

Contract Management Plan

1. Introduction

The purpose of this Contract Management Plan (CMP) is to provide guidance and procedures concerning effective contract management for all contracts that bind Austin Peay State University (APSU) to terms and conditions with another party and to ensure fairness, transparency, and competitive bidding as required for University contracts.

2. Purpose

The purpose of a written contract is to embody the complete agreement in writing. The title of a document is irrelevant. Whether the document is called an agreement, contract, memorandum of agreement, memorandum of understanding, purchase order, or other similar name, it is subject to the requirements of this plan and related APSU policies and procedures. No relevant terms should be left to an unwritten understanding or verbal agreement between the parties. The document should clearly identify all parties and be explicit in setting forth the rights and duties of each party. **Every department is responsible for understanding and adhering to the requirements of their contracts.**

3. Entity of the State

Austin Peay State University (APSU) is a public institution of higher education. As such, it possesses certain rights and privileges and is subject to certain limitations and restrictions. As an instrumentality of the State of Tennessee, APSU has sovereign immunity under Article I, Section 17 of the Tennessee Constitution and the Eleventh Amendment to the Constitution of the United States. Only the Tennessee General Assembly has the authority to waive sovereign immunity; no official within the State University System has this authority. APSU has limited contracting authority and can agree only to contract terms that are consistent with Tennessee law.

4. Determination of Status as Employee or Independent Contractor

Individuals performing services for APSU must be properly classified and hired either as an independent contractor through a contract processed by Procurement Services or as an employee through Human Resources (HR). Please see the "Employee vs. Independent Contractor" form found on the Office of Legal Affairs - [Contracts website](#) to determine the individual's status. Departments may contact the Contracts Office or the HR Office for guidance regarding the proper classification of a service provider.

5. Procurement

All proposed contracts of \$50,000 or more (including renewals and amendments, and excluding grants, which is \$15,000 or more) must be competitively bid unless adequate sole source justification is provided. For additional information and support on the procurement process, including through a competitive, non-competitive or sole source, or purchasing vehicle process, please reach out to the Procurement Services Office or refer to the [Procurement Services Manual](#).

6. Fiscal Review

Pursuant to T.C.A. 4-56-107, the State's [Fiscal Review Committee](#) must review the following contracts and/or contract amendments, and absent extraordinary circumstances, such review must occur prior to award:

- A. Proposed non-competitive contracts with a term of more than one (1) year or which contain a provision to allow for extension by either party that would extend the contract beyond 12 months and which has a cumulative value of not less than \$250,000, including all possible extensions; and
- B. Any amendment to a contract meeting the term and dollar threshold requirements as described in A. above, regardless of whether the original contract was procured through competitive or non-competitive means, where the amendment:
 - a. Increases or decreases the maximum liability;
 - b. Extends or shortens the contract term;
 - c. Changes the entity or name of the entity with which the State is contracting; or
 - d. Otherwise changes an original contract or amended contract in a substantive manner.
- C. Contracts that meet these criteria must be submitted to Fiscal Review. In addition to the backup documentation described herein, the following Fiscal Review Forms must be completed – All forms are found on the Office of Legal Affairs- Contracts Forms and Templates website.
 - a. Fiscal Review Checklist;
 - b. Fiscal Review Supplemental Department Documentation;
 - c. Fiscal Review Contract Summary; and
 - d. Fiscal Review Non-Competitive Contract Form – New Contract or
 - e. Fiscal Review Non-Competitive Contract Form – Amendments/Renewals

The Fiscal Review Committee's review process requires at least 60 Calendar Days' lead-time to prepare the documents and submit them for review. **APSU requires at least 90 days lead-time to assure Fiscal Review requirements are met for their review process.** Either Procurement Services or Contract Services will, with the assistance of the requesting

department, prepare and submit information as needed for Fiscal Review Committee presentation. Please reach out to the Procurement Services Office with questions.

7. **Procedures and Guidelines - General Contract Provisions Applicable to All Contracts**

Unless otherwise noted, these procedures apply to all contracts or agreements (expenditure, no-cost and revenue-generating) between APSU and any external party, with the exception of research grant contracts, which are administered by the [Office of Research and Sponsored Programs](#). Please see the [Procurement Services Manual](#) and [APSU Policies](#) related to Grants for details on procuring and contracting using Grant monies.

A. **Approval/Authority**

Documents which legally bind APSU can ***only be signed by the President or by his/her designee who has signatory authority for contracts on behalf of the University per APSU Policy 4:002.*** Unless the President has specifically designated you as a signatory for a particular document type, you could be assuming personal liability when signing agreements. Contract Services uses AdobeSign© to obtain the appropriate electronic signatures.

B. **Negotiation**

It is the Office of Legal Affairs, Contract Specialist's responsibility to negotiate with the other party to bring an agreement into conformity with APSU Policies and Tennessee law and to confirm the terms are acceptable to the contractor before the agreement is sent to the appropriate approving authority per [APSU Policy 4:002](#).

APSU's Office of [Legal Affairs](#) is available for assistance in negotiating modifications with the contractor when the Contract Specialist has been unable to secure acceptable language with the contractor.

