

Common “Delay” Factors in Contract Processing

One issue that sometimes causes a delay in processing a contract for signature relates to the fact that the University enjoys the protection of sovereign immunity. This immunity, established by the Alabama Constitution, bars any suit against the State of Alabama or any of its instrumentalities, including the University. The Alabama Supreme Court has held that not even the State legislature may waive the State’s sovereign immunity. This means that University officials have no authority to sign contracts that contain provisions explicitly or implicitly purporting to waive the sovereign immunity of the University.

A University official who is presented with a contract containing a provision by which the University agrees unqualifiedly that the laws of another state will govern the contract should be aware of the implications of such a provision. It may mean that the University will submit itself to the jurisdiction of the courts of that state, that the University will submit to binding arbitration, and/or that the University will indemnify/hold harmless the other party to the contract. If the official signs the contract with this kind of provision, he/she risks personal liability, since each of the eventualities mentioned above involves an explicit or implicit waiver of sovereign immunity, a waiver which no official has the authority to make on behalf of the University. In such cases, an addendum must be prepared to preserve the University’s sovereign immunity. The addendum will have to be sent to the other contracting party for approval. While approval of such addenda is the rule, the approval process will typically require a week or two.

Another factor that can slow the processing of even an apparently simple contract is the fact that it may incorporate other documents by reference, thereby making those other documents part of the contract. The document incorporated may have little or no legal import as far as the University is concerned, such as the rules of conduct for guests at a hotel. However, until that document is secured and attached to the contract, its provisions remain unknown and legal review cannot proceed. To avoid delays, any referenced documents should be included with the contract when it is submitted for processing.

In addition to incorporating paper documents by reference, increasingly contracts incorporate by reference terms and conditions found on the Internet at a specified link. Those referenced terms and conditions may themselves reference other documents or terms and conditions found at still other Internet links. The terms and conditions residing on a website may be changed readily and often. Each of the referenced documents must be reviewed and many contain provisions that result in a purported waiver of sovereign immunity. As a result, they must be printed out to make the exact terms agreed to a matter of record. In most cases, the referenced documents will require an addendum to deal with sovereign immunity issues.

Attention to the foregoing matters by University officials will make it possible for the Office of Counsel to conduct a more efficient legal review.