routing Process**

To assure the proper and timely routing of College contracts through the approval process, the College requires the use of the GGC Cobblestone Contract Management System. The system provides an easy routing process so that College contracts can be handled expediently. Information regarding this system may be found at: [www.ggc.edu/contracts](http://www.ggc.edu/contracts).
**Contract Retention**

The College complies with the Board’s published record retention guidelines, which may be reviewed at [http://www.usg.edu/records_management/schedules/](http://www.usg.edu/records_management/schedules/). Unless otherwise required within any particular division or for any particular contract, departments/units should retain the final, executed agreements for retention purposes; the department/unit is responsible for maintaining copies of such agreements in its own files and for complying with the specific retention requirements. In addition, any College contract provisions dealing with document retention by the parties must be satisfied, even if such contractual provisions require longer retention periods than the Board’s guidelines. The Office of Legal Affairs is designated as the College’s overall records retention office. Guidance on records retention for any particular document may be obtained by contacting the Office of Legal Affairs if the above site is not helpful or adequate.

**Contract Administration**

Unless otherwise provided by College policy, the individual, or his/her designee, who originates the College contract is responsible for properly carrying out the terms of the contract for the College. It may be advisable for each College department/unit to establish a database of all its current contracts, including such information as performance dates, payments to or from the College, and receipt of certificates of insurance, performance bonds or letters of credit. Failure to monitor these requirements can expose the College department/unit and the College to financial loss, legal actions, and potential claims for breach of contract or default. If any contract administrator has any questions regarding these matters, he/she should contact the Office of Legal Affairs.

**Contract Procedures Training**

The Office of Legal Affairs will provide Contract Procedures training for any department and/or individual as requested. There will be Contract Procedures training material forthcoming on the Office of Legal Affairs website found at: [http://www.ggc.edu/community/legal-affairs/](http://www.ggc.edu/community/legal-affairs/).

**Contract Procedures Violations**

Any contract found to be out of compliance with any of the above mentioned procedures will be sent back to the contract originator to correct the matter with an attached memo specifying what needs to be corrected. Continued failure by an originator to route contracts for appropriate signature(s) may cause contracts to be sent back to the originator for proper routing.
Contract Checklist

1. Does the contract properly identify all parties of the contract?
2. Are the effective dates properly identified?
3. Does the contract have signature lines for all individuals who need to sign the contract?
4. Does your contract involve the physical performance of services with a cost $2,500 or more? If so, an e-verify is required.
5. Does the contract have the appropriate language, some of which may need modification or deletion, for the following:
   a. 30 days for payments
   b. Finance charges and/or payment penalties
   c. Liability
   d. Indemnification
   e. Attorney fees and/or court costs and/or litigation expenses
   f. Insurance
   g. Termination Clauses
   h. Breach of Contract Clauses
   i. Any state laws other than Georgia governing the contract
   j. Binding arbitration or mediation laws
   k. Other

6. Have all levels described in the administrative review approved and/or signed the contract?

Signature Lines for College Signatories

Signature: ___________________________ Date: ________________
Name: Bruce Burbank
Title: Director of Purchasing

Signature: ___________________________ Date: ________________
Name: Frank Hardymon
Title: VP for Business and Finance/CBO

Signature: ___________________________ Date: ________________
Name: T.J. Arant, Ph.D.
Title: Senior VP for Academic and Student Affairs and Provost
# Contract Cheat Sheet

## Basics

<table>
<thead>
<tr>
<th>Question</th>
<th>Modification</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Does the contract correctly identify GGC?</td>
<td>The Board of Regents of the University System of Georgia by and on behalf of GGC</td>
</tr>
</tbody>
</table>
| 2. Does the contract require GGC expend funds and end after the close of the fiscal year? | Change term of the agreement to run concurrent with fiscal year.  
*Example:* This agreement begins on _______ and expires on June 30, 20__. With the mutual written consent of the parties, this agreement may be renewed four (4) times with each additional term expiring at the end of GGC’s fiscal year. |
| 4. Is the other party an independent contractor?                        | Insert language clarifying the independent contractor status.  
*Revision:* This Agreement does not create a joint venture, partnership, employment, or agency relationship between the parties. |
| 5. Does the agreement make GGC responsible for performance under the contract rather than the Board of Regents? | Clarify in the contract.  
*Revision:* Georgia Gwinnett College will perform all obligations of The Board of Regents of the University System of Georgia under this Agreement. |

## Insurance Requirements

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<th>Question</th>
<th>Modification</th>
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| 1. Does the contract require the College to obtain general liability insurance or a bond? | Delete and insert insurance language from boilerplate section of this manual.  
*Revision:* The parties acknowledge that GGC is a governmental entity and is subject to the Georgia Tort Claims Act (OCGA § 50-21-20 et seq.). The parties further acknowledge that GGC is self-insured through the Department of Administrative Services at amounts set by the state legislature. |
| 2. Should the contract require the Vendor to provide insurance or a bond? | The contract should. GGC should also be named as an additional insured. If the other party is resistant, perform risk assessment and consult with Office of Legal Affairs. |
### Payment Terms

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<th>Question</th>
<th>Modification</th>
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<tbody>
<tr>
<td>1. Does the contract provide for payment at least thirty days after receipt of a proper invoice?</td>
<td>No? Modify to include.</td>
</tr>
<tr>
<td>2. Does the contract call for late payment penalties or finance charges?</td>
<td>Yes? Delete.</td>
</tr>
</tbody>
</table>

*Example: In the event of delay in payment Vendor reserves the right to levy a service charge to cover administrative and other associated costs in relation to overdue accounts at the rate of 1% per month on all unpaid amounts [or] If College does not pay any invoice by the due date, Vendor may charge interest on the outstanding amount, calculated daily at an annual rate equal to Prime Rate plus 1.5% from the due date to the date of payment.*

### Liability and Indemnification Issues

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<th>Question</th>
<th>Modification</th>
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</thead>
<tbody>
<tr>
<td>1. Does the contract seek to limit the Vendor’s liability and the College's scope of recovery?</td>
<td>Yes? Delete. (If unsuccessful, seek counsel from Office of Legal Affairs.)</td>
</tr>
</tbody>
</table>

*Example: In no event shall VENDOR be liable to College for any special, incidental, or consequential damages, arising from breach of warranty, breach of contract, negligence, strict liability in tort, or any other legal theory, even if VENDOR has been advised of the possibility of such damages. Such damages include, but are not limited to, loss of profits/revenue, cost of capital, overhead costs, costs of any substitute services or claims of College for any such damages. Or in combination with other terms that limit Vendor liability: The remedies set forth in this Agreement shall be College’s sole and exclusive remedies for any claims against Vendor under or related to this Agreement.*