C. **General Contract Procedures and Routing Requirements**

- a. All necessary signature approval lines will be prepared by Contract Services.
- b. Per APSU Policy 4:013 and 4:002, all contracts must be routed to Procurement Services and Contract Services via the appropriate routing form in Govs eShop.
- c. If the party with whom the institution is contracting is a corporation, its name must be stated in the contract exactly as it appears in its charter or as listed with the Tennessee Secretary of State's office. The person signing on behalf of the corporation must have legal authority to do so, and his/her title/position should be shown on the signature page.

- d. If the other party is a state agency, the contract must include appropriate signature line(s) for the agency's Commissioner, or official(s) of equivalent rank, or their designee.
- e. Agreements containing blank spaces may be returned to the department for correction.
- f. **Timeline. Contracts should be fully executed prior to commencement of services.** Departments should plan in advance so that sufficient time is allowed to fully process contracts prior to any services being performed. Contract requests submitted via Govs eShop should be done at least **two weeks prior to services performed by the vendor. Software/hardware contracts request could require at least six (6) weeks prior to the planned implementation date.**

Please note that Invitation to Bid (ITB) services contracts and Request for Proposal (RFP) services contracts could take up to three (3) months to negotiate with the vendor after the bid has been awarded.

- g. **Renewals, Amendments, Extensions.**
 - i. A contract should not be extended or amended after the original term has expired.
 - ii. Amendments must be accompanied by a copy of the original agreement and any prior amendment or addendum attached to the appropriate routing form in Govs eShop.

D. Required Contract Provisions

APSU Approved Form Templates. Whenever possible, one of the contract templates located on the Office of Legal Affairs- Contract Services website should be utilized in order to assure that an agreement conforms to the requirements of APSU Policies and state law.

Vendor Generated Contracts. If necessary to use a vendor generated contract, the following provisions should be included when applicable:

- a. **Purpose/Duties/Scope.** Every contract should contain language regarding its purpose and the duties of the parties.
- b. **Term of Agreement.** A contract should be entered into for a period of time sufficient to adequately accomplish APSU's objectives.

In general, expenditure contract terms should not exceed a total term of sixty (60) months. Revenue contracts should not exceed a total of one hundred and twenty (120) months. Any exceptions may be submitted for consideration and approval prior to contracting activities with the other party.

Expenditure and revenue agreements must provide a beginning and ending date or must include clear language as to how these dates will be determined.

Contracts executed or proposed to be executed for periods of time of more than twelve (12) months:

- i. should contain a provision giving the Institution the right of cancellation for convenience; (See T. C. A. § 12-3-305(c)(1))
- ii. shall contain a provision giving the Institution the right of cancellation at the end of any fiscal year without notice, in the event that funds to support the contract become unavailable. (See T. C. A. § 12-3-305(c)(2))

A contract may provide for automatic renewal if it:

- i. requires no expenditure of state funds; or
- ii. contains language that allows for cancellation at the end of any fiscal year for lack of funding.

In the event of automatic renewal, the maximum term of the contract is subject to Section b. above.

c. **Payments**

Contracts requiring payments for goods or services must include specific rates and prices for the goods or services being procured as well as any payment conditions.

Payments are to be made only upon the submittal of an invoice by the contractor after the goods are received or the services performed; however, advance payments may be made under the following types of contracts:

- i. Licensing
- ii. Preventive maintenance/service
- iii. Subscriptions
- iv. Memberships
- v. In other instances, only if approved by the Director of Procurement or Contract Specialist, as appropriate.

- d. **Monitoring.** All contracts should contain a provision that the Contractor's performance shall be subject to monitoring and evaluation by the Institution and/or other appropriate parties.

e. **Foreign Contractor.** If the Contractor is not a US citizen, or Permanent U. S. resident, payment of any portion of the contract from any source will not be made until the Contractor has provided proof of tax status to the Institution. The payment is contingent upon Contractor's eligibility for payment and tax status, and the contract should specify that appropriate withholding may be deducted from the Contractor's payment.

f. **Maximum Liability**

Contracts requiring payment(s) by the Institution should specify the maximum dollar amount or include clear language on how expenditures will be tracked (i.e. purchase orders against master terms, order forms, etc.).

g. **Conflict of Interest.** The following language should be in all contracts:

Contractor certifies its compliance with applicable federal and state laws, rules and regulations and APSU policies with respect to Conflict of Interest, including, but not limited to the following:

- i. Pursuant to T.C.A. § 12-4-103, Contractor acknowledges that it is unlawful for any state official or employee to bid on, sell, or offer for sale, any merchandise, equipment or material, or similar commodity, to the state of Tennessee during the tenure of such official's or employee's office or employment, or for six (6) months thereafter, or to have any interest in the selling of the same to the state.
- ii. Pursuant to APSU's Conflict of Interest Policy 1:001, APSU prohibits purchases of merchandise, equipment, materials or similar commodities from an APSU employee's business or from a family member's business. Family member, as defined by the policy, means a spouse or child dependent or non-dependent of APSU employee, unless otherwise defined by statute.
- iii. Pursuant to APSU's Conflict of Interest Policy 1:001, APSU prohibits service contracts with an individual who is, or within the past six months has been a state employee. Contracts with the employee's spouse, a company or corporation in which a controlling interest is held by any state employee or the employee's spouse shall be considered, for the purpose of applying this rule, to be a contract with said individual.
- iv. The Contractor warrants that no part of the total Contract Amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract.

