

# Contracts Law for the Procurement Professional

*Steven J. Adamczyk*

*Office of the General Counsel*

*The University of Arizona*

# Part 1

## The Uniform Commercial Code (UCC) and the Common Law of Contracts:

**What is a Contract?** A promise, the breach of which the law gives a remedy, or the performance of which the law recognizes a duty.

**What's the difference between the UCC and the Common law?**

- **UCC applies to the Purchase of Goods:** The Uniform Commercial Code (UCC) applies to contracts for the purchase or sale of goods. "Goods" include anything moveable. The UCC is a uniform set of principles that many States have enacted as statutes. The UCC rules are generally uniform among all States (except LA). The UCC is known as a contract "gap filler," as it supplies essential terms to a contract when the parties do not.
- **Common Law applies to the Purchase of Services:** The Common Law applies to all contracts for services. Common law means the legal precedent of the courts of a particular State (judicial precedent rather than statutory laws). In the absence of controlling authority, Arizona courts will generally follow the *Restatement (Second) of Contracts*, a publication of the *American Law Institute*, in deciding contracts cases.

# A. Purchase of Goods

## Uniform Commercial Code (UCC):

- **Under the UCC, when must a contract be in writing?**
- **The Statute of Frauds:** A contract for the sale of goods for \$500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but in such case the contract is not enforceable beyond the quantity\* of goods shown in the writing.
  - **Exceptions to the writing requirement:** A contract that does not satisfy the Statute of Frauds, but which is valid in other respects is enforceable if:
    - (a) the goods are to be specially manufactured, are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation, has made either a substantial beginning of their manufacture or commitments for their procurement;
    - (b) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but only to the extent of the quantity of goods admitted; or
    - (c) payment has been made and accepted or the goods have been received and accepted.

\* Note: "Quantity" can also be a term that is measured by the output of the seller or the requirements of the buyer.

# UCC: Purchase of Goods

## Formation of the Contract:

- **A valid Contract Requires an *Offer and an Acceptance*:**
  1. An offer may be accepted in any manner and by any medium reasonable under the circumstances.
  2. An order (or offer) to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming goods.

# UCC: Formation of the Contract

- **When Does a Vendor's Offer Expire?**

An offer by a “merchant” (one who regularly deals in goods) to sell goods in a signed writing, which gives assurance that it will be held open, is not revocable during the time stated, or if no time is stated for a reasonable time, but in no event shall such period of irrevocability exceed three (3) months.

# UCC: Formation of a Contract

- **Additional Terms in the Acceptance:**

**A.** A written confirmation to an offer, which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

**B.** The additional terms are to be construed as proposals for addition to the contract, which must be rejected or they become part of the agreement. If not rejected, then any conflicting terms cancel each other out.

**C.** Conduct by both parties that recognizes the existence of a contract is sufficient to establish one, although the writings of the parties do not. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any provision of the UCC (“gap fillers”).

# UCC: Terms of Contract

## Examples of “Gap Filler” Terms:

- **Price:** If the parties intend to conclude a contract without a price, then the price is a reasonable price at the time for delivery.
- **Performance requirements:** The obligation of the seller is to transfer and deliver the goods, and that of the buyer is to accept and pay in accordance with the contract.
- **"Good faith:"** Every contract imposes an obligation of good faith in its performance. In the case of a merchant, “good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
- **Modifications:** A signed agreement that excludes modification except by a signed writing cannot otherwise be modified. Modifications of contracts within the Statute of Frauds must be in writing.
- **Delivery:** The place and time for delivery of goods is the seller's place of business and a reasonable time, unless otherwise agreed to by the parties.
- **Title:** Seller warrants transfer of the goods, with clean title to the buyer, free and clear from any liens or encumbrances.

# UCC: Acceptance of the Goods

- **What Constitutes the Buyer's Acceptance of the Goods?**

- A. Acceptance of goods occurs when the buyer:

1. After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
2. Fails to make an effective rejection, but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
3. Does any act inconsistent with the seller's ownership.

Note: You cannot accept just part of a “commercial unit.” A commercial unit may be a single article (such as a machine) or a set of articles (such as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

- B. The “Rejection” of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

# UCC: Express Warranties

- **Creation of Express Warranties (but formal words not needed):**

1. **Promises**: Any **affirmation** of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain (spoken or written and relied upon during negotiations) creates an express warranty that the goods shall conform to the affirmation or promise.