<table>
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<tr>
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<tbody>
<tr>
<td>2. Should the contract require vendor to indemnify the College for any personal injury?</td>
<td>This depends on a number of factors. If vendor is not indemnifying college, consult with Office of Legal Affairs.</td>
</tr>
</tbody>
</table>
3. Does the contract subject the College to tort liability or otherwise waive State's sovereign immunity?  
   Yes?  Delete
   *Example: College assumes all risk of loss for any damages that arise under this Agreement.*

4. Does the contract contain "hold harmless" or indemnification clauses in favor of the Vendor?  
   Yes?  Delete
   *Example: College shall defend, indemnify, and hold Vendor harmless against any expense, judgment or loss or which results from College's actions under this Agreement.*

5. Does the contract require personal liability of the College signatory or any other College employee?  
   Yes?  Delete

6. Does the contract provide for the College to pay attorney fees, court costs, or other litigation expenses of other parties if there is a dispute?  
   Yes?  Delete
   *Example: In the event of a breach of this Agreement, the breaching party shall pay to the other party all attorneys' fees and other costs and expenses incurred by the non-breaching party in connection with the enforcement of any provision of this Agreement.*

7. Does the contract provide for a limitation of damages to be paid by GGC?  
   No?  Insert Boiler Plate Language

### Breach of Contract and Termination Clauses

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<th>Question</th>
<th>Modification</th>
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</table>
| 1. Does the contract allow the Vendor to unilaterally terminate the contract for cause?  
   *Example: Vendor may terminate this Agreement for breach [or cause] at any time upon thirty (30) calendar days' prior written notice to College.* | Modify the contract to make the clause mutual to both parties, so that the College may also terminate for cause in the same way the Vendor can and allow for a cure period.  
   *Revision: Either party may terminate this Agreement at any time upon prior written notice to the other Party of a specific breach and the failure of the other Party to cure its breach within 30 days of receipt of notice of breach.* |
2. Does the contract allow the Vendor to unilaterally terminate the contract for convenience?

Example: Vendor may terminate this Agreement at any time upon thirty (30) calendar days’ prior written notice.

Yes?

Modify the contract to make the clause mutual to both parties, so that the College may also terminate for convenience in the same way that the other party can. Check with client to determine if more time is required to terminate the agreement.

Example: Either Party may terminate this Agreement at any time it determines it is in its best interest to do so upon thirty (30) calendar days’ prior written notice to the other Party.

3. In the event of termination by Vendor does the contract allow the Vendor to receive full payment under the contract?

Example: In the event Vendor terminates this Agreement for breach, Vendor shall retain the deposit and College shall issue payment on the remaining balance [or loss of business] within 30 days of the date of termination.

Yes?

Modify the contract to provide that the College will reimburse the Vendor for reasonable costs incurred prior to the date of termination. If not successful, then delete the clause.

4. Does the contract state that a breach by the College would cause irreparable harm and justify injunctive action?

Ex: College acknowledges that for any breach of the confidentiality article of the contract, Vendor will not have an adequate remedy at law and shall be entitled to obtain entry of an injunction against College in a court of competent jurisdiction.

Yes?

Delete. If unsuccessful, seek advice from the Office of Legal Affairs.

5. Does the contract contain a survival clause?

Example: Termination of this Agreement by either party shall not affect the rights and obligations of the parties accrued prior to the effective date of the termination. The rights and duties under Articles survive the termination or expiration of this Agreement.

Yes?

Ensure that the articles specified in the survival clause are ones that the College wants to survive the contract, such as those shown in the revision below.

Example: Termination of this Agreement by either party shall not affect the rights and obligations of the parties that accrued prior to the effective date of the termination.

Terms Governing Disputes and Lawsuits

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<tr>
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</table>

Example: Any dispute, claim, or disagreement that arises under this Agreement shall be submitted and resolved by binding arbitration.
2. Does the contract allow for mediation? Yes? Ensure the agreement caps all College expenses for mediation, the mediation is not binding, and the mediation occurs in Fulton County. Contact Legal Affairs with questions or for language modifications.

3. Does the contract provide less than three years for the College to file a legal claim or sue for breach of contract? Yes? Delete the reference so that the contract is silent on the issue or modify the contract to include the relevant Georgia statute of limitation as shown below. If unsuccessful, seek advice from Legal Affairs.

4. Does the contract contain clauses that would make it subject to the courts of another state or country? Yes? Modify to be the State of Georgia, Fulton County. If unsuccessful, seek advice from the Office of Legal Affairs.

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**Miscellaneous Provisions**

<table>
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<tr>
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<th>Modification</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Does the contract allow modifications to be made by any means other than mutual written agreement of authorized signatories of the Parties?</td>
<td>Delete clause and ensure the GGC modification language from the boilerplate section is included in the agreement.</td>
</tr>
</tbody>
</table>
2. Does the Agreement specify that any statements made by any College employees in connection with the Agreement are binding on the College?

   Example: The College shall be bound by any representations or statements made on the part of its employees or agents whether oral or in writing.

   Yes? Delete clause and ensure the GGC modification language from the boilerplate section is included in the agreement.

3. Does the contract allow the Vendor to use the College’s name in any advertising, endorsement, or promotion?

   Example: Any legal action brought pursuant to this Agreement shall be initiated within a period of one (1) year following the discovery by the party bringing such action of the event giving rise to the cause of action.

   Yes? Contact Strategic Communications and Positioning to discuss and for approval. If approval is not given, include language protecting College’s intellectual property.

   Revision: Vendor agrees that it shall not use the name or intellectual property of Georgia Gwinnett College, or the University System of Georgia, including trademarks and service marks, without the express written permission of the College.

4. Does the agreement require that any part of the Agreement is confidential?

   Example: The terms of this Agreement are confidential and College shall not disclose this Agreement to any third party without Vendor’s prior written consent.

   Yes? Delete clause.

5. Does the Agreement incorporate other documents or information by reference or refer to information that is not in the Agreement?

   Example: The terms and conditions located on our website are incorporated and made part of this agreement.

   Yes? Obtain copies of the documents incorporated, review and modify as necessary, and then attach them as Exhibits to the original agreement. Incorporate the exhibits into the agreement, not the separate documents.

6. Is the intellectual property of GGC, including patent rights, part of the agreement?

   Yes? Contact Legal Affairs.

