

# IIT Office of General Counsel Education Program

## CONTRACTS

## Definition of a Contract

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

A contract need not always be in writing to be enforceable.

## Contract Elements

- Offer
- Acceptance
- Meeting of the Minds
- Consideration
- Authority

## Contract Elements

**Offer:** A promise to do or forbear from doing something within a certain time period.

In response to a request for proposal, Acme Janitorial Company offers to clean IIT's academic buildings for 12 months for \$10,000.00 a month.

## Contract Elements

**Acceptance.** An acceptance of an offer through either a promise or performance.

IIT accepts Acme's offer by executing a contract or allowing Acme on-site to perform the work. In either case, a contract has been formed.

## Contract Elements

**Meeting of the Minds.** The parties have to agree upon all the material terms.

IIT agrees to pay Acme \$10,000.00 a month but only if Acme cleans the academic buildings and the MTCC. IIT has made a counter-offer. No contract is formed until the counter-offer is accepted.

## Contract Elements

**Consideration.** There must be a legal and adequate inducement given in exchange for the promise to do something that one is not legally required to do or to forbear from doing something that one is legally allowed to do.

Acme cleans IIT's buildings, and IIT pays Acme \$10,000.00 a month.

## Contract Elements

- **Authority.** For a corporation, the person signing a contract can bind the party only if the person has the authority to do so. IIT's Policy on "Authority for Negotiation and Approval of Contracts" is on the GC's webpage under IIT Policies & Procedures or at: <http://www.iit.edu/hr/policies/pdfs/Procedure%20Q1%20Authority%20for%20Negotiation%20and%20Approval%20of%20Contracts.pdf>.

This Policy sets forth explicitly who has contracting authority and can bind IIT to a contract.



## Contract Elements

**Apparent Authority.** A party may not be able to avoid a contract executed by an unauthorized employee, if that employee had “apparent authority” to do so.

IIT’s Director of Facilities asked Acme for a proposal and was the only administrator who negotiated with Acme. The Director signed the contract, even though he was not authorized to do so. IIT probably cannot avoid the contract.

## Barriers to Contract Formation

- Mutual mistake or ambiguity with respect to material terms
- Revocation or expiration of offer

## Breach of Contract

- Failure to perform either fully or adequately the obligations provided for in the contract
- Can be actual breach or “anticipatory” breach

## Remedies for Breach

- **Damages** – generally designed to compensate nonbreaching party; may be compensatory, consequential, punitive or nominal.
- **Specific Performance**
- **Rescission and Restitution**
- **Reformation**
- **Waiver**



# Points to Consider When Negotiating and Reviewing a Contract

## Points to Consider

### Subject Matter and Purpose

Does the contract adequately address the reason(s) for which it is being entered into?

This is a business question and outside the scope of any legal review.

## Points to Consider

### Bargaining position

Who needs this contract more? The one who needs it more will be in a weaker position to demand favorable terms.

Is this a long term relationship? If so, this may mitigate against one side taking advantage of the other in negotiations.

## Points to Consider

### Who negotiates?

If the contract falls exclusively within your unit's jurisdiction, the head of the unit, or his/her designee, should negotiate it. The person who must sign the agreement should be kept apprised of the negotiations.



## Points to Consider

Who drafts the agreement?

Whoever drafts the agreement has the advantage. However, drafting takes time and many vendors already have form contracts. Form contracts can ALWAYS be modified.

## Points to Consider

### The Parties

“Illinois Institute of Technology” is always the name of the contracting party. If necessary, an academic unit may be included in the name, e.g. “Illinois Institute of Technology, on behalf of its administrative unit Chicago-Kent College of Law.” Alternatively, the unit can be referred to in the first recital of the contract.

## Points to Consider

If you are involved in drafting the contract, be sure to ascertain the correct name of the contracting party and determine whether the party with whom you are negotiating has the authority to sign the contract.