2. **Descriptions**: Any **description** of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

3. **Samples**: Any **sample or model** that is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

4. It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty. However, an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

# UCC: Implied Warranties

## (not written or spoken)

- I. **Merchantability:** Unless excluded or modified, a warranty of merchantable is **implied** in a contract if the seller is a merchant with respect to goods of that kind.
  - A. For goods to be “merchantable” they must:
    1. Pass without objection in the trade under the contract description;
    2. In the case of fungible (interchangeable) goods, are of fair average quality within the description;
    3. Are fit for the ordinary purposes for which such goods are used;
    4. Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
    5. Are adequately contained, packaged, and labeled as the agreement may require; and
    6. Conform to the promises or affirmations of fact made on the container or label if any.
  - B. Unless excluded or modified, other **implied** warranties may arise from course of dealing or usage of trade.

# UCC: Implied Warranties

## II. **Fitness for a Particular Purpose:**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless specifically excluded or modified, an implied warranty that the goods shall be fit for such purpose.

# UCC: Exclusions or Modifications of Implied Warranties:

- A. Conspicuous Writing:** To exclude or modify the implied warranties of merchantability or fitness, the language must mention merchantability or fitness and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that **“there are no warranties which extend beyond the description on the face hereof.”**
- B. Other Valid Exclusions:**
1. All implied warranties are excluded by expressions like **“as is”**, **“with all faults”** or other language, which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty;
  2. When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed to him; and
  3. An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

# UCC: Shipping Terms

- **F.O.B. and F.A.S. terms:**

**A.** F.O.B., which means “free on board,” at a named place, even though used only in connection with the stated price, **is a delivery term** under which:

1. When the term is F.O.B. the place of shipment, the seller must at that place ship the goods and bear the expense and risk of putting them into the possession of the carrier; or
2. When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that destination and there tender delivery of them.
3. When under either paragraph 1 or 2 the term is also F.O.B. vessel, car or other vehicle, the seller must load the goods on board. If the term is F.O.B. vessel, the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of the UCC on the form of bill of lading.

**B.** F.A.S. , which means “free alongside” vessel at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must:

1. At his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and
2. Obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

- **C.I.F. and C. & F. terms:**

The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

# UCC: Shipping Terms

- Where the seller is required to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then he must:
  1. Put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case;
  2. Obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
  3. Promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph 3 or to make a proper contract under paragraph 1 is a ground for rejection only if material delay or loss ensues.

# UCC: Risk of Loss

Where the contract requires the seller to ship the goods by carrier:

1. If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier; but
2. If it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are so tendered as to enable the buyer to take delivery.

# UCC: Buyer's right to Inspection

- Where goods are tendered or delivered, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time, and in any reasonable manner. When the seller is required to send the goods to the buyer, the inspection may be after their arrival.
- Expenses of inspection must be borne by the buyer, but may be recovered from the seller if the goods do not conform and are rejected.

# UCC: Adequate Assurances

- **Right to Request “Adequate Assurances” of Performance:**

**A.** A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may, in writing, demand adequate assurance of due performance and until he receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return.

**B.** Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

**C.** Failure to provide assurance of due performance as is adequate under the circumstances of the particular case is a **repudiation** of the contract if not made within a reasonable time, not exceeding thirty (30) days, after receipt of a justified demand.

# UCC: Termination and Cancellation of a Contract

- **Termination:** Occurs when either party, pursuant to a power created by agreement or law, puts an end to the contract for reasons other than for breach.
- **Cancellation:** Occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination," except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

# UCC: Buyer's Remedies

- ***Damages for Breach.*** Where the seller fails to make delivery or repudiates or the buyer rightfully rejects, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract, the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:
  - 1. "Cover" and have damages as to all the goods affected; or
  - 2. Recover damages for non-delivery.

# UCC: Buyer's Remedies

- “Cover” means making in good faith and without unreasonable delay any reasonable purchase of goods in substitution for those due from the seller.
- The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages, but less expenses saved in consequence of the seller's breach.

# UCC: Buyer's Remedies

- In lieu of “cover,” the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages, but less expenses saved in consequence of the seller's breach.

# UCC: Buyer's Remedies

- A. “Incidental” damages include expenses reasonably incurred in inspection, receipt, transportation and care or custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
- B. “Consequential” damages resulting from the seller's breach include:
  1. Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
  2. Injury to person or property proximately resulting from any breach of warranty.