7. Does the contract require GGC to be responsible for taxes?

   Yes? Delete and provide a copy of the tax exemption letter.
Boilerplate Language

Amendment
This constitutes the entire Agreement, along with any Exhibits or appendices attached. This Agreement may not be amended orally, but only by an instrument in writing signed by the party against whom enforcement of such amendment is sought.

Applicable Law
The validity, construction and effect of this Agreement shall be governed by the laws of the State of Georgia as if this agreement were signed and completely performed in Georgia, regardless of the place of performance. Any litigation between and/or among the parties to this contract shall be adjudicated in the State of Georgia and for that purpose each party expressly and irrevocably consents to exclusive jurisdiction and venue in the Superior Court of Fulton County, Georgia or the United States District Court for the Northern District of Georgia.

Assignment
This Agreement is not assignable in whole or in part by either Party without the prior written approval of the other Party.

Nondiscrimination
There will be no discrimination on the basis of race, color, national origin, religion, creed, sex, sexual orientation, gender identity/expression, age, genetics, or disability.

Force Majeure
Neither party shall be in default under the Contract if performance is delayed or made impossible by an act of God. In each such case, the delay or impossibility must be beyond the control and without the fault or negligence of the Contractor. All parties agree that this clause shall serve to suspend, but not excuse, all parties from the performance of their obligations pursuant to this Agreement, and that full performance shall occur as soon as practicable after the force majeure circumstance is no longer present.

GORA
Notwithstanding anything herein, GGC is subject to the Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq. The parties agree that nothing herein shall prevent or delay GGC from fulfilling its obligations under the Georgia Open Records Act.

Headings
The Section headings provided herein are for convenience only and shall have no force or effect upon the construction or interpretation of any Provision hereof.
**Insurance**

OTHER PARTY will add GGC as an additional insured on the liability coverage(s) on a primary and noncontributory basis and provide evidence of such insurance.

The parties acknowledge that GGC is a governmental entity and is subject to the Georgia Tort Claims Act (OCGA § 50-21-20 et seq.). The parties further acknowledge that GGC is self-insured through the Department of Administrative Services at amounts set by the state legislature.

**Merger**

These Terms and Conditions constitute the entire agreement and understanding of the parties with respect to this Agreement and supersede all previous understandings and agreements between the parties, whether oral or written.

**Notice**

Notice under this Agreement will be sent:

For GGC:  

For______:

**Relationship**

This Agreement does not create a joint venture, partnership, employment, or agency relationship between the parties.

**Severability**

If any term, provision, covenant or restriction of this Agreement is held by a court of competent jurisdiction to be invalid, illegal, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions set forth herein shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

**Waiver**

Failure to exercise, or any delay in exercising, any right or remedy provided under this Agreement or by law shall not constitute a waiver of that or any other right or remedy.
Letter to Vendors

Legal Issues Related to Contracting with Georgia Gwinnett College

Dear Sir or Madam:

As a public institution and an instrumentality of the State of Georgia, Georgia Gwinnett College (GGC) is subject to a number of regulations that prevent us from entering into certain kinds of contracts. While these rules may occasionally make the process of negotiating a contract with the College more difficult, these rules are not unique to GGC. They apply to all of the other public colleges and universities in Georgia. In fact, many if not most public institutions of higher education throughout the United States are subject to similar restrictions.

1. Legal Name of Georgia Gwinnett College
   The correct legal name of Georgia Gwinnett College, which should appear on all GGC contracts, is "The Board of Regents of the University System of Georgia by and on behalf of Georgia Gwinnett College.

2. Indemnity
   An indemnity is a contractual clause by which a vendor may ask that the College defend it against any claims of other persons who might be injured as a result of something that happens while the parties are carrying out their duties under the contract. The Georgia Attorney General has determined that public agencies cannot enter into agreements indemnifying vendors, or any other entity, against third party claims. A copy of an official opinion from the Attorney General to this effect is attached to this letter as Exhibit "A."

Occasionally a vendor will attempt to deal with this restriction by rewriting an indemnity clause so as to eliminate the words "indemnity" or "indemnify," while leaving the intent of the clause intact - that is, to obligate the College to defend the vendor against third party claims. "Indemnity" is not a magic word, and if a contract clause has the effect of creating an indemnity, we would not be able to agree to it even though that word has been removed.

GGC does not enter into clauses that obligate it to indemnify a vendor "to the extent permitted by law." There are two reasons for this. From our standpoint, because we know that the extent to which the law permits us to indemnify vendors is no extent whatsoever, it would be disingenuous for us to imply in a contract that there might be some set of circumstances under which we would defend the vendor against third-party claims. We would not agree to something that we know we could not do. Secondly, the "extent" clause is simply an invitation to litigate the matter in the event third-party claims arises, and we prefer not to enter into agreements that invite litigation.
Please do not ask us to ignore this rule. Because the College lacks the contractual authority to enter into an indemnity, any person who is signing such a document on the College’s behalf signs it without authority to do so. We would not ask our administrators to expose themselves to personal liability by signing contracts that they know cannot be enforced.

We find that the indemnity issue is seldom a problem once vendors understand that we cannot provide indemnities, and why. If you think about what an indemnity is, it starts to look a lot like a policy of liability insurance. While the College cannot offer its vendors indemnities, there are many insurance companies that exist for precisely that purpose.

3. Insurance

Many vendors ask for clauses that define the manner in which the College insures itself. As a state instrumentality, the College is covered under the Georgia State Tort Claims Act (GSTCA), O.C.G.A. §§ 50-21-20 et seq. The GSTCA is too voluminous to attach to this letter, but you can see it online at http://w3.legis-nexis.com/hottopics/gacode/Defau1t.asp. Look at Title 50, Chapter 21, Article 2. The State of Georgia waives its sovereign immunity as to covered claims, but retains it as to other claims.

The GSTCA works in much the same way as liability insurance, or self-insurance. For all the types of claims that are covered under the GSTCA, coverage is provided at a limit of $1,000,000 per person, $3,000,000 per occurrence. GSTCA coverage is administered by the Georgia Department of Administrative Services, Risk Management Division.

The GSTCA is different from liability insurance in that we cannot adjust the coverage limits upward or downward; the limits are set by law. Also, because it is not insurance in the conventional sense, we cannot add vendors as additional insured parties.

4. Multi-year Contracts

The authority to commit taxpayer funds to various agencies for various purposes from year to year belongs to the Georgia General Assembly. While the Board of Regents of the University System of Georgia receives an appropriation every year, and the Board of Regents allocates a portion of that appropriation each year to GGC, we cannot presume by contract to commit the General Assembly to doing so. That power belongs to the General Assembly exclusively. Consequently, we cannot enter into contracts that commit funds from future years’ appropriations. For example, we cannot enter into multiyear leases with public funds.