## Points to Consider

### Defined Terms

If a word or term is used more than once in the contract, it should be “defined” the first time that it is used, and then capitalized at each subsequent use. This is almost always done with the names of the parties, e.g. Illinois Institute of Technology (“IIT”).

## Points to Consider

### Term of the Contract

The contract should state clearly the beginning or effective date and the ending date. It may also provide for extension or renewal, either automatically unless terminated, or by specific agreement of the parties.

## Points to Consider

### Other Termination Considerations

- Termination for Convenience: Either party may terminate this contract for convenience, at any time before the Expiration Date, by giving the other party 30 days advanced written notice. Any such termination shall not be deemed a breach or default by the terminating party and shall not give rise to any action for damages or other cause of action against the terminating party.
- If a Termination for Convenience clause is not possible because a vendor is incurring build-out costs, it is wise to attempt to negotiate a termination with penalty clause.
- Automatic Renewals: This Contract will automatically renew for subsequent terms unless either party gives notice to the other party at least 30 days prior to the expiration of the then-pending Term that it does not wish the Agreement to renew.

## Points to Consider

### Cost

Determine the total cost of the contract. Include associated costs such as reimbursement of expenses.

This is a business question and outside the scope of any legal review.

## Points to Consider

### Contract Review

- If the amount of a contract exceeds \$100,000 or includes provisions which pose a substantial risk to IIT or includes new, non-standardized provisions which are unfamiliar it should be submitted to the General Counsel's Office for review before execution.



## Points to Consider

### Payment Terms

- The contract should state the total amount to be paid and the payment terms. Generally payment to IIT should be made within no more than 30 days
- Be aware of any nonobvious costs, such as travel expenses for contractors. Impose caps when appropriate.

## Points to Consider

### Services to be performed

Does the contract clearly and completely describe the services to be performed or the goods to be delivered? Are important delivery or performance dates included?

## Points to Consider

### Warranties or representations

Has either party guaranteed its product or promised to fix any defective work? A vendor will generally try to limit its liability but should at least be required to remedy defective services or accept the return of defective products.

## Points to Consider

Insurance and indemnification (often one of the most difficult subjects to negotiate – consult general counsel's office for assistance)

Basic Premise: Each party takes responsibility for the acts of its own employees and agents.

Exception: Governmental Entities

## Points to Consider

### Insurance and indemnification (cont'd)

These issues are especially crucial if:

- A vendor will be providing a service or product through which IIT could be exposed to lawsuits by third parties.
- A vendor will be working on IIT premises.
- The risk of injury or financial harm in the performance of the contract is high.

## Points to Consider

### Insurance and indemnification (cont'd)

**If there is a risk of injury or property damage to a vendor, its employees or a third party, IIT will require the vendor to obtain insurance and to name IIT as an additional insured on a primary and not contributory basis and with a waiver of subrogation. IIT will also require the vendor to defend and indemnify IIT from claims for personal injury and property damage arising from the vendor's negligence in performing under the contract.**

## Points to Consider

### Insurance and indemnification (cont'd)

IIT requires software and hardware vendors to defend and indemnify IIT from third party claims that the software or hardware infringes a third party's copyright.

## Points to Consider

### Insurance and indemnification (cont'd)

When the other party seeks indemnification from IIT, we limit any such indemnification to claims arising out of the negligence of IIT.



## Points to Consider

### Insurance and indemnification (cont'd)

#### Sample Indemnification Language:

**Each party shall indemnify, defend and hold harmless the other party and its trustees, directors, officers, employees and agents from and against any and all claims, damages, liabilities, losses and expenses, including attorney's fees (collectively, "Claims") incurred or brought by its trustees, directors, officers, employees and agents and by all third parties, to the extent any Claims arise from or are the result of its negligent act or omission and/or from its breach of this Agreement. Notwithstanding any other provision of this Agreement, each party agrees to waive any claims against the other for special, consequential, indirect, punitive and exemplary damages as well as economic loss or business disruption.**

