

Guidelines for UAH Standard Form Contract for Professional Services

I. Background

The Office of Counsel has developed a number of form contracts for use by the University community. These form contracts greatly simplify contract preparation by requiring, for the most part, that the user merely fill in the blanks with factual information specific to the particular circumstances of the contract concerned. In addition, the use of standard form contracts simplifies and speeds up the process of legal review by permitting the Office of Counsel to ignore the pre-printed portions and to focus on the portions of the contract that have been completed by the user.

By far the most widely used of the form contracts is the Contract for Professional Services (CPS). This contract consists of basic provisions that are printed on the front and back of a single sheet of paper, along with a multi-page set of “General Terms and Conditions” that are incorporated into the contract and that must be provided to the Contractor. Copies of this contract are available from UAH Printing Services. Users should not type or scan the contract into a word processor document. Doing this will only slow the legal review of the contract. When the contract has been printed from a word processor document, the Office of Counsel must review the entire document to ensure that none of the standard wording (which would be pre-printed on the UAH Printing Services form) has been omitted or changed and that no inappropriate words have been added during the typing process.

II. Limitations on Use of the Contract for Professional Services

A. General Limitations

There are two significant qualifications relating to the use of the CPS. The first has to do with Alabama Competitive Bid Law requirements. A contract for services where payment will exceed \$7,500 must, as a general rule, be awarded by competitive bidding to the lowest responsive, responsible bidder. In these instances, the competitive bid process must precede the completion and execution of the CPS. The second qualification is potentially more complex. A CPS is the appropriate document to use when the service provider or worker is an independent contractor only; it is not generally appropriate when the provider is an employee. The University must therefore make an initial “independent contractor vs. employee” determination before proceeding to develop a CPS.

This classification issue is more than a hypothetical exercise. A number of important consequences flow from the decision made by the University to place a worker in one classification or the other. If the worker is an employee, the University is responsible for withholding income taxes, Social Security taxes, etc., from the compensation paid, while an independent contractor is simply paid the agreed lump sum and is then responsible for making the required estimated income tax and other payments. An employee receives University medical and retirement benefits, while an independent contractor does not and must obtain any such benefits on his/her own.

The Internal Revenue Service (IRS) has an obvious interest in the way employers like the University classify service providers. The fact that a CPS is utilized, indicating an independent contractor relationship, does not settle the matter for the IRS. In an audit, the IRS will likely review the facts upon which the University relied in making the determination. If, based on that review, the IRS concludes that the University improperly classified a worker as an independent contractor instead of as an employee, the University will be subject to payment of a fine and will be obligated to remit all payroll deductions (both the University's portion and the employee's portion) pertaining to sums paid to the individual under the contract.

The IRS has traditionally applied a "twenty factor" analysis in determining how a worker should be classified. Under that analysis, the following are regarded as factors indicating that the worker is an employee: payment of the individual by the hour rather than payment by lump sum; continuity of the relationship (even if "on-call" in nature); the employer's setting the hours of work; the individual's working on the employer's premises, when the work could be performed elsewhere; the employer's payment of business/travel expenses; the employer's furnishing of tools and materials; a requirement that the individual work full-time; the employer's providing of training for the individual; the employer's providing of detailed instructions regarding how the work is to be performed; the integration of the individual into the employer's work environment and workforce; and a requirement that the services be provided personally by the individual (as opposed to another worker that the individual may engage to provide the services). These indicators focus generally on the degree of control exercised by the employer over the performance of the worker. For an employee, the employer exerts a high degree of control over the manner in which the duties are performed, whereas for an independent contractor such control is minimal. This approach is consistent with the common law rule according to which the key determinant in classifying a worker is the degree of control reserved to the employer.

In this context, there are two situations in which use of the CPS, with an attendant classification of the worker as an independent contractor, is highly suspect. First, if current UAH employees are performing the same services on campus as those set forth in the CPS for the worker, such similarity is a strong indicator that the worker should be classified as an employee. Second, if the worker will perform duties formerly performed by a UAH employee, the worker should almost always be regarded as an employee. This is particularly true where the worker was previously a UAH employee, resigns, and is then engaged by contract to carry out the same duties and responsibilities he/she previously had. As a final, related note, it is inappropriate, for reasons relating to this classification issue as well as for other reasons, to try to circumvent a hiring freeze or limitation by labeling the provider of the desired services an "independent contractor" and using the CPS as the contracting document.

B. University Employee/Retiree Limitations

A CPS involving a University staff or faculty member as the contractor must be entered

into in conformity with the limitations on consulting found in the *Staff Handbook* under the heading “Outside Employment and Consulting” and in the *Faculty Handbook* at paragraph 9.3, “Consulting.” In addition to requiring prior approval of the consulting activity, both *Handbooks* require that the consulting activity not interfere with the employee’s primary duties and that there be no conflict of interest. In the case of staff employees, the consulting activity must not be performed during regularly scheduled work hours, unless the supervisor approves vacation leave, personal leave, or leave without pay.