An opinion of the Georgia Attorney General on this point is attached to this letter as Exhibit "B".

This does not mean that we cannot enter into any multiyear contract. Contracts that have appropriate escape clauses do not create problems. Nor do contracts that do not require funding, such as sponsorship contracts. And contracts that are funded through non-public sources of money may be permitted under some circumstances.
5. Unliquidated Expenses

In much the same way that we cannot presume that our next year’s appropriation would permit us to fund a multi-year contract, we cannot presume that we would have funds available to pay for claims that might exceed our available funding. Certainly, indemnities would fall into this category - who can say how it might cost to fund an indemnity that has no cap? But the same thing is true as to any other potential expense that cannot be calculated, such as paying a vendor’s attorney’s fees, paying for add-ons which aren’t priced in the contract, paying for unknown cost increases during the life of the contract, and so on.

6. Credit Agreements; Interest

The Board of Regents lacks the legal authority to borrow money. An opinion by the Georgia Attorney General on that point is attached as Exhibit “C.” When the State of Georgia borrows, it does so by issuing bonds through the Georgia State Finance and Investment Commission. Other State agencies don’t borrow money. Please don’t ask us to fill out credit applications in conjunction with contracts. We simply cannot do that. Nor can we agree to pay interest on late payments, which is tantamount to borrowing money. The State of Georgia enjoys the highest bond ratings, and Georgia Gwinnett College is an excellent customer, with a reputation for honoring its financial obligations promptly. We do that without the need to apply for credit, and without the threat of interest charges.

7. Waivers of jurisdiction and service; arbitration; laws of another state

Under Georgia’s constitution, the Attorney General is the State’s attorney for all purposes - including, especially, management of litigation. GGC cannot usurp his authority by agreeing in advance to control the way litigation would be managed in the event of a dispute. We cannot agree that we would submit to the laws or jurisdiction of another state, that we would waive formal service of process, or to binding arbitration. It doesn’t mean, for example, that we would absolutely refuse to arbitrate a dispute if one arose. It simply means that decisions of that nature are reserved for the Attorney General and we cannot sign a contract that would usurp his constitutional authority. The text of Art. 5, Sec. 3, Par. 2 is attached to this letter as Exhibit “D.”

8. Confidentiality

As a State institution, GGC is subject to the Georgia Open Records Act (GORA) (O.C.G.A. § 50-18-70 et seq.). While many types of records are protected by the Family Education Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act (HIPPA), and by various exceptions contained within the GORA, this Act gives any party the right to inspect and receive copies of most college records, including documents, contracts, and communications related to GGC’s normal course of business. We cannot agree, for example, to provisions that attempt to prohibit GGC and a vendor/vendor, to any party that submits a request to inspect and obtain such records.
In conclusion, there are a few other special rules that come up from time to time, but these are the rules that come into play most often. Georgia Gwinnett College enters into hundreds of contracts every year, with a huge array of vendors and vendors from every field imaginable. With an impact worth over a half billion dollars a year to the local economy, GGC is the kind of customer vendors cherish. Though the special rules that apply to public institutions can make doing business with us a little different, we think the value of a business relationship with GGC is well worth the effort for our vendors. On very rare occasions, these rules do prevent us from entering into a contract with a vendor. But the College works hard, and creatively, to find ways to work with vendors to build good business relationships while staying within the rules. And we find that most of our vendors are willing to work just as hard, and just as creatively, to achieve the goal.

We appreciate the understanding that all of our vendors show. If there is any further information that you need to help you understand the rules that govern GGC, please contact us.

Sincerely yours,

Marc P. Cardinall, J.D.
Executive Director of Legal Affairs

Reviewed and Approved: 3/17/2017
EXHIBIT A
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA
OPINION 80-67
May 23, 1980

SYLLABUS:
Re: The Georgia Fire Academy may not agree to indemnify the Georgia Power Company from the payment of money on account of injuries to persons or damage to property in any way attributable to the use of a Georgia Power Company right of way by the Fire Academy; nor may the Fire Academy agree to reimburse the Power Company for expenses it incurs as a result of the Fire Academy’s use of its right of way.

REQUESTBY:
To: Superintendent, Georgia Fire Academy

OPINIONBY:
ARTHUR K. BOLTON, ATTORNEY GENERAL

OPINION:
You have requested an opinion from the Attorney General on the question of whether or not the Georgia Fire Academy may agree to terms set forth in a Georgia Power Company Encroachment Agreement which would require the Fire Academy to indemnify the Power Company for money paid for personal injuries and property damages arising from the Fire Academy’s use of its right of way and to reimburse the Power Company for its cost for any damage to its facilities resulting from the Fire Academy’s use of its right of way.

Paragraph 8 of the Encroachment Agreement requires the Fire Academy “to indemnify and save harmless and defend the Power Company” from the payment of money on account of injuries to persons or damage to property in any way attributable to the use of the right of way by the Fire Academy. Article III, Section VIII, Paragraph XII of the Constitution of Georgia of 1976 (Georgia Code Ann. § 2-1413) forbids the state’s granting “any donation or gratuity in favor of any person, corporation, or association.” In Washburn v. MacNeill, 205 Ga. 772 (1949), the Georgia Supreme Court held that the prohibition against gratuities prevents the state from refunding payments made by sureties on a recognizance bond. See also, McCook v. Long, 193 Ga. 209 (1942); Op. Atty Gen. 796-28.

Op. Atty Gen. 68-328 (unofficial) interpreted Article III, Section VIII, Paragraph XII of the Constitution to prohibit an indemnity and hold harmless clause in a proposed contract, under which clause the Georgia State Patrol would indemnify Irnk’s, incorporated, for any liability, personal injury and property damage incurred as a result of use by the State Patrol of a vehicle leased pursuant to the proposed contract.

The opinion advised that the “hold harmless” agreement in the proposed Brak’s contract was also violative of Article VII, Section III, Paragraph III of the Constitution of Georgia of 1945 (Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976 [Georgia Code Ann. § 2-4804]) which provides that “the credit of the State shall not be pledge or loaned to any individual, company, corporation or association.” See also, Op. Atty Gen. 74-115 which discusses the application of this constitutional provision to the contractual incurring of a liability which is not to be discharged by a tax levied within the year in which the liability is undertaken. It is my opinion that the proposed hold harmless provision in Paragraph 8 of the Encroachment Agreement constitutes both a gratuity and a pledge of the state’s credit and thus falls within the
prohibitions contained in Article III, Section VIII, Paragraph XII and in Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976.

