“There's really no need for confusion. Part 95 of section 33 of Article L in the contract clearly states...”
What is a Contract?

Any agreement where two (or sometimes more than two) parties make mutual promises to each other.

E.g. One Party promises to provide services. The other Party promises to pay for the services.
WHAT’S IN A NAME?

- The name of document does not matter:
  - Contract, Agreement, Settlement Agreement, Affiliation Agreement, Memorandum of Understanding, or no name. If there are mutual binding promises--it’s a contract.

  - Although many contracts involve money, not all contracts involve money.
THE WHO, WHAT, WHERE, WHEN, AND HOW

Generally, a Contract should contain at least the following provisions:

- Identification of the Parties
- Rights and Responsibilities of the Parties
- Term of the Contract
- Termination
- Remedies Upon Breach -- Indemnification
- Choice of Law and Venue
- Notice
- Force Majeure
- Amendment
- Severability
- Waiver
UNDERSTANDING OUR CONTRACT FOR SERVICES

- **Always READ and UNDERSTAND** the terms to a contract. **WHY?**
- Because the contract sets out the rights and obligations of the contracting parties.
- **Rights? Obligations?** What are these?
- **Contract Rights** are those rights provided within the contract. For example, the right to payment within thirty days from receipt of the invoice; right to terminate the contract with or without cause; right to delay services under the force majeure clause.
- **Contract obligations** are those duties that a party is legally responsible to perform in a contract. For example may be the University’s obligation to make payment upon receipt of services rendered. If either party fails to perform their contractual obligations according to the contract terms, this may result in a breach of contract claim.
- **UNDERSTAND A PARTY’S RIGHTS AND OBLIGATIONS UNDER THE CONTRACT!**
UNDERSTANDING YOUR CONTRACT FOR SERVICES!

The Introduction in the University’s Form contract for services:

- Identifies the date the contract is made, effective and executed.
- Identifies the legal names of the parties,
- Identifies the address of the parties,

This agreement is made, entered into, and effective on [DATE] by and between the University of Massachusetts, [Campus] (hereinafter called “University”), an agency of the Commonwealth of Massachusetts and [NAME OF CONTRACTOR], (Contractor’s legal name and address) (hereinafter called the “Contractor” and collectively the “Parties”).
UNDERSTANDING YOUR CONTRACT FOR SERVICES!

This agreement (the “Contract”) is comprised of the following documents, listed in the order of precedence: (1) this Contract Terms and Conditions; (2) any Contract Amendments, as identified in Section 2, below; and (3) any attached Scope of Services as identified in Section 1, below, including any addenda thereto. The Contract Terms and Conditions and any agreed upon changes thereto included in any Contract Amendments shall take precedence over any additional or conflicting terms and conditions as may be included in any other document attached hereto.

<table>
<thead>
<tr>
<th>Document Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Contract terms and conditions stated in the contract for services</td>
<td></td>
</tr>
<tr>
<td>Any amendment to the contract for services</td>
<td></td>
</tr>
<tr>
<td>The scope of services and any attachment to the scope of services</td>
<td></td>
</tr>
</tbody>
</table>
UNDERSTANDING YOUR CONTRACT!

The terms of the contract for services—and any amendment to the terms of the contract for services executed by the parties will **CONTROL** IF any language in the scope or documents attached to the scope are in **addition to** or **conflict** with the contract terms and conditions or an amendment, they will **NOT control**.

What is an example of a term that is an “addition to?”

*The Contractor includes an arbitration clause or limitation of liability clause.

This agreement (the “Contract”) is comprised of the following documents, listed in the order of precedence: (1) this Contract Terms and Conditions; (2) any Contract Amendments, as identified in Section 2, below; and (3) any attached Scope of Services as identified in Section 1, below, including any addenda thereto. The Contract Terms and Conditions and any agreed upon changes thereto included in any Contract Amendments shall take precedence over any additional or conflicting terms and conditions as may be included in any other document attached hereto.
UNDERSTANDING YOUR CONTRACT!

IF any language in the scope of services/work or documents attached to the scope of services/work conflict with the contract terms and conditions or an amendment, they will NOT control.

What is an example of a term that is “conflicting?”