The Contractor acknowledges, understands, and agrees that this Contract shall be null and void if the Contractor is, or within the past six months has been, an employee of the State of Tennessee or if the Contractor is an entity in which a controlling interest is held by an individual who is, or within the past six months has been, an employee of the State of Tennessee

Note: This provision is not applicable and should be omitted from agreements between other Locally Governed Institutions (LGI), Tennessee Board of Regents (TBR), TBR Institutions, University of Tennessee System Institutions (UT), and another State entities.

h. **Non-discrimination**

Contracts should contain the following provision or a similar provision in which the parties agree not to discriminate:

- i. Non-discrimination. The Contractor shall abide by all applicable Federal and State law pertaining to discrimination and hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or otherwise be subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of classifications protected by Federal or State law.

i. **Audit and Documentation**

Except as noted in ii. and iii. below, the following provision should be included in contracts which require any payment to be made by the Institution:

- i. The Contractor shall maintain documentation for all charges against the Institution under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this Contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the Institution, the Comptroller of the Treasury, or their duly appointed representatives. Any financial statements required by this Contract shall be prepared in accordance with generally accepted accounting principles.” (Reference T.C.A Code 12-3-602(c))”
- ii. See Grant website for audit language for grants.
- iii. The audit clause is not required for a one-time, fixed payment contract.

j. **Payment for Travel, Meals, and Lodging**

If a contractor is to be paid/reimbursed for travel, meals or lodging, such payment shall be in the amount of actual cost/per diem, and shall be expressly subject to the limits and provisions of APSU Policy 4:015 -General Travel.

k. **Governing Law**

Contracts shall contain a provision that the contract is to be governed by and construed in accordance with the laws of the State of Tennessee. The contract may be silent as to the governing law if the other party will not accept the governing law of the State of Tennessee.

I. Sales and Use Tax

The following provision shall be included in all contracts for the acquisition of goods or services:

“The Contractor shall be registered with or have received an exemption from the Department of Revenue for the collection of Tennessee sales and use tax. This registration requirement is a material requirement of this Contract. The Contractor shall comply, and shall require any subcontractor to comply, with all laws and regulations governing the remittance of sales and use taxes on the sale of goods and services made by the Contractor, or the Contractor’s subcontractor.”

m. Debarment

The following provision shall be included in all contracts for the acquisition of goods or services:

“Debarment and Suspension. The Contractor certifies, to the best of its knowledge and belief, that it and its principals:

- i. are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal or State department or agency;
- ii. have not within a three (3) year period preceding this Contract been convicted of, or had a civil judgment rendered against them from commission of fraud, or a criminal offense in connection with, obtaining attempting to obtain, or performing a public (Federal, State, or Local) transaction or grant under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property;
- iii. are not presently indicted for or otherwise criminally or civilly charged by a government entity (Federal, State, or Local) with commission of any of the offenses listed in section (ii) of this certification; and
- iv. have not within a three (3) year period preceding this Contract had one or more public transactions (Federal, State, or Local) terminated for cause or default.

n. Illegal Immigrants

The following provision shall be used in all contracts for the acquisition of goods or services:

“T.C.A. § 12-3-309 prohibits State entities from contracting to acquire goods or services from any person who knowingly utilizes the service of illegal

immigrants in the performance of the contract and **by signing this Contract, the Contactor attests, certifies, warrants, and assures that the Contractor shall not knowingly utilize the services of illegal immigrants in the performance of the Contract and will not knowingly utilize the services of any subcontractor, if permitted under the Contract, who will utilize the services of illegal immigrants in the performance of the Contract.** *(For contracts that require Fiscal Review Committee approval, the original language with the signed Attestation Form incorporated as an Attachment to the Agreement must be used)*

o. Click-Wrap Agreements

Contracts which may require individual Institutional users to accept online terms and conditions should contain the following clause:

“Click-Wrap Agreements. The Contractor agrees that click-wrap or click-through agreements shall not be binding upon the Institution. No employee has the actual or apparent authority to enter into click-wrap or click-through agreements on behalf of the Institution without the approval of APSU’s Procurement and Contracts Services Office. No employee has the authority to modify, amend, or supplement this Agreement through a click-wrap or click-through agreement. This Agreement can only be modified, amended, or supplemented under these terms through a written amendment in accordance with APSU’s procedures, policies, and guidelines.”

p. Contractor Commitment to Diversity

The Governor’s Office of Diversity Business Enterprises requires all contracts contain the following clause:

“Contractor Commitment to Diversity. The Contractor shall assist the Institution in monitoring the Contractor’s performance of this commitment by providing, as requested, a quarterly report of participation in the performance of this Contract by small business enterprises and businesses owned by minorities, women, and Tennessee service-disabled veterans. Such reports shall be provided to the Institution in form and substance as required by Institution.

q. Data Security and Privacy

For contracts in which the Contractor will have access to APSU students, faculty, and staff data and will be maintaining the data on the Contractor’s computer network or servers, the Data Security Addendum and General Data Protection Regulation (GDPR) Addendum should be added either within or as attachments to the agreement.