By virtue of the doctrine of sovereign immunity, suit may not be maintained in the courts of this state against the state without the express consent of the legislature. Koehler v. Massell, 229 Ga. 359 (1972); Crouder v. Department of State Parks, 228 Ga. 436, 438 (1971). See the discussion contained in Op. Atty Gen. 56-261 in which the Attorney General advised the Board of Regents that the legislature’s delegation of the power to contract to the Regents does not include by implication the power to waive sovereign immunity by the contractual assumption of tort liability and that an attempt by Regents to do so would be ultra vires and void. Similarly, an attempt by the Georgia Fire Academy to contractually waive the state’s sovereign immunity by entering into an indemnity agreement would be ultra vires and void.

Therefore, in summary it is my official opinion that Article III, Section VIII, Paragraph XII and Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976 prohibit execution of an indemnification agreement by the Georgia Fire Academy and that such an agreement would furthermore be invalid as an unauthorized attempt to contractually waive the state’s sovereign immunity.

In Paragraph 6 of the proposed Encroachment Agreement the Fire Academy agrees to reimburse the Power Company for all cost and expense for any damage to Power Company facilities resulting from its use of the right of way. The Fire Academy further agrees that if in the opinion of the Power Company it becomes necessary, as a result of the Fire Academy’s use of the right of way, to relocate, rearrange, change or raise any of the Power Company’s facilities, it will promptly reimburse the Power Company for this expense. Since Paragraph 6 involves a contractual pledge of the state’s credit to pay for damages and expenses incurred by the Power Company without time or monetary limits, it is my official opinion that it is prohibited by Article VII, Section III, Paragraph IV of the Constitution of Georgia of 1976.
EXHIBIT B
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF GEORGIA
Opinion 74-115
August 23, 1974

TYPE: OFFICIAL OPINION

SYLLABUS:
A state agency may not incur a fiscal obligation beyond that authorized by currently effective appropriations; contracts incurring an obligation dependent upon future appropriations or the continuation of any other source of state funds are invalid.

REQUESTED BY:
State Auditor

OPINION BY:
Arthur K. Bolton, Attorney General

OPINION:
This is in reply to your request for my opinion as to whether, and under what circumstances, a state agency may lawfully execute a contract with a private party to purchase goods or services where the term of the contract extends beyond the current fiscal year. Your request is drawn in terms of an inquiry as to a proposed contract by the Department of Administrative Services for computer goods and an inquiry as to the extent the Board of Regents of the University System of Georgia is bound by the principles applicable to other state agencies in this area.

Because prior opinions on this question may not adequately explain their reasoning sufficiently to govern the specific inquiries made, I have undertaken to set forth herein a restatement of the underlying rationale and specific conclusions for the purpose of future guidance. 11

11 This opinion deals exclusively with contracts between state agencies and private parties. Contracts between state agencies or between a state agency and another instrumentality of the state involve different considerations. Ga. Const., Art. VII, Sec. VI, Par. I (Ga. Code Ann. § 2-5901).

The resolution of the issue presented requires consideration of several constitutionally embodied concepts, each of which is related to the underlying purpose of foreclosing the state from incurring "debt" except in specified instances.

The first of these is Art. VII, Sec. III, Par. IV. With certain exceptions authorizing certain types of debt, none of which is here pertinent, it provides that

"... the credit of the state shall not be pledged or loaned to any individual, company, corporation or association. . . ." Ga. Const., Art. VII, Sec. III, Par. IV (Ga. Code Ann. § 2-5904).
This limitation, which gathers meaning from its own terms and from the exceptions authorizing the state to incur debt for certain purposes, forecloses the execution of any contract which pledges the faith and credit of the state. State v. Port Authority, 201 Ga. 773 (1947). The purposes and meaning of this prohibition, contained also in the Constitution of 1877, were exhaustively treated by the Supreme Court in City Council of Dawson v. Dawson Waterworks Co., 116 Ga. 696 (1899), where, although dealing specifically with similar prohibitions applicable to political subdivisions of the state, the court delineated the pertinent limitations with reference to the state itself. The court noted that

"Taking into review, as the framers of the Constitution did, the condition of the public debt of the state... nothing can be plainer than that the power to create debts, incur liabilities and impose burdens to be discharged in the future, was liable to be grossly abused, if the same existed without restrictions... in the hands of the General Assembly... In light of all those facts, what is meant by the various provisions of the constitution we have above referred to? What was the plan to be followed in the future in regard to the public debt of the state itself? Nothing can be clearer. The public debt of the state must not be increased for any purpose except those few above mentioned. " * * * The various departments of government must be supported from year to year by taxation, and only in certain instances is the state authorized to incur a debt..." Id. at 705-706.

The Supreme Court's definition of "debt" was also drawn in reference to the state itself. "Almost without exception," the court noted, "not only in regard to the subordinate public corporations of the state, but in regard to the state itself the general rule has been that... salaries and all expenses of government are paid by the year out of taxes raised during the year in which the service is compensated was rendered. " * * * Debt, therefore, as used in the Constitution is to be understood as a liability which is undertaken and which must be discharged at some time in the future but which is not to be discharged by a tax levied within the year in which the liability is undertaken." Id. at 711-712.

Specifically, the court held that

"The policy of the Constitution is not only against the incurring of liabilities to be discharged in the future for services rendered concurrently with the liability incurred, or previously paid by the year out of taxes raised during the year in which the service is compensated was rendered. " * * * Debt, therefore, as used in the Constitution is to be understood as a liability which is undertaken and which must be discharged at some time in the future, notwithstanding that it depends upon the performances of some service to be rendered in the future." Id. at 712.

This delineation of the debt limitation was incorporated in the present constitutional provisions. Thompson v. Talmdge, 201 Ga. 867, 885-886 (1947).

Much of the court's discussion in Dawson, supra, is, of course, directed to municipalities of the state where there is a union of legislative and executive powers. When the issue is drawn to the state level, however, the required correspondence of the obligation and taxation as stated in Dawson, supra, is not entirely dispositive. That principle, established in Art. VII, Sec. III, must be considered with related provisions of the Constitution also bearing on the issue presented.

Article III, Sec. VII, Par. XI, provides:

"No money shall be drawn from the Treasury except by appropriation made by law." (Ga. Code Ann. § 2-1911).
Article VII, Sec. IX, Par. I, requires the General Assembly to

"... annually appropriate the funds necessary to operate all the various departments ... and meet the current expenses of the state for the next fiscal year." (Ga. Code Ann. § 2-6201).