The contract for services provides that the contract is governed by Massachusetts law. The Contractor includes in its scope of services that Maryland Law shall govern the contract.

This agreement (the “Contract”) is comprised of the following documents, listed in the order of precedence: (1) this Contract Terms and Conditions; (2) any Contract Amendments, as identified in Section 2, below; and (3) any attached Scope of Services as identified in Section 1, below, including any addenda thereto. The Contract Terms and Conditions and any agreed upon changes thereto included in any Contract Amendments shall take precedence over any additional or conflicting terms and conditions as may be included in any other document attached hereto.
WHEN DOES THE CONTRACT **START AND END**!

The “*Start Date*” is the date services are being rendered. The “*Completion Date*” is the date the services end.

The “*Start Date*” cannot be dated *BEFORE*, the effective date of the contract provided in the introductory paragraph.

Why? Because you cannot start services *BEFORE* you enter into the Contract.

3. **Dates of Performance:**
   - **From**: ___________________
   - **(Start Date)**
   - **To**: ___________________
   - **(Completion Date)**

**EXAMPLE:**
This agreement is made, entered into, and effective on **July 1, 2013** by and between. . . .

~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~

**Dates of Performance:**
- **From**: March 1, 2013  **To**: December 31, 2013
Indemnification is a way to allocate risks arising from the transaction entered into under a contract. The risk of loss may be shifted to be born by the vendor.

The University cannot indemnify another entity.
As a public entity the University is prohibited from indemnifying a Vendor or other parties to the Contract. Vendors requesting additional information can be informed of the following:

- “The University, as an entity of the Commonwealth, is prohibited from pledging the credit of the Commonwealth without the approval of a two-thirds vote of the Massachusetts Legislature. See Article 62 of the Massachusetts Constitution, as amended. The Massachusetts courts have construed statutory authorizations for public entities to enter into contracts as not authorizing indemnity clauses. Lovering v. Beaudette, 30 Mass.App.Ct. 665, 669 (1991); Raisman v. Cunningham, Inc., Civil Action No. 93-5070-G (Super. Ct. 1995).”

- Do not agree to use the language “to the extent permitted by law...”
ALLOCATION OF RISK
(UNIVERSITY CANNOT INDEMNIFY)

- WHAT HAPPENS IF YOU AGREE TO INDEMNIFY?

• The University as an agency of the State may lose its sovereign immunity. “Sovereign Immunity” is a doctrine that prevents the government, its political subdivisions, and agencies from being sued without their consent. Agreeing to indemnification may “waive” the University’s right to sovereign immunity:
  - The University may be subject to claims—it may not ordinarily be subject to as public agency
  - The University may be subject to liability limits that in some cases may be “capped” at a certain amount or not apply to the University under the law.

• The University’s exposure to liability may be great.
Allocation of Risk
Is This an Indemnification Clause?

- What risks are you assuming?

It is important to understand that any clause that seeks an allocation of the risks to the University, whether or not the title of the provision is “Indemnification” may be seeking indemnification.

This is an indemnification clause: “The University agrees to pay XYZ Company reasonable attorney’s fees incurred in connection with any legal action brought to enforce the terms of this agreement in addition to any other costs or damages which may be found due.”
The indemnification language in the Contract for Services protects the University.

The Contractor Must “DEFEND:” The Contractor MUST hire an attorney to protect the contractual rights of the University.

The Contractor MUST “INDEMNIFY:” The Contractor MUST compensate the University for its loss.

The Contractor MUST HOLD the University “HARMLESS:” The Contractor will not hold the University responsible for any loss, damage, or legal liability.

23. Indemnification of University. The Contractor shall defend, indemnify, and hold harmless the Commonwealth, the University, its Trustees, Officers, servants, and employees from and against any and all claims, liability, losses, third party claims, damages, costs, or expenses (including attorneys’ and experts’ fees) arising out of or resulting from the performance of the services performed by the Contractor, its agents, servants, employees, or subcontractors under this Contract, provided that any such claims, liability, losses, third party claims, damages, costs, or expenses are attributable to bodily injury, personal injury, pecuniary injury, damage to real or tangible personal property, resulting therefrom and caused in whole or in part by any intentional or negligent acts or omissions of the Contractor, its employees, servants, agents, or subcontractors. The foregoing express obligation of indemnification shall not be construed to negate or abridge any other obligation of indemnification running to the Commonwealth and/or the University that would otherwise exist. The University shall give the Contractor prompt and timely notice of any claims, threatened or made, or any law suit instituted against it which could result in a claim for indemnification hereunder. The extent of this Contract of indemnification shall not be limited by any obligation or any term or condition of any insurance policy. The obligations set forth above shall survive the expiration or termination of this Contract.
**PROTECT ME!**