When APSU will be collecting the Contractor’s information, the below clause should be in the terms and conditions:

“APSU collects the information Contractor provides to it for the purpose fulfilling its obligations under this Contract. APSU will share the information Contractor provides only to the extent required by law. APSU will store Contractor’s

personal data consistent with its policies on document retention, which can be accessed through [APSU's Records Retention and Disposal of Records Policy 4:017](#). If Contractor is a resident of the European Economic Area ("EEA") and has standing under the General Data Protection Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016, Contractor may have the right (i) to request from APSU access to and rectification or erasure of personal data or restriction of processing; (ii) to object to processing; (iii) to data portability and (iv) to lodge a complaint with a supervisory authority in the EEA. By providing personal data to APSU, Contractor consents to the processing of its data for the purposes described above.

r. **Service and Software Accessibility Standards**

If the contract will require either that employees or students of the Institution access the Contractor's software or website, the contract should contain the following clause:

"The Contractor warrants and represents that the service and software, including any updates, provided to the Institution will meet the accessibility standards set forth in WCAG 2.0 AA (also known as ISO standard, ISO/IEC 40500:2012), EPub 3 and Section 508 of the Vocational Rehabilitation Act. To the extent that the Products fail to meet the WCAG 2.0 AA, EPub 3 and Section 508 standards, the Contractor will provide Institution with a fully completed Accessibility Statement and Conformance and Remediation forms. The Contractor shall indemnify and hold the Institution harmless in the event of claims arising from inaccessibility related to the Contractor's products/services."

s. **Iran Divestment Act**

All contracts should contain the following:

"The requirements of T.C.A. § 12-12-101 et.seq., addressing contracting with persons with investment activities in Iran, shall be a material provision of this Contract. The Contractor agrees, under penalty of perjury, that to the best of its knowledge and belief that it is not on the list created pursuant to T.C.A. § 12-12-106.

t. **Anti-Israel Boycott**

All contracts with a total potential value of \$250,000 or more, unless the vendor employs fewer than 10 employees, should include the following (T.C.A. § 12-4-119):

"Boycott of Israel: The Contractor certifies that it is not currently engaged in, and will not for the duration of the contract engage in, a boycott of Israel as defined by T.C.A. § 12-4-119. This provision shall not apply to contracts with a total potential value of less than two hundred fifty thousand dollars (\$250,000) or to contractors with less than ten (10) employees."

u. **Impermissible Provisions**

The provisions listed under this section **are not to be included** in any contract:

- i. Provisions requiring the institution to pay taxes (T.C.A. §§ 67-5-203 and 67-6-322), cancellation fees, liquidated damages, incidental or consequential damages, or punitive or exemplary damages (Institution is liable for actual damages only T.C.A. § 9-8-101 et seq.). Provisions requiring the Institution to pay late charges, finance charges or interest in excess of that provided under the Tennessee Prompt Pay Act (T.C.A. § 12-4-701 et seq.). Provisions requiring the Institution to pay punitive damages or costs of litigation other than court costs (T.C.A. § 9-8-307(d)).
- ii. Payment of travel/per diem expenses in excess of maximum limitations set forth in APSU Policy 4:015.
- iii. Provisions designating the governing law of a state other than Tennessee.
- iv. Provisions requiring the institution to make deposits or payments before goods are received or services are performed (T.C.A. § 12-4-703), except that the institution may pay for licensing, preventive maintenance/service, subscriptions, memberships, and in other instances only if approved in accordance with APSU Policies, upon the signing of an agreement.
- v. Provisions requiring the institution to purchase or obtain liability, property or other insurance or a performance bond. TCA § 9-8-108 (a)(3)(C) and 9-8-108 (a)(4).
- vi. Provisions requiring the Institution to agree to assume the risk of liability which might otherwise fall on other parties are void as both an unauthorized attempt to abrogate sovereign immunity and an unauthorized attempt to lend the State's credit. OAG No. 04-065, OAG 93-1. Tenn. Const. art. I, §17; Tenn. Const. art. II, §31. Indemnification and Hold Harmless provisions requiring the Institution to indemnify and hold another party harmless are prohibited. Rules of Tennessee Department of General Services 0690-03-01-.17 (3)(a). and T.C.A. § 8-6-301.
- vii. Provisions requiring the institution to obtain or pay for outside labor of persons not employed by the institution (for example, union stage-hands, teamsters, etc.) are prohibited unless such cost is included as part of the total contract price.
- viii. Provisions requiring the institution to consent to binding arbitration by a third party of claims arising out of or relating to the agreement. Only the Attorney General can enter into a settlement agreement that is binding upon the State. TCA §§ 8-6-301 and 20-13-103. Therefore, the State may participate in arbitration or mediation should it choose to do so, but no agreement reached during arbitration is binding unless approved by the Tennessee Attorney General.
- ix. Provisions passing risk of loss or title to the Institution before delivery and/or installation of products unless vendor provides shipment protection in the

Institution's interest.