On the other hand, Art. VII, Sec. IX, Par. II, of the Constitution provides that the General Assembly

"... shall not appropriate funds for any given fiscal year which, in aggregate, exceed a sum equal to the amount of unappropriated surplus ... together with an amount not greater than the total Treasury receipts from existing revenue sources anticipated to be collected in the fiscal year, less refunds ..." (Ga. Code Ann. § 2-6202).


Both under the Constitution and by statute, therefore, the General Assembly has, for purposes of the present issue, complete and absolute control over appropriations and other sources of state funds which may be made available to the department and has neither authorized any state agency to obligate the continued availability of appropriations or of any other sources of state funds, nor could it constitutionally do so, beyond the authorization contained in a presently effective General Appropriations Act.

Footnote: In certain instances, the Constitution mandates a continued availability of funds and we do not deal with those instances here. See, e.g., Ga. Const., Art. VII, Sec. IX, Par. IV (B) (Ga. Code Ann. § 2-6204).

Footnote: The import of these concepts on the question you presented may be succinctly stated: No agency of the state may execute a contract with a private party for the purchase of goods or services which purports to obligate appropriations or state funds from any other source not on hand at the time of the contract or where the fiscal obligation of the state agency depends for its full performance upon such future appropriations or the continued existence of any other source of state funds.

As a matter of general application, this principle forecloses a state agency from executing a contract the term of which extends beyond the current fiscal year. In such a case, the required correspondence of the incurring of an obligation and the availability of funds to satisfy the obligation is provided.

Footnote: The implication in prior opinions that the term of reference is any twelve month period is, of course, not correct. See, e.g., Ops. Atty Gen. 70-6, 67-345.

However, this is not necessarily the case. For example, a state agency may execute a contract for the purchase of goods and services even though the term of that contract extends to the next fiscal year if the state agency has on hand at the time of the execution of the contract available appropriated funds necessary to meet its entire obligation under the contract. Such a contract does not obligate an appropriation not then made. Moreover, the Constitution itself specifically provides that appropriations which would otherwise lapse at the close of the fiscal year do not so lapse if the appropriated funds are "contractually obligated." Art. VII, Sec. IX, Par. II (Ga. Code
Ann. § 2-6092). The Constitution itself, therefore, specifically contemplates contracts of the type discussed above.

On the other hand, a state agency generally may not contract for the present purchase of goods or services in one fiscal year which is to be paid for out of appropriations, or funds to be derived from other sources, in a subsequent fiscal year.

A state agency may, however, under certain circumstances, execute a contract the term of which extends to the next fiscal year where the state's fiscal obligation is for services rendered or goods to be received in the subsequent fiscal year and is payable from an appropriation for that subsequent year as long as the General Appropriations Act for that fiscal year making the appropriation has become effective. While the appropriation constitutionally does not become available for expenditure until the fiscal year for which it is made begins, such a contract does not anticipate future appropriations or obligate other sources of funds, and thus does not create a present, unfunded obligation.

II.

In prior informal reviews of state agency contracts by this office, we have encountered multi-year contracts which contained several types of provisions designed to obviate the conflict with the Constitution which would otherwise be posed.

The first of these is a contract, otherwise within the limitations stated above, which grants to the state agency, but not to the private party with whom the contract is made, an option to extend the term of the contract for an additional fiscal year. Generally, the option may be exercised by the state agency within 60 days prior to the beginning of the next fiscal year and thus at a time when appropriations for that fiscal year under a General Appropriations Act have become effective. Such a provision does not in any way obligate future appropriations and is thus within the constitutional limitations set forth above, n5

--- Footnotes ---

n5 Prior opinions make clear, however, that penalties imposed on the state agency incident to the failure to exercise the options are invalid. See, e.g., Ops. Att'y Gen. 1969-70, p. 32; Op. Att'y Gen. 79-4.

--- End Footnotes ---

A second alternative employed in otherwise invalid multi-year contracts is an attempt to deal directly with the problem inherent in them. Under this approach, a multi-year contract is subject to automatic termination at the end of any fiscal year included in its term if there is a failure on the part of the General Assembly to appropriate sufficient funds for its continuation. Several factors make it apparent that such a clause is insufficient to avoid the constitutional deficiency otherwise inherent in the contract. The General Assembly does not, in fact, and serious doubts exist as to whether constitutionally it may, appropriate with reference to specific contracts executed or to be executed by state agencies. Op. Att'y Gen. 73-192 (and constitutional provisions cited); Ga. Const., Art. I, Sec. I, Par. XXIII (Ga. Code Ann. § 2-120); Fuller v. State, 236 Ga. 961 (1974) (contravening opinions of Hall, J., Boston & Gough v. Cummings, 36 Ga. 102, 105 (1852). Absent such a scheme for the appropriations process, the continuing fiscal obligation inherent in such contracts would purport to govern expenditure of appropriations in fact made to the state agency. See, Irwin v. Harrison, 186 Ga. 244, 253-54 (1937); Harrison v. State Highway Dept., 188 Ga. 290 (1936). For these reasons, it is in my opinion that a "failure of appropriations" clause does not save an otherwise invalid multi-year contract.

The third device is a provision granting to the state agency, or to both parties, under a contract which otherwise violates the Constitution, an option to terminate the contract. Generally, such an option is subject to exercise within a period of time immediately preceding the beginning of a new fiscal year. In my opinion, such a contract does not comply with the Constitution and is beyond the authority of a state agency. A state agency is not authorized to pledge the credit of the
Ann. § 2-5029. The Constitution itself, therefore, specifically contemplates contracts of the type discussed above.

On the other hand, a state agency generally may not contract for the present purchase of goods or services in one fiscal year which is to be paid for out of appropriations, or funds to be derived from other sources, in a subsequent fiscal year.

A state agency may, however, under certain circumstances, execute a contract the term of which extends to the next fiscal year where the state's fiscal obligation is for services rendered or goods to be received in the subsequent fiscal year and is payable from an appropriation for that subsequent year as long as the General Appropriations Act for that fiscal year making the appropriation has become effective. While the appropriation constitutionally does not become available for expenditure until the fiscal year for which it is made begins, such a contract does not anticipate future appropriations or obligate other sources of funds, and thus does not create a present, unfunded obligation.