## B. Purchase of Services

### Common Law of Contracts:

- Each State has its own “common law” of contracts (embodied in case law precedent as opposed to statutes). Many States, including Arizona, generally follow the view of the ***Restatement (Second) of Contracts*** in the absence of contrary authority. The standards set forth in this section are derived from the ***Restatement***.
- **REVIEW:** What is a Contract?  
A contract is a promise or set of promises, the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty.

# Services: Common Law of Contracts

- **Formation of a Contract:**

The formation of a contract for services requires a bargain, in which there is a manifestation of mutual agreement and a consideration.

- Thus, an enforceable contract requires:

(1) an Offer,

(2) Acceptance; and

(3) Consideration

# Common Law of Contracts

- **Offer:** An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his agreement to that bargain is invited and will conclude it.
- **Acceptance:** Acceptance of an offer is a manifestation of assent to its terms, made by the offeree in a manner invited or required by the offer.
- **Consideration:** Consideration is performance or a return promise that is bargained for.

# Common Law of Contracts

- **Is there an Offer? The terms of the Offer must be clear and definite:**
  - The Offer must identify the Price, Quantity, Parties and Subject Matter of the contract.
  - The Offeror can revoke the Offer at any time before acceptance, unless the Offer states that it will remain open, and some consideration is provided in return for it remaining open (i.e., option contract).
  - If an offer prescribes the place, time or manner of acceptance, its terms in this respect must be complied with in order to create a contract (“mirror image” rule). However, if an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.
- **Acceptance: Acceptance must be timely, complete and unconditional.**
  - » An acceptance that contains conditions or additional terms is a **counteroffer** and thus a rejection of the offer (acceptance must be a “mirror image” of the offer).
  - » If the offeree rejects the offer or makes a counteroffer, the original offer is terminated.

# Arizona's Statute of Frauds

- **When are oral contracts enforceable? Contracts may be oral or written. Oral Contracts are generally enforceable, except as prohibited by the Statute of Frauds:**

**In Arizona, to be enforceable, the following types of contracts cannot be oral and must be in writing and signed by the party to be charged:**

- A contract to sell goods valued at \$500 or more (same as the UCC), unless the buyer accepts part of the goods, and actually receives them or gives something in earnest to bind the contract, or in part payment.
- A contract that cannot be performed within one (1) year from the making (must be impossible). (Examples: A promise to employ someone for five years at a set rate cannot be completed in one year. However, a promise to employ someone for the rest of their life can, because the person may die within the first year.)
- A lease for longer than one (1) year, or for the sale of real property or an interest therein.
- A contract authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission.
- A contract to loan money or grant credit.

# Common Law of Contracts:

## Effect of Mistakes

- **Mistakes:** A mistake is a belief that is not in accord with the facts.

(1) **Mutual Mistake:** When does a mistake of both parties as to a basic assumption on which the contract was made make the contract voidable?

Where the mistake has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party.

(2) **Unilateral Mistake:** When does the mistake of one party as to a basic assumption on which the contract was made make the contract voidable?

Where the mistake has a material effect on the agreed exchange of performances by that party, the contract is voidable by it only if:

- (a) the effect of the mistake is such that enforcement of the contract would be unconscionable (“unreasonably detrimental”), or
- (b) the other party had reason to know of the mistake or its fault caused the mistake.

- **Fraud:** If a contract is fraudulent, it is voidable at the option of the victim.

# Common Law of Contracts:

## Interpreting the Contract

- **Interpretation Against the Party who Drafted the Contract:**

In choosing among the reasonable meanings of contract terms, that meaning is generally preferred which operates against the party who supplied it.

- **Implied Covenant of “Good Faith”:** Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

# Common Law of Contracts: Interpretation

## The “Parol Evidence” Rule

- **Parol Evidence: When one party tries to introduce prior oral or written evidence in court to vary the terms of a contract.**
- **Effect of an Integrated Agreement on prior Oral or Written agreements:**
  - 1) An “integrated” agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
  - 2) A binding integrated agreement discharges prior or contemporaneous oral or written agreements to the extent that it is **inconsistent** with them or they are **within its scope**.
  - 3) Integration or merger clauses are often used in contracts as a means for the parties to agree that they have created an integrated agreement.
  - 4) Fully integrated agreements effectively bar admissibility of Parol Evidence to contradict or modify their terms.

# Common Law of Contracts: Interpretation

- **“Course Of Dealing”:**

(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) Unless otherwise agreed, a course of dealing between the parties gives meaning, supplements or qualifies the terms of their agreement.