- x. Right of vendor to enter institution's premises without notice to remove equipment or product upon alleged default by institution.
- xi. Provisions permitting the vendor to take a secured interest in personal property under the agreement.
- xii. Provisions providing for a limitation of time in which the Institution may bring suit. (T.C.A. § 28-1-113).
- xiii. Provisions requiring confidentiality and nondisclosure that violate the Tennessee Open Records Act, TCA § 10-7-101, et seq. Except as otherwise provided by statute, all State records are public records and open to inspection by any citizen of this State. TCA §10-7-503.
- xiv. Limitation of Liability. Pursuant to T. C. A. §§ 12-3-701 and 12-3-1210 an Institution shall not agree to limitation the liability of a contractor for less than two (2) times the maximum liability, estimated liability or maximum revenue of the contract.

IN NO EVENT SHALL THIS LIMITATION OF LIABILITY APPLY TO CLAIMS FOR INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS, INTENTIONAL TORTS, CRIMINAL ACTS, FRAUDULENT CONDUCT OR ACTS OR OMISSIONS THAT RESULT IN PERSONAL INJURIES OR DEATH.

- xv. Provisions by the vendor of disclaimers of express or implied warranties.
 - xvi. Provisions renewing or automatically extending the contract beyond the original term, unless the contract is cancelable for convenience upon a specified period of days' notice by the University.
 - xvii. Provisions permitting State of Tennessee funds to purchase alcoholic beverages. State funds should not be used for the purchase of alcoholic beverages.
- v. **Other possible language to be added.**
- i. All relevant documents containing information pertinent to the transaction, or additional terms or conditions not included within the body of the contract should be incorporated by reference, with the order of interpretation clearly set forth.
 - ii. If the contract is a result of a competitive process it should contain a clause in substantially the following form:

Contract Documents. This Contract consists of the following documents:

1. This Contract document, its attachments and amendments/addenda, the latest of which having priority;

2. The Request for Quotation/Request for Proposal/Invitation to Bid number and its associated amendments; and
3. The Contractor's Bid dated (add date), including any clarifications and addenda thereof, the latest of which having priority.

In the event of a discrepancy or ambiguity regarding the Contractor's duties, responsibilities, and performance under this Contract, these documents shall govern in the order of precedence detailed above.

Please see the [Procurement Services Manual](#) for information and direction on the bid process.

- iii. Amendments and addenda to existing contracts shall clearly state the additions, deletions and/or modifications to the contract including whether the new terms are in substitution of, or in addition to, the terms expressed in the original contract.

8. **Contract Monitoring Plan**

All contracts are to have a monitor assigned to the contract to monitor the vendor's performance either annually, bi-annually, quarterly, or monthly. The contract monitor shall record milestones and/or issues with the vendor throughout the term of the agreement to ensure the following:

- A. Contract performance in terms of progress and compliance with contract provisions;
- B. Communication with Contractor to ensure maximum performance and intended results;
- C. Financial obligations of the Institution do not exceed the contract pricing;
- D. Deliverables are received;
- E. Appropriate approval and remittance of payments for acceptable work are in accordance with contract provisions and applicable law;
- F. Maintenance of records for each contract that documents activities such as procurement, management, and sub-recipient monitoring, if applicable; and
- G. Evaluation of contract results in terms of the achievement of organizational objectives.

9. **Contract of Adhesion**

When APSU is presented with a contract that includes impermissible terms and the vendor is unwilling to negotiate mutually agreeable terms, APSU may consider such a contract to be a contract of adhesion.

A contract of adhesion must meet the following criteria:

- A. The proposed contract must be a standard form contract or license;
- B. It is offered to APSU on a 'take it or leave it' basis;
- C. APSU has no realistic opportunity to negotiate different terms; and
- D. The desired product or service cannot be obtained except by agreeing to the form contract

Prior to entering into a contract of adhesion:

- A. Contract Services will document the Institution's attempts to negotiate needed changes in the contract and the vendor's refusal to agree to any changes (i.e., despite the fact they were given statutory language that governs certain situations or that contradicts contract language);
- B. Contract Services will require the requesting department to provide a written explanation regarding the need for the particular goods or services, the fact that the vendor is the sole source (or that all vendors require the impermissible language), the intended use(s) of the goods or services, and any risk(s) associated with the intended use(s).

Approval for contracts of adhesion shall be as follows:

- a. Contract Services may approve contracts of adhesion up to but not greater than \$5,000 annually if an appropriate risk assessment has been performed.
- b. The President or President's designee with authority from the Policy 4:002, may, after consultation with the Office of Legal Affairs, approve contracts of adhesion greater than \$5,000 annually but less than \$25,000 in total.
- c. Contracts of adhesion greater than \$25,000 shall only be approved by the President and only after consultation with the Office of Legal Affairs.