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A second alternative employed in otherwise invalid multi-year contracts is an attempt to deal directly with the problem inherent in them. Under this approach, a multi-year contract is subject to automatic termination at the end of any fiscal year included in its term if there is a failure on the part of the General Assembly to appropriate sufficient funds for its continuation. Several factors make it apparent that such a clause is insufficient to avoid the constitutional deficiency otherwise inherent in the contract. The General Assembly does not, in fact, and serious doubts exist as to whether constitutionally it may, appropriate with reference to specific contracts executed or to be executed by state agencies. Op. Atty Gen. 73-192 (and constitutional provisions cited); Ga. Const., Art. I, Sec. I, Par. XXIII (Ga. Code Ann. § 2-124); Fuller v. State, 232 Ga. 981 (1974) (contrary opinions of Hall, J., and Baxton & Gunby v. Cummings, 36 Ga. 193, 199 (1854)). Absent such a scheme for the appropriations process, the continuing fiscal obligation inherent in such contracts would purport to govern expenditure of appropriations in fact made to the state agency. See, Irons v. Harrison, 185 Ga. 244, 253-54 (1937); Harrison v. State Highway Dept., 185 Ga. 950 (1936). For these reasons, it is my opinion that a "failure of appropriations" clause does not save an otherwise invalid multi-year contract.

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state. A multi-year contract obligating future appropriations, even with an option to terminate, is
a pledge of the state's credit thus beyond the authority of the state agency in the first instance
option to terminate the contract does not modify the pledge of credit and purports to vest in the
state agency a power to determine whether the pledge shall be terminated. No state agency has
such a power and this becomes especially apparent in view of the fact that, under such a
contract, the state agency's neglect will suffice to continue the pledge as sufficiently as a

III.

As you noted in your request, the Board of Regents of the University System of Georgia is not
subject to the same limitations imposed on agencies of the state. See, e.g., State of Georgia v.
Regents of the University System of Georgia, 172 Ga. 210, 222 (1934); Ga. Const., Art. VIII, Sec.
IV, Par. I (Ga. Code Ann. § 2-6701). On the other hand, the Board of Regents is not authorized to
obligate future appropriations which are made to it in its departmental capacity. State of
Georgia v. Regents, supra; State Ports Authority v. Arnold, 201 Ga. 719 (1947). With respect to
appropriations to it, the Board of Regents is subject to the same limitations which apply to other
agencies of the state.

In your request, you make reference to a specific multi-year contract executed by the Board of
Regents for computer equipment which it now desires to replace. In the bid documents issued
incident to securing replacement equipment, prospective vendors are advised that the successful
vendor must make the necessary arrangements to liquidate the existing contractual obligation to
the vendor of the equipment to be replaced. Without reference to the existing contract, of course,
I cannot reach an opinion as to the validity of that document.

The limitations applicable to other state agencies are also applicable to the Board of Regents of
the University System of Georgia to the extent its contractual obligations are dependent upon
appropriations made to it in its capacity as a department of State Government.

IV.

Your specific request with respect to the Department of Administrative Services seeks my
opinion as to whether, as presently drawn, a proposed contract for the rental by that department
of computer equipment and related goods is consistent with the limitations stated above.

Under that contract, the department agrees to rent the equipment for an initial six-year period
for a rental payable in monthly increments of $158,000. Anticipating the issue presented here,
the contract provides:

"[DOAS] may terminate items of equipment... upon... written notice of thirty
(30) days or the remainder of the... fiscal year, whichever is less, certifying that
the availability of budgetary funding from those sources currently supporting
these items of equipment can no longer support the affected items... so that
termination of those items will have resulted from the loss of funding. It is not
the intent of this provision to permit [the Department] to then make, request or
allocate budgetary funding for the acquisition of new or use of existing [non-
vendor] equipment...."

The Department of Administrative Services, in its provision of computer services, is in a unique
position. Under the present statutory framework, the department does not receive for the
provision of these services a direct appropriation to it. Instead, DOAS invoices the state agency
users of that equipment and by this method funds the costs of providing those services.
That the fiscal obligations of DOAS under contracts with vendors are not payable from direct appropriations to it but depend instead on user fees in turn supported by direct appropriations does not render any less applicable the debt limitations stated above. See, State Ports Authority v. Arnott, 201 Ga. 713 (1947); Op. Att'y Gen. 72-39. Unless the "escape" clause noted above is sufficient to negate a future obligation, it is my opinion that the contract is invalid.

In my opinion, moreover, the "escape" clause is not sufficient to avoid the conclusion that the contract creates a debt. In the first instance, the initial obligation of the Department of Administrative Services is stated as a continuing, general obligation. Even if the quoted language were otherwise sufficient to modify this conclusion as to the nature of the obligation, however, the contract imposes an obligation not to "make, request or allocate budgetary funding for the acquisition or use of non-vendor equipment..." In my opinion, such a limitation retains the original character of the department's obligation and thus not only is insufficient to avoid the debt implication but is further invalid because the nature of the obligation incurred and the period of time within which that obligation encompasses is also beyond the contractual authority of the department conferred, or which might be conferred, by statute. 55

Footnotes


End Footnotes

However, because of the unique position occupied by the Department of Administrative Services, it is my conclusion that different considerations are applicable to its powers in connection with multiyear contracts. In my opinion, the department may remedy the deficiencies inherent in the existing language of the proposed contract if in lieu of the language quoted above the following is substituted:

"(a) The total monthly charge established hereunder is payable by the customer solely from fees received by the customer from other agencies of the State of Georgia for the use of the products, which, to the extent authorized by law, are established in the sole discretion of the customer. In no event shall the sum of the total monthly charges made in any fiscal year of the customer exceed the sum of the fees so received by the customer during such fiscal year.

(b) In the event that the source of payment for the total monthly charge no longer exists or is insufficient with respect to the products or to any of them, then this contract as to all products, or as the case may be, as to any products included under this contract, shall terminate without further obligation of the customer as of that moment. The certification by the customer of the event stated above shall be conclusive."

Under such a clause, the department does not obligate the continuation of any source as state funds and thus neither pledges the credit of the state nor obligates the state in a manner beyond the authority conferred by statute. See, e.g., City Council of Dawson v. Dawson Waterworks Co., 116 Ga. 596, 712 (1899); Miller v. Head, 186 Ga. 654 (1936).