# Common Law of Contracts

## Breaches

- **Non-Performance As a Breach:**

(1) Full performance of a duty under a contract discharges the duty.

(2) When performance of a duty under a contract is due, any non-performance is a breach.

# Common Law of Contracts:

## *Material vs. Minor Breaches*

- A Material breach gives rise to a claim for damages and excuses further performance by the aggrieved party.
- A Minor (or partial) breach only gives rise to a claim for damages, but does not excuse further performance.
- **Circumstances Significant In Determining Whether A Failure Is a Material Breach:**
  - (a) the extent to which the injured party will be deprived of a benefit reasonably expected;
  - (b) the extent to which the injured party can be adequately compensated for the part of that benefit deprived;
  - (c) the extent to which the party failing to perform will suffer forfeiture;
  - (d) the likelihood that the party failing to perform will cure its failure, taking account of all the circumstances including any reasonable assurances; and
  - (e) the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing.
- **Note:** Adding a “**time is of the essence provision**” to a contract can turn a minor time performance breach into a material breach.

# Common Law of Contracts: The Measure of a Breach

- **There is no general rule for determining when a breach creates a claim for damages for total breach or, instead creates a claim for damages for partial breach. The results usually depend upon how much each party has already performed.**
- **However, a breach by non-performance accompanied or followed by a repudiation, gives rise to a claim for damages for total breach.**

## **A repudiation is:**

(a) a statement by the obligor to the obligee indicating that the obligor will commit a breach, or

(b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

# Common Law of Contracts: Request for Assurances

- **When a Failure to Give Assurances May Be Treated as a Repudiation:**

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach, the obligee may demand adequate assurance of due performance **and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.**

(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

# Common Law of Contracts

- **The Measure of Damages:**

**The injured party, generally, has a right to damages based on its expectation interest as measured by:**

(a) the loss in the value of the other party's performance, plus

(b) any other loss, including incidental or consequential losses, caused by the breach, less

(c) any cost or other loss that is avoided by not having to perform.

***“Incidental”*** losses include costs incurred in a reasonable effort, whether successful or not, to avoid loss, as where a party pays brokerage fees in arranging or attempting to arrange a substitute transaction.

***“Consequential”*** losses include such items as lost profits and injury to person or property resulting from defective performance.

**Note: Damages are not recoverable for loss that the injured party could have reasonably avoided without undue risk, burden or humiliation.**

## Part 2

# Contracting Issues:

## A. Contract Clauses: What are the common clauses?

- 1) **The Preamble:** identifies the Parties to the agreement.
- 2) **“Whereas...”** or purpose recitals: indicate the intent of the parties for entering into the agreement and sometimes define key terms.
- 3) **Term or Length of Agreement:** Contains the effective date and length of the contract, and any provisions for automatic renewal or notice required to non-renew.
- 4) **Scope of Work:** A description of the goods to be delivered or services to be performed, which may be subject to particular specifications, a milestone schedule and a budget.

# Common Contract Clauses

- 5) **Price:** Sets forth the price, whether fixed, level of funding or cost reimbursement, and the payment terms.
- 6) **Contract Time:** States when the Work needs to commence and be completed or when the goods must be delivered.
- 7) **Changes:** (i) whether and how changes to the Work scope can be made, including required drawings, designs, or specifications; (ii) method or point of delivery; (iii) milestone schedules and price; or (iv) the completion date.
- 8) **Assignment/Delegation:** Whether one party can assign its rights and obligations to a non-party. Usually requires both parties' prior written consent.

# Common Contract Clauses

- 9) **Termination or cancellation clause:** Provision enabling either party to terminate the agreement and cease performance for material breach by the other party, usually after giving reasonable notice. Governments often insist on the ability to terminate for convenience or cancel a contract in the event of a non-appropriation.
- 10) **Choice of Law and Forum:** What State's laws apply to interpreting the agreement and the rights of the parties and what courts have jurisdiction over the parties in the event of a lawsuit.
- 11) **Warranties:** A guarantee that the work or services will meet a certain standard, measurement or goal (express) or be fit for a particular purpose (implied).