A letter stating that APSU regards the agreement as a contract of adhesion shall be sent with the executed contract when it is sent to the Contractor. A copy of the letter shall be maintained in the Institution's records.

In appropriate instances, the President or President's designee may approve a contract as a contract of adhesion when the vendor has agreed to some change(s), but the contract still contains impermissible language; documentation as required above must be maintained.

10. **Types of Agreements**

- A. Dual Services Agreements
 - a. Scope

This section applies to agreements whereby an Institution/state agency is procuring the services of a full-time employee of another Institution/state agency.

b. General Rules

Job priorities/Rate of Compensation

- i. A full-time employee of an Institution/state agency is to provide services to another Institution/state agency, they must devote their full working time to their position; therefore, any agreement which diminishes an employee's availability for the performance of his/her duties will not be approved, except as provided herein.
- ii. In general, the services performed pursuant to a dual services agreement are to be of an infrequent or short-term nature. (See [APSU Policy 5:014, Outside Employment and Extra Compensation](#) for APSU full-time employee guidance on dual services).
- iii. The rate of payment under a dual services agreement must not exceed the rate the procuring institution/agency normally pays for such services, shall conform to the Fair Labor Standards Act and be coordinated with the employee's primary Human Resource and/or Payroll Department.
- iv. Dual service agreements must avoid conflicts of interest.

c. Payment.

- i. Any payment for employee services shall be between the Institution and the state agency or other Institution. An Institution may not pay an employee of another Institution or State Agency directly for services of any nature.
- ii. Payment shall only be made after performance of services is completed and upon receipt of invoice from the vendor institution.

d. Approvals. Dual services agreements require the written approval of:

- i. An authorized official of the state agency/Institution procuring the services (Procuring Party) and the Institution whose employee is to provide the service (Vendor Party).

Note: If compensation is \$1,500 or more, agreement requires approval by the commissioner of the Department of the state agency providing the employee's services and of the appropriate official for Finance & Administration. This does not include Tennessee Board of Regents (TBR), TBR schools, Locally Governed Institutions (LGI), or UT System.

e. Blanket Dual Services Agreements.

- i. If a Procuring Party contracts for the services of multiple employees of a Vendor Party, one blanket dual service agreement may be processed that includes the names and rates of compensation for each employee.
 - f. Form Agreement
 - i. The form agreement below contains all required elements; however, as a minimum, every agreement must contain the following:
 - 1. A brief description of the services being provided;
 - 2. The name of the employee providing the services;
 - 3. The rate and means of compensation, including when payment will be made and to what address invoices are to be sent.
 - 4. A provision that an invoice from the vendor party is required prior to payment to an Institution for services rendered by its employee.
 - g. Templates:
 - i. Dual Services Agreement (DSA) template APSU as the Procuring Party.
 - ii. Dual Services Agreement (DSA) template APSU as a Vendor Party.
- C. Pro Forma Contract – Professional/Personal Services Agreement (PSA) -

Personal or Professional Services (PSA) provided by independent contractors or non-employees who have specialized skills, knowledge, and resources to perform unusual or technical services unavailable from University personnel. Examples include consulting services, speakers, filming events, or lecturing.

Individuals performing services for the University must be appropriately classified and hired either as an independent contractor through a contract processed by the Office of Legal Affairs, Contract Services, or as an employee through Human Resources (HR). Please see the “Employee vs. Independent Contractor” form found on the Office of Legal Affairs- [Contracts website](#) to determine the individual’s status. Contract Services will process independent contractor contracts and HR will process employee contracts. Departments may contact Contract Services or the HR Office for guidance regarding the proper classification of a service provider.

Note: If the contractor is a full-time employee of another State of Tennessee Agency (example: Tennessee Department of Health, MTSU, or ETSU), please use the “Dual Services Agreement” routing form found on the front page of Govs-eShop.

- a. General Rules
 - i. The description of the goods/services should be detailed enough to enable

a party unfamiliar with the subject matter to determine exactly what good(s)/service(s) the Contractor will be providing/performing for the Institution.

- ii. In most cases, the description of services should provide qualitative and quantitative measures. For example, a custodial services contract might provide for the Contractor to provide the cleaning solutions, that a facility's floors to be mopped on a nightly basis and stripped and waxed on a biannual basis.
- iii. This type of Agreement must not create an employer/employee relationship. An individual must meet all of the following conditions to be classified as an independent contractor:
 1. The Institution controls only the results of the work, not how it gets done.
 2. The individual assumes a business risk (assumes all expenses for personnel, equipment and materials) as a result of this association with the Institution.
 3. The individual is responsible for paying and reporting applicable self-employment tax.
 4. The individual is free to complete the assigned task without control or direction from the Institution.
 5. The individual's association with the Institution normally ceases upon completion of a specified project.
 6. The individual is free to work for other entities.
 7. The individual has declared himself/herself to be an independent contractor when providing similar services to the general public.
- iv. In appropriate cases, the Institution should require the contractor to demonstrate proof of appropriate forms of insurance, and/or to provide a performance bond.
- v. When appropriate, language regarding intellectual property rights should be included in a contract. (See [APSU Policy 2:047 Intellectual Property, Patents, and Copyrights](#))
- vi. All contracts for legal services which are subject to T.C.A. §§ 8-6-106 and 8-6-301 must originate in the APSU's Legal Office prior to any action being taken to retain any legal or legally related services;
- vii. Contracts for services required to be approved by the State Building Commission must be coordinated with the Office for Capital Planning, Design, and Construction;
- viii. State law prohibits APSU from either establishing a vending or food services operations contract for new or existing facilities or from performing such services itself, without first notifying the Division of Blind