**From what?**

Any and all claims, liability, losses, third party claims, damages, costs, or expenses, including expert and attorneys' fees

**WHEN?** When these claims are related to the performance of services under this Contract.

**IF** the claims relate to:

- **Bodily injury**
- **Personal injury**
- **Pecuniary injury**
- **Damages to real or tangible personal property**

**AND** the claims are

**Caused** by the intentional or negligent acts of the Contractor.

**Contractor pays even if damages go beyond the insurance limits of the Contractor.**

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23. **Indemnification of University.** The Contractor shall defend, indemnify, and hold harmless the Commonwealth, the University, its Trustees, Officers, servants, and employees from and against any and all claims, liability, losses, third party claims, damages, costs, or expenses (including attorneys' and experts' fees) arising out of or resulting from the performance of the services performed by the Contractor, its agents, servants, employees, or subcontractors under this Contract, provided that any such claims, liability, losses, third party claims, damages, costs, or expenses are attributable to bodily injury, personal injury, pecuniary injury, damage to real or tangible personal property, resulting therefrom and caused in whole or in part by any intentional or negligent acts or omissions of the Contractor, its employees, servants, agents, or subcontractors. The foregoing express obligation of indemnification shall not be construed to negate or abridge any other obligation of indemnification running to the Commonwealth and/or the University that would otherwise exist. The University shall give the Contractor prompt and timely notice of any claims, threatened or made, or any law suit instituted against it which could result in a claim for indemnification hereunder. The extent of this Contract of indemnification shall not be limited by any obligation or any term or condition of any insurance policy. The obligations set forth above shall survive the expiration or termination of this Contract.
SPEAKING OF INSURANCE….

Contractor should provide insurance to the University. Naming the University as an additional insured.

WHY?

A Contractor may agree to the Indemnification language; but, where is the money coming from? By requiring Insurance—you know where the money is coming from to protect the University.

PROVIDE AN AMENDMENT TO THE CONTRACT INSERTING THE FOLLOWING AS A SEparate PARAGRAPH IN SECTION 23.

See: Sample Amendment and Exhibit

a. required ______  not required ______
Commercial General Liability Insurance including products and completed operations liability, and contractual liability coverage specifically covering the Contract, written on an occurrence form, with combined limits for bodily injury, personal injury, and property damage of at least two million dollars ($2,000,000) per occurrence and four million dollars ($4,000,000) per aggregate.

b. required ______  not required ______
Workers’ Compensation Insurance in compliance with applicable federal and state laws, including Employers Liability Insurance with limits of at least one million dollars ($1,000,000) per occurrence.

c. required ______  not required ______
Automobile Liability Insurance covering owned, non-owned, and hired vehicles with combined limits for bodily injury and property damage of at least one million dollars ($1,000,000) per accident.

d. required ______  not required ______
Professional Liability Insurance on a claims made basis, covering claims made during the policy period and reported within four (4) years of the date of occurrence. Limits of liability must not be less than $1,000,000.
Massachusetts courts enforce the consensual allocation of risk made by parties under a contract.

A “limitation of Liability” provision allocates the risks between each of the parties and limits the liability exposure of the parties.

May exclude the payment of certain types of damages, such as “consequential,” “punitive,” “indirect,” etc.

A “limitation of liability” provision may apply to certain types of causes of action, such as breach of contract, infringement, disclosure of confidential information, etc.

A “limitation of liability” provision “caps” the amount of total damages a party may pay or seek under a claim/cause of action.
CASE LAW EXAMPLE
(LIMITATION OF LIABILITY PROVISION)

XYZ Company hired ABC Company to inspect and test the sprinkler system at its facility twice a year, in September and March. The contract contained a limitation of liability clause that expressly confined ABC’S liability “for personal injury, death or property damage arising from performance under this contract” to the contract price, $480 per year.” The sprinkler head broke causing over $100,000 in property damage. The Massachusetts court upheld the limitation of liability amount of $480.