## Points to Consider

### Insurance and indemnification (cont'd)

IIT's Policy on Insurance Requirements for Third Parties can be found on the GC's website under IIT Policies & Procedures or at <http://www.iit.edu/hr/policies/pdfs/Procedure%20E6%20Insurance%20Requirements.pdf>

Sample Insurance Language: At its sole cost and at all times during the Term of this Agreement, Company shall procure and maintain in full force and effect the following insurance: (a) commercial general liability insurance with limits not less than \$2,000,000 combined single limit for any one occurrence covering personal injury, sickness or death or for damage to or destruction of property that may arise from, relate to or result from this Agreement; (b) property insurance insuring the full replacement cost of all equipment, real and/or personal property owned or used by IIT and the Company in connection with the Project, if any; and (c) Worker's compensation insurance in an amount not less than the required statutory limits and including employer's liability insurance with limits of not less than \$500,000 per occurrence. Such coverages shall be primary and not contributory and contain a waiver of subrogation. The form of all such policies shall be issued by insurers with an A.M. Best rating of "A- VIII". In addition, the policy required under (a) above shall name Illinois Institute of Technology as an additional insured and shall require at least 30 days' prior written notice to the additional insured before termination or modification.

## Points to Consider

### Breach

The contract should provide specific remedies in the event either party breaches. Among other remedies, IIT should always have the right to terminate upon the other party's breach usually after giving the other party a period of time to "cure" the breach.

## Points to Consider

### Confidentiality

A party may ask the other to keep confidential information which it will be disclosing. If such a provision is necessary, any confidential information (whether in tangible or intangible form) should be affirmatively identified as confidential and the standard limitations on such an obligation should be included.

## Points to Consider

### Governing Law and Venue

Illinois is the preferred governing law and Cook County the preferred venue. The next best option is silence. Any agreement to accept the governing law of or venue in another state should be run by the General Counsel's Office in advance.

## Points to Consider

### Exhibits

All exhibits, addenda or attachments to the contract should be reviewed carefully because they usually contain important business terms.

# Procedures for Contract Review and Execution

## Procedures

Procedure Q.1 of the Policies and Procedures Handbook discusses the “Authority for Negotiation and Approval of Contracts.” It can be found on the GC’s webpage under IIT Policies & Procedures or at: <http://www.iit.edu/hr/policies/pdfs/Procedure%20Q1%20Authority%20for%20Negotiation%20and%20Approval%20of%20Contracts.pdf>



## Procedures

Who can sign contracts for IIT?

Part IV of Procedure Q.1 lists authorized signatories for specific categories of contracts.

## Procedures

Defending employees who sign contracts.

Part VI of Procedure Q.1 states that IIT will defend a employee against claims based on a transaction the employee enters into on IIT's behalf, so long as it is in within the scope of employment and the authority granted by IIT.

## Procedures

IIT will not defend an employee who is sued for signing a contract on IIT's behalf that the employee was not authorized to sign.

## Procedures

### General Counsel's Review

Part V of Procedure Q.1 states that all contracts for goods and services in excess of \$100,000 or includes provisions which pose a substantial risk to IIT or includes new, non-standardized provisions which are unfamiliar should be submitted to the General Counsel's Office for review.

## Procedures

Before submitting the contract to the General Counsel's Office for review the administrator negotiating the contract should read it to determine if its terms satisfy the University's business purposes. The attorney reviewing the contract will only comment on the legal aspects of the contract unless asked to comment on the business terms.

## Procedures

All relevant documents should be submitted with the contract. The General Counsel's Office should be informed of any deadlines.

**Contracts cannot be provided for review with enough lead time.**

## Procedures

Contracts reviewed and approved by the General Counsel's Office will be returned via some means that indicates it has been reviewed by the Office and noting any concerns that the Office has or if there are no concerns that it is approved as to legal form.