Services for the State of Tennessee. (T.C.A. §§ 49-8-118 & 71-4-503)

- ix. Pro Forma Contract - This contract may be used to procure goods or services as the need dictates. It is included in the approved RFP format as the pro forma contract and should be used in the following instances:
 - 1. For personal service contracts that result from an RFP process;
 - 2. For personal service contracts which require Fiscal Review approval; and
 - 3. For all other contracts, in which APSU's procurement and/or contracts office determines this form is appropriate.
- x. A Purchase Order may be used to procure goods or, in very limited circumstances, services in lieu of a signed agreement.

D. Clinical Affiliation Agreements

A Clinical affiliation agreement is an agreement between an Institution and another entity (Affiliate) for the provision of practical clinical experience to the Institution's students.

General Rules. Generally, these agreements do not provide for monetary compensation to either the Institution, Affiliate or student.

a. Health Records and Insurance.

- i. The Institution may provide health records of students and faculty upon request by the Affiliate. The Institution must give students/faculty prior written notice when they will be required by the Affiliate to obtain and provide health records in order to participate in clinical experience. Each student will be required to execute proper release forms for FERPA purposes.
- ii. The Affiliate may require written evidence of professional liability insurance coverage for students and faculty participating in the experience.
- iii. The Institution shall notify students of Affiliate's requirement(s) regarding professional liability insurance, the minimum amount of coverage that is required by the Affiliate. The Institution may notify the student of available options to obtain such coverage.

b. Criminal Background Checks and/or Drug Screening

- i. If criminal background checks and/or drug screening of students are required by the Affiliate, the Institution shall notify students of this requirement prior to enrollment in the program or as soon as the requirement is known.

- ii. The Institution shall inform students that the check and/or screen must be completed prior to the student's initial clinical placement.
 - iii. Each student is responsible for making timely arrangements for a background check and/or drug screening and paying all costs associated with such checks/screens.
 - iv. If criminal background checks and/or drug screenings are required for Institutional faculty or staff, the Institution shall arrange for the background check/drug screens, pay all costs associated with such checks, and provide the results to the Affiliate.
 - v. At a minimum, the Affiliate shall be responsible for setting the eligibility standards for clinical participation at its facility, and if there is any question as to whether the standard has been met, to evaluate the results of the background check/drug screen to determine if the student or faculty /staff member shall be allowed to participate at its facility. The Institution shall take steps to ensure that any individual not clearly meeting the Affiliate's eligibility standards does not participate in the clinical program at the Affiliate's facility.
 - vi. A Clinical Affiliation Agreement which requires background checks should also include a provision that if an Institutional faculty/staff member or student is also an employee of Affiliate, the Affiliate will allow the faculty/staff member or student to participate in its clinical program without undergoing an additional background check.
 - vii. Recognizing that students enrolled in certain programs at the Institution will potentially participate in multiple clinical placements at multiple facilities, clinical agreements should include a provision that the Affiliate will accept the results of the background check done prior to the student's initial clinical placement if the student maintains continuous enrollment in the institution's program and the background check agency maintains the results of the background check.
 - viii. Institutions shall inform students or faculty/staff members excluded from clinical placement on the basis of a criminal background check/drug screen of any review or appeal process available pursuant to the Fair Credit Reporting Act or any other law or policy.
- c. Health Insurance Portability and Accountability Act of 1996 (HIPAA) Compliance
- i. Although HIPAA language is included in the form contract, this language may be omitted upon the request of the Affiliate.
 - ii. For purposes of HIPAA, students are trainees and are, by definition,

considered to be the “workforce” of the Affiliate (at the same time, it should be noted that students are employees of neither the Institution nor the Affiliate). Therefore, entering into business associate agreements is not permitted.

- iii. Agreements which comply with this guideline and do not deviate substantially from the form template or which have been reviewed and approved by the Office of Legal Affairs, do not require further approval. Agreements previously approved by the Office of Legal Affairs may be renewed if no changes are made.
- iv. Institutions are encouraged to seek terms of longer than one year for clinical affiliation agreements.

d. Clinical Affiliation Forms

E. Use of APSU Facilities

Any outside party using any APSU facility must go through the [Office of University Facilities](#). Facilities located in the Foy Fitness Center must go through the [University Recreation](#) office. Athletic facilities are handled through the Athletics’ office.

F. Rental of Off Campus Facilities

When renting space off campus a “Rental of Off Campus Facilities” agreement should be in place with the venue. If the venue has their own agreement it must be reviewed by the Office of Legal Affairs, Contract Services, to ensure it does not contain any impermissible clauses and required clauses have been placed in the agreement.