TERMINATION

- The contract must allow for some type of termination by both parties.

- Prior written notice should be provided before termination.

- The termination language should indicate whether it is for “Cause” or “Without Cause”

- Sometimes termination is based upon “Completion” of the work.
**TERMINATION CLAUSE**

Termination “**Without Cause**” allows the University to terminate the Contract without any liability. The Contractor does not have the right to sue the University for damages because the University ended the Contract before its term. In order to benefit from this clause, the University must give the Contractor notice of termination thirty days before the termination event.

Termination “**With Cause**.” If the Contractor breaches a “material” term or condition, the University can end the Contract—with notice. What is “material.”

A “material” term in a contract is a term or provision which concerns significant issues, such as price, quantity, the type of work to be done, and terms of payment or performance.

A breach of a material term would not only include the material terms in the Contract; but, also include the Contractor not performing services outlined in the Scope of Service that are essential to the performance of the Contract.

**Termination:**

A. Without Cause. This Contract may be terminated without cause by either party by giving written notice to the other at least thirty (30) calendar days prior to the effective date of termination stated in the notice.

B. With Cause. If Contractor breaches any material term or condition stated herein or fails to perform or fulfill any material obligation required by this Contract, the University may terminate this Contract by giving written notice to the Contractor stating the circumstances of the breach at least seven (7) calendar days before the effective date of termination stated in the notice. Notwithstanding the foregoing, the notice of termination provided by the University may state a period during which the alleged breach may be cured by the Contractor, which cure shall be subject to approval by the University. In the event of a breach by Contractor, Contractor may be subject to any and all applicable contract rights and remedies available to the University. Applicable statutory or regulatory penalties may also be imposed.
REMEDIES UPON BREACH

When there is a breach of the contract what risks are allocated to the University?

- Does the contract include an “indemnification” clause?
  - Is there insurance?

- Is the indemnification clause limited by a “limitation of liability” clause.

- Does the contract include a “liquidated damages” clause
WHAT HAPPENS UPON TERMINATION?

If the Contract is terminated for any reason, all data and finished products become the property of the University. If they were prepared by the Contractor under this Contract.

If the Contract is terminated Without Cause, the University is responsible for paying the Contractor for all services the Contractor rendered subject to any offsets of moneys due the University. And only if the Contractor is NOT in Default. And only if the Contractor sends in an invoice as to the amounts due.

12. Obligations in Event of Termination:

A. Upon termination of this Contract, all finished or unfinished documents, data, studies, and reports prepared by the Contractor pursuant to this Contract, shall become the property of the University.

B. Upon termination of this Contract without cause, the University shall promptly pay the Contractor for all services performed to the effective date of termination, subject to offset of sums due the Contractor against sums owed by the Contractor to the University, and provided Contractor is not in default of this Contract and Contractor submits to the University a properly completed invoice, with supporting documentation covering such services, no later than thirty (30) calendar days after the effective date of termination.
The University cannot maintain the confidentiality of the vendor’s information. **WHY?**

Because **-- THE UNIVERSITY IS SUBJECT TO THE MASSACHUSETTS PUBLIC RECORDS LAW, WHICH PROVIDES IN ESSENCE THAT:**

Every record that is made or received by a government entity or employee is presumed to be a public record unless a specific statutory exemption permits or requires it to be withheld in whole or in part. In addition, the University is not required to notify anyone of the disclosure, except the individual making the public records request.
What does this mean?

The University will **DISCLOSE ALL information** not exempt by the Public Records law.

The University will **NOT** give the Contractor prior notice of the disclosure.

The University will **NOT** be liable for disclosing information in accordance with the Public Records law.

The University will **NOT** maintain the confidentiality of any information subject to the Public Records Law.