It is my opinion, therefore, that if the Department of Administrative Services amends the proposed contract in the manner stated above, then the fact that the term of the contract extends beyond the current fiscal year does not invalidate the contract.
Hon. Harmon Caldwell, President
University of Georgia

I am pleased to acknowledge your letter of March 29th, in which you state the following:

"The question has arisen as to whether the University of Georgia Athletic Association is authorized to borrow money for the purpose of financing its operations. For many years the Association has followed the practice of borrowing money during the spring and summer months and repaying the loans during the fall when the sales of football tickets are made. The Athletic Association of the University was incorporated in 1928 by action of the Superior Court of Clarke County. This charter expired last month. A petition is now pending for a renewal of the charter."

"We should greatly appreciate your giving us an official ruling on the question of the Association's right to borrow money so that we will know how we can safely proceed in handling the affairs of the Athletic Association."

Article 8, Section 4, Paragraph 1 of the Constitution provides in part as follows:

"There shall be a Board of Regents of the University System of Georgia, and the government, control, and management of the University System of Georgia and all of its institutions in said system shall be vested in said Board of Regents of the University System of Georgia. The said Board of Regents of the University System of Georgia shall have the powers and duties as provided by law existing at the time of the adoption of this Constitution, together with such further powers and duties as may be hereafter provided by law.

It is well settled that physical education, which includes football and other athletic contests, are integral parts of the educational program conducted by the State of Georgia. See Allen v. Regents of the University System of Georgia, 82 Ga. 1 Ed. 2448, and the cases cited therein. It must likewise follow that athletic contests engaged in by State institutions are under the control and management of the Board of Regents of the University System of Georgia. There is no legal method by which the Board of Regents of the University System of Georgia can be divested of this control over the athletic program conducted by the University and its various branches. It is also true that this authority cannot be delegated to a private corporation in such a way that the corporation will be performing functions and duties which are vested exclusively under the control and management of the Board of Regents.

The above statements, however, do not prohibit the Board of Regents from exercising a sound discretion as to the means and methods to be employed in carrying out their control and management of the University System and its institutions. The only restriction on such authority is that to be found in the Constitution and statutory laws passed in pursuance thereof. The Board of Regents, being a constitutional department of the State government, is necessarily bound by all restrictions and limitations contained in the laws of this State to the same extent as all other departments and branches of the State government. The Board of Regents cannot contract debts or obligations on behalf of the State in violation of Article 7, Section 3, Paragraph 1 of the Constitution. Neither can the Board of Regents pledge the credit or property of the State to any individual, company, corporation or association, nor shall the State "become a joint owner or stockholder in or with, any individual, company, association or corporation." This would be in violation of Article 7, Section 3, Paragraph 4 of the State Constitution.

The Supreme Court of Georgia in the case of State of Georgia v. Regents of the University, 179 Ga. 140, at page 221 of the opinion in speaking of the status of the corporation known as Regents of the University System of Georgia, observed the following:
"The limitations upon the creation of State indebtedness as contained in that instrument do not apply to separate legal entities created as corporations by the State. The framers of the constitution saw fit to limit the bonded indebtedness which might be incurred by counties, cities, and other political divisions of the State, and it would seem that the omission of any limitations upon the university would imply that note of the inhibitions could be referred to that institution. Furthermore, the language of those constitutional provisions as to State indebtedness clearly indicate their applicability only to the State itself as a sovereign."

On page 929 of the opinion, the court in considering whether the bonds issued by the corporation were debts against the State held as follows:

"Regardless of the stipulations made, the State of Georgia could never be called upon to pay these bonds. Nor would it be under any obligation, moral or otherwise, to levy any tax for the purpose of repairing any loss that might result to the university in consequence of these transactions, if the action of the board should ultimately prove to be unwise and a loss should result...

"The university corporation is not the State, or a part of the State, or an agency of the State. It is a mere creature of the State, and a debt of the creature does not stand upon a level with the creator and never can rise thereto. It is first, last, and always a debt of the creature and in no sense a debt of the creator."

Following the law as announced by the Supreme Court of Georgia in the above case, we must come to the conclusion that under no circumstances could the credit or property of the State be pledged by the Athletic Association, and likewise it is clear that this association could in no way create a debt against the State of Georgia. Regardless of the stipulation made in any agreement between the Athletic Association and the financial institution or person loaning money to it, it must be clearly understood that the State of Georgia is in no way responsible for such obligations. As stated above, the Constitution absolutely prohibits this.

Since you do not set forth the agreement or method by which it is proposed to permit the Athletic Association, Inc. to aid or assist in conducting the athletic program in State institutions, it must be understood that this opinion cannot rule upon the relationship between the Board of Regents and the corporation. The powers of the Board of Regents in exercising management over the various phases of the State educational system are very broad and comprehensive. In speaking of these powers, the Supreme Court of Georgia in State of Georgia v. Regents of the University, supra at page 218 of its opinion, held as follows:

"So long as the Board does not exercise its powers capriciously or arbitrarily, or so as to thwart the purpose of the Legislature in establishing a system of university education, the board itself must determine what is necessary for the usefulness of the system, and thus will govern the University of Georgia and its several branches. The powers granted are broad and comprehensive, and subject to the exercise of a wise and proper discretion, the regents are untrammeled except by such restraints of law as are directly expressed, or necessarily implied. The Legislature does not pretend to govern the system, but has entrusted this responsibility to the Board of Regents."

The Board of Regents being a constitutional department of the State government and charged with the control and management of the entire university system, it must necessarily follow that at all times every phase and detail concerning the operation of the State educational system are under the direct and exclusive authority of the said Board of Regents. It can in no wise delegate this duty and responsibility to the Athletic Association, Inc. Likewise, any State function which may be performed by the Athletic Association, Inc. is always subject to the supervisory powers of other State officials who by law are charged with certain responsibilities to all departments of the State government. In other words, the State Auditor must at all times have complete access to the books and records of the Athletic Association, and the same is subject to his authority and direction to the same extent as any other department or unit of the State government."
It likewise follows that if the Board of Regents see fit to permit the Athletic Association to aid or assist in the performance of the State educational program, this corporation is subject to the investigative powers of the Attorney General. In other words, the Board of Regents cannot escape its complete and full responsibility in relation to its athletic program.

In view of the above laws and legal circumstances, it is my opinion that the Georgia Athletic Association may incorporate and borrow money to finance its operations, as a private corporation without in any way creating a debt or obligation against the State, but that it must operate under the supervision of the State Board of Regents subject to the Constitution and all provisions of law relating to the powers and duties of the Board of Regents in its control and supervisory power which in the present case is based upon its control and supervision of football as a part of the educational program of the University of Georgia.
EXHIBIT D

Georgia Constitution, Art. 5, Sec. 3, Par. 3

The Attorney General shall act as the legal advisor of the executive department, shall represent the state the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.