G. Software/Hardware:

a. Definitions:

- i. Software. Instructions that tell a computer what to do. The software comprises the entire set of programs, procedures, and routines associated with a computer system's operation.
- ii. Software Program. A set of instructions that directs a computer's hardware to perform a task is called a program, or software program.
- iii. Hardware. The physical components of a computer system.
- iv. Software as a Service. Software as a Service (“SaaS”) shall be treated as a term license for software or services, not as a Subscription as defined in section 4.1 of this manual. A SaaS license may use a “subscription schedule” as payment methodology, but this does not make it a

“Subscription” as defined by the State. All SaaS agreements shall comply with the rules, policies, and procedures of the Procurement Office, Contract Services Office, and the Office of Information Technology.

- v. End Use License Agreement. A legal contract entered into between a software developer or vendor and the user of the software which is usually provided by the vendor during the procurement process.
 - vi. Voluntary Product Accessibility Template (VPAT). If the contract will require either that employees or students of the Institution access the Contractor’s software or website, a VPAT is required from the vendor and reviewed by APSU’s Accessibility Administrator. If the vendor does not have a VPAT, please send them a blank one found [here](#), to fill out and return to you.
 - vii. Alternative Access Plan (AAP). If the vendor does not have a VPAT and/or cannot complete a blank one, APSU’s Accessibility Administrator may ask you to fill out an AAP. This document defines how you will accommodate someone with accessibility needs when they use the software or website.
 - viii. Quote. This form is a detail statement of what the vendor will charge for their software. This is a required document to be attached to the requisition when requesting the software.
 - ix. Data Security. In order to ensure our faculty, staff, and student’s “Personal Identifiable Information” (PII), as defined below, will be protected, software agreements must contain language approved by APSU’s Information Technology Security Director.
 - x. Personal Identifiable Information (PII). Any information relating to an identifying a person. Example: Phone number, Email address, etc.
- b. A fully executed contract may be required to support the software purchase or subscription if any of the following applies:
- i. has a to click “I Agree” clause online;
 - ii. requires a signature certifying intended use and acknowledgement of vendor restrictions;
 - iii. to use a site or software/subscription requires agreement to online terms and conditions.
- c. Software and/or services routinely renewed should be bid or supported annually by current sole-source documentation:
- i. federal funds – more than \$9,999.99 over the life of the contract/agreement/terms and conditions;

- ii. university funds - more than \$49,999.99 over the life of the contract/agreement/terms and conditions.
- d. Account Codes:
 - i. 74430 – Software purchases and software maintenance/technical support agreements should all be coded on this account code and is subject to OIT approvals.
 - ii. 74481 – Subscription services to established databases of information for an established finite period where the vendor allows access to their website and no download of software occurs and its subject to OIT approval.
 - iii. 78610 – Capitalized software (Actual purchase of programs for long-term campus wide service (rare; cost must be greater than \$100,000 and be a perpetual (not annual license fee).

H. Academic Agreements

- a. Academic Agreements which meet the criteria of [APSU Policy 2:065](#) should be developed in compliance with instructions or guidance from the Office of Academic Affairs.

Examples of potential Academic Agreements include but are not limited to:

- Research Abroad
- Study Abroad/Exchange
- Dual Enrollment Agreement/Memorandum of Understanding (MOU)
- 2+2 Articulation Agreements with Community Colleges
- Transfer Agreements with Universities
- 3 + 1 or 3 + 3 Agreements
- Collaborative/Cooperative Agreements
- Joint Degrees
- Dual Degrees
- Outsourcing of Instruction to other Entities/Companies
- *Clinical Affiliation Agreements – see section D.*
- Internship Agreements
- Practicum Agreements
- Teacher Education Placement Academic Agreements

I. Non-credit Instruction Agreement

This section is applicable to revenue-generating agreements whereby APSU provides non-credit instruction/training for business and industry.

a. General Rules

- i. The Institution is responsible for the administration of fees, charges, and refunds in accordance with [APSU Policy 1:021](#) (Fees, Charges, Refunds, and Fee Adjustments).

b. Essential Contents of the Agreement

- i. The form agreements at the end of this section contain all required elements; however, a few elements are described below:
 1. The program title name, a brief description of the program, Continuing education Units (CEUs) awarded, if applicable, the name of the instructor, if applicable, conducting the course, and the dates, times, and location of the course.
 2. The minimum and maximum number of participants and the program fee that will be invoiced to company.
 3. Other provisions should be specific to include such elements as deliverables by the Institution including textbooks, instructional materials, CEU records/transcripts for participants, and/or certificates awarded, etc.
 4. Specific requirements of the company should be included such as safety and security of Institutional equipment, additional fee assessments outside of the instructional costs, documents/information necessary for instruction, etc.

J. Exceptions

Any exceptions to the procedures outlined in this Manual shall be subject to the approval of the President or designee and shall be requested in writing by the requesting department via the appropriate VP. Exceptions shall be made on a case-by-case basis. If an exception is made, a written determination signed by the President or designee shall be included in the contract file.