*Therefore, if the vendor insists on confidentiality language, the University must insert language referencing its obligations under the Massachusetts Public Records law.*
Confidentiality/ Privacy. The Contractor shall comply with all applicable state and federal laws and regulations relating to confidentiality and privacy. In addition, in the performance of this Contract, the Contractor may acquire or have access to “personal data” and become a “holder” of such personal data (as defined in Mass.Gen.Laws ch. 66A) or personal information (as defined in Mass.Gen.Laws ch. 93H). Personal data and personal information shall be deemed to be “Personal Information.” Contractor shall implement feasible safeguards to restrict access and ensure the security, confidentiality and integrity of all Personal Information owned, controlled, stored, or maintained by University and provided to or accessed by Contractor in the performance of services irrespective of the medium in which it is held. The Contractor agrees that it shall inform each of its employees, servants or agents, having involvement with Personal Information of the laws and regulations relating to confidentiality and privacy.
CAN I AMEND THIS CONTRACT?

YES, you can.

This section allows the Parties to “Amend” the Contract when:

The Amendment is executed by the Parties.

Executed by “authorized” representatives of the Parties.

In writing

Upon mutual agreement.

27. **Amendments.** This Contract may be amended only by written agreement of the Parties, executed by the Parties’ authorized representatives and in compliance with all other regulations and requirements of law.
CHOICE OF LAW, VENUE

- **CHOICE OF LAW OR “GOVERNING LAW”** is the law that will be applied to the contract when there is a dispute or breach of contract claim.

- **VENUE** is the location or “forum” where the litigation will take place when there is a dispute or contract claim.
As a public agency, Massachusetts law for “choice of law” and “venue” is important. Agreeing to apply another state’s law or venue to the contract “may” waive the University’s sovereign immunity.

Agreeing to another state’s law means you may need to find out how that law interprets the language of the Contract. How that law interprets the rights of the parties in a dispute. How that law determines damages.

You may need to hire an attorney in that state to review that state’s laws as it relates to the provisions of the Contract to better protect the University.

If there is a dispute arising out of the Contract and a lawsuit is held in another state, Commonwealth Medicine will likely be responsible for the costs of hiring outside counsel, reimbursing travel expenses (including accommodations) for counsel, witnesses, and expert witnesses as well as other potential out-of-state expenses.
WHAT HAPPENS IF YOU AGREE TO AGREE TO ANOTHER STATE'S LAW?

- The University as an agency of the State “MAY” lose its right to sovereign immunity. “Sovereign Immunity” is a doctrine that prevents the government, its political subdivisions, and agencies from being sued without their consent. Agreeing to another state’s laws or venue “may” “waive” the University’s right to sovereign immunity. If the University loses its right to sovereign immunity then:

  - The University may be subject to claims—it may not ordinarily be subject to as public agency

  - The University may be subject to liability limits that in some cases may be “capped” at a certain amount or not apply to the University under the law.

- The University’s exposure to liability may be great.
SILENT CHOICE OF LAW

IF YOU AGREE TO KEEP THE CHOICE OF LAW SILENT, INCLUDE LANGUAGE IN THE “CHOICE OF LAW” SECTION WHICH PROVIDES THAT THE UNIVERSITY DOES NOT “EXPLICITLY” OR “IMPLIEDLY” WAIVE ITS SOVEREIGN IMMUNITY. THE LEGAL OFFICE CAN PROVIDE YOU WITH LANGUAGE.

ALSO, IF YOU CANNOT AGREE TO MASSACHUSETTS AS THE VENUE. AT THE VERY LEAST AGREE TO MASSACHUSETTS AS THE VENUE FOR DISPUTES IN WHICH THE UNIVERSITY BRINGS SUIT.
CHOICE OF LAW/VENUE LANGUAGE

WHEN CHOICE OF LAW IS SILENT [YOU WOULD NOT AGREE TO ANOTHER LAW] BUT YOU “MAY” INSERT THE FOLLOWING LANGUAGE.

“The parties acknowledge that the University is an agency of the Commonwealth of Massachusetts. No provision (or lack of provision) shall be construed explicitly or implicitly to be a waiver or limitation of the University’s sovereign immunity or rights or defenses arising out or related to its sovereign immunity including; but not limited to, its rights under the Massachusetts Tort Claims Act.”
THE “NOTICE” PROVISION ON A CONTRACT INFORMS THE PARTIES AS TO THE MANNER IN WHICH INFORMATION REGARDING A DISPUTE OR BREACH OF CONTRACT IS TO BE DELIVERED TO THE OTHER PARTY.