# Common Contracts Clauses

- 12) Confidentiality and Non-Disclosure:** Provisions restricting either parties' ability to disclose the confidential information or trade secrets of the other party.
- 13) Indemnification and Hold-harmless:** Provision wherein one party (A) agrees to pay the other party (B) for any adverse claims or judgments brought by a non-party (C) against (B) because of the acts or omissions of (A) related to the performance of the agreement, provision of services or use of the goods, plus (B)'s attorneys fees and costs.
- 14) Arbitration:** Provision that requires the parties to submit any unresolved disputes related to the agreement to a private entity for binding or non-binding resolution. University agreements normally require any dispute involving the sum of \$50,000 or less in money damages be resolved by arbitration pursuant to the Arizona Uniform Arbitration Act. For purchases, ABOR Policy 3-809(C) provides administrative remedies for claims and disputes.
- 15) Entire Agreement, Integration or Merger Clause:** Provision stating that the agreement integrates or supersedes all prior oral, written or contemporaneous agreements or understandings between the parties.

# Contracting Issues

## B. Contracting Caveats and Pitfalls:

- 1) **Signature Authority:** Only an officially authorized and designated contracting officer can bind the university to an agreement or change order. Procurements having an aggregate cost of \$50,000 or greater must be by written contract after competitive selection. Beware of clauses permitting one party to change contract terms or make changes without the written permission of the other.
- 2) **Disclaimers of Warranties:** Read warranty disclaimers carefully to fully understand what rights you are giving up. Limitations of liability for incidental or consequential damages are very common and can be costly.
- 3) **Indemnification:** The University cannot normally indemnify other parties to the contract. We have no appropriation. However, the University can agree to be responsible for its own acts of negligence, including acts of negligence of its employees while acting in the course and scope of employment because State Risk provides insurance.
- 4) **Conflict of Interest:** All University contracts are subject to cancellation under ARS § 38-511 for conflicts of interest.
- 5) **Penalty Clauses and Attorneys Fees:** Beware of clauses that require the University to pay penalties or attorneys' fees to the other party. The University has no legislative appropriation or allotment to pay such fees.

# Contracting Issues

## Contracting Caveats-continued

- 5) **Termination for Non-Appropriation:** The University must have the ability to cancel or terminate the agreement if the Legislature fails to appropriate the necessary funds.
- 6) **Non-Discrimination:** Parties to University contracts must comply with all applicable state and federal statutes, regulations and executive orders governing Equal Employment Opportunity, Non-Discrimination, and Immigration.
- 7) **Choice of Law:** Beware of agreeing to resolve disputes in distant locations under the laws of another State or foreign government.
- 8) **Force Majeure:** Beware of excusing performance for circumstances that are within the other party's control.
- 9) **Time is of the Essence:** Beware of such clauses as they can transform a minor time performance breach into a material breach.
- 10) **University Trademarks:** Beware of clauses that permit vendors to use the University's trademarks without prior written authorization from the University's Office of Trademarks & Licensing.
- 11) **Continued Performance:** Beware of clauses that require continued payment or performance even if the other party has breached its obligations to perform.
- 12) **Audit:** Vendors must agree to keep all books and other records relating to the contract for a period of five (5) years after completion of the contract and such records shall be subject to audit under A.R.S. § 35-214.

# Contracting Issues

## C. Electronic Contract Transactions and Signatures

- **Arizona Law Provides:**

1. A record or signature in electronic form cannot be denied legal effect and enforceability solely because the record or signature is in electronic form.
2. A contract formed by an electronic record cannot be denied legal effect and enforceability solely because an electronic record was used in its formation.
3. An electronic record (any record stored or sent electronically) satisfies any law that requires a record to be in writing.
4. An electronic signature (an electronic record with something attached and executed by an individual with intent to sign the record) satisfies any law that requires a signature.

- **Federal Law provides:**

1. A signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
2. A contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

# Contracting Issues

## **D. Contracts Requiring Board of Regents Approval:**

1. Research, Public Service and Intergovernmental agreements in excess of \$1 million.
2. Lease-Purchase agreements of \$1 million and greater.
3. Agreements with foreign countries in excess of \$1 million.
4. Contracts for the services of legal counsel (requires Board or Board Counsel approval).
5. Purchases of real property.
6. Matters related to issuing revenue bonds.
7. A lease of real property as landlord or tenant requires Board approval unless it meets very specific ABOR policy criteria.
8. Contracts with a term greater than five (5) years require a prior determination by the University President, in writing, that such contract would be advantageous to the University.
9. Acceptance of gifts or grants that require the expenditure or commitment of any university funds, personnel or resources.

# Disclaimer:

- **This presentation is intended solely to provide general information. It is not intended to provide legal advice, nor does it constitute legal advice, and should not be relied upon as such.**