- It is important to provide accurate contact information to ensure the “Notice” is delivered to the correct location.

- It is important to make sure the Notice provision clearly identifies when it has been delivered.
WHAT IS A SCOPE OF WORK?

A “Scope of Work/ Services” is a document which describes the tasks or services to be performed under a contract in some detail.

The Scope of Work/Services:

- Manages the contract
- Manages disputes and performance issues
- Outlines the objectives and goals of the Project
- Sets forth the tasks needed to implement the objectives and goals
- Sets out the deliverables that achieve the objectives and goals
WHAT IS A SCOPE OF SERVICES?

The Services that are to be provided must be spelled out clearly defining any required reports and timelines.

The Scope should include at least the following elements:

- **An introduction**
- **Qualifications of the Contractor**
- **Outline of the Services to be performed**
- **Timelines associated with any Services Delivered**
- **How the Contractor will be paid.**
- **Signature of the Parties**

### SCOPE OF SERVICES/WORK

1. **Introduction/Purpose**
   - [Insert introductory sentence or two about purpose of contract, reason for procurement]

2. **Qualifications of Vendor**
   - [Insert this paragraph if Contractor has professional qualifications; e.g., license to practice medicine; license to sale a ship or special skill; etc., that are required for the Services or Tasks to be rendered by the Contractor.]

3. **Services To Be Provided By Contractor**
   - [Insert list of services in general detail or tasks to be performed by the Contractor specific to this contract.]

4. **Deliverables & Timelines**
   - [This may be combined with the “Services To Be Provided.” Specify Timeline of Services, milestones, or Tasks to be rendered by Contractor]

5. **Compensation**
   - [Insert brief description of payment terms. If applicable indicate whether certain payments are associated with certain Services or Tasks being rendered by Contractor. If a particular person needs to sign off on the payments indicate that person’s name.]

   - **[SIGNATURES OF THE PARTIES]**
Are the Parties properly identified?
“Contractor” “University”

Are the services identified?

Are the delivery dates identified?

Are the payment terms for services rendered identified?

If services are rendered in stages, are the milestone dates and services clearly identified?

ARE ALL THE DETAILS INCLUDED?
If the contractor has abandoned the project, the University has terminated the contractor, or the contractor has otherwise failed to complete the work in accordance with the contract, the University may be entitled to seek the recovery of damages.

The University will need to determine damages as it relates to the scope of work NOT performed. Or, NOT performed adequately, the scope of work will be the document that will assist in determining the amount of the damages to be recovered.
PROVISIONS THAT SEEK PAYMENT OF VENDOR’S LEGAL FEES

- Do not agree to a request to pay another party’s legal fees.
- Why?

- Under the law, not all claims made against a party require the payment of legal fees. By agreeing to this type of provision, you would be agreeing to the payment of any damages [from the litigated action] including attorneys fees, which may not have been required under the law.
The Contractor CANNOT give its obligations under the Contract to a Third Party WITHOUT prior written consent from the University.

Example:

Sam contracts with Susan Company to deliver bottled water to his home.

Susan Company contracts with another company to deliver bottled water to Sam’s home. Susan Company must have consent from Sam FIRST.

17. **Assignment and Delegation.** The Contractor shall not assign or in any way transfer any interest in this Contract without the prior written consent of the University, nor shall the Contractor subcontract any service without the prior written approval of the University. Any purported assignment of rights or delegation of performance in violation of this Section is VOID.
WHO IS EXECUTING?

- The person executing the Contract must be “authorized” to execute contracts on behalf of the University. [Delegation of Authority]

- The person executing the Contract for the Contractor, must be “authorized” to execute contracts on behalf of the Contractor.

- Both must have the authority to BIND the parties to the terms and conditions of the Contract.
I SUGGEST WE ACCEPT THAT THE PUNCTUATION ON PAGE 26 COULD HAVE BEEN BETTER.

MAYBE WE SHOULD JUST CONCEDE THE SEMI COLON!

GIVE THEM THE SEMI COLON AND THEY'LL REJECT THE WHOLE DAMN CONTRACT!

GPC NEGOTIATORS WILL ONLY TAKE ON BOARD 'MERITED CRITICISM'.