In addition, § 36-25-1, *Alabama Code*, provides that no public employee, or a member of the household of the public employee, and no business with which the person is associated shall enter into any contract to provide services where payment will be made in whole or in part out of state funds unless the contract has been awarded through a process of competitive bidding and a copy of the contract is filed with the Alabama Ethics Commission. Contracts exempt from the Bid Law are also exempted from the provision.

Finally, there are additional limitations on the performance of personal services by retired University employees. These limitations are highly fact-dependent and their complexity precludes their discussion here. In simplest terms, those retirees who did not work “in a position of authority” may perform personal services for the University on a contract basis, subject to certain dollar limitations.

III. Completion of the Contract for Professional Services Form Contract

A. The Approval Block

The CPS contains at the upper left a block with information to be provided by the user. It is important that this block be accurately completed. This includes ensuring that the “General Terms and Conditions” have been provided to the contractor and the block checked to reflect that this has been done.

B. The Heading

The next blank to be completed is the identification of the contractor. In the case of an individual contractor, identification will consist of the contractor’s first name, middle initial (if any), last name, and current mailing address. If a partnership is the contractor, enter the name under which it operates, the names of the partners, and its principal place of business. If a corporation is the contractor, the name under which it is incorporated, along with its principal place of business, should be entered. The name of the contractor, as entered here, must be consistent with the signature block for the contractor on the reverse of the CPS.

C. Paragraph 1, “Scope of Work”

The next portion to be completed is the “Scope of Work.” This is the portion of the CPS that describes the nature of the services to be provided. It should be sufficiently detailed to permit a stranger to the contract to determine what services are to be rendered based upon

reading the CPS and any documents referenced in the “Scope of Work” and attachments. This is also the place to establish requirements for any milestones for the performance of the contract. For instance, an oral report of the results of a study might be required by a certain date, with the final written report due by a later specific date.

The “Scope of Work” can incorporate other documents by reference. For instance, a CPS to obtain referee services for a series of intramural athletic contests could include the following language: “Provide referee services for intramural basketball games, using the UAH Intramural Basketball Rule Book. Such services shall be provided for each of the games reflected in the attached schedule, which is hereby incorporated and made a part of this contract.”

It is also permissible to type the entire “Scope of Work” on a separate page using a word processor and then incorporate it by reference. Incorporating by reference a separate “Scope of Work” document is best reserved for use in cases where an elaborate description is needed. To do this, a plain sheet of paper should be headed “Scope of Work” and the “Scope of Work” portion of the CPS should contain the following language: “See the attached ‘Scope of Work,’ which is hereby incorporated and made a part of this contract.”

D. Paragraph 2, “Compensation”

The next portion to be completed are the provisions relating to “Compensation.” The most common terms for compensation are provided for on the CPS, so that in most cases the user need only place an “X” in the blank in front of a particular provision and insert the correct dollar amount. There is also an entry for “Other” where unusual or complicated compensation terms may be set forth. As in the case of the “Scope of Work” portion, complex compensation terms may be incorporated by placing an “X” in front of “Other,” and entering in the blank following words such as: “See the attached document entitled ‘Compensation,’ which is hereby incorporated and made a part of this contract.” The compensation provisions can then be prepared using a word processor on a piece of paper that is headed “Compensation.”

E. Paragraph 3, “Term”

The next portion to be completed establishes the term (period of time) within which the services are to be performed. Be sure that any dates mentioned in the “Scope of Work” fall within the starting and ending dates entered in the “Term” section. It is also necessary to keep in mind that a CPS can only obligate payment of money for work performed within the same fiscal year within which it is signed. If it is necessary to establish a contract term that crosses into the next fiscal year, it will be necessary to add a clause that conditions payment in the future fiscal year upon the availability of funds appropriated by the legislature. This is sometimes called a “funding out” clause.

To add a “funding out” clause, wording such as the following should be entered in the

“Additional Provisions” portion of the CPS, or this wording can be incorporated by reference as previously discussed:

Failure of Appropriations. The University believes that funds can be obtained sufficient to pay all monies due during the Term of this Contract and hereby covenants that it will use its best efforts to pay such monies. It is the University's intent to pay monies due for the full Term if funds are legally available therefor. If no funds or insufficient funds are appropriated and budgeted in any fiscal period for monies due under this Agreement, then the University will immediately notify the Contractor of such occurrence and this Agreement shall terminate on the last day of the fiscal period for which appropriations were received without penalty or expense to the University of any kind whatsoever, except as to the portions of monies herein agreed upon for which funds shall have been appropriated and budgeted.

F. Paragraph 6, Additional Provisions

The next portion to be completed is that entitled “Additional Provisions.” As previously noted, this is an appropriate location for inserting or incorporating by reference a “funding out” clause. It is designed to provide a location to enter any special terms not dealt with by the “General Terms and Conditions.” These could require, for example, that the contractor maintain special insurance coverage, professional certifications, or licenses during the term of the contract.

G. Signature Blocks

The signature block is the last portion to be completed. As noted earlier, the contractor's signature block must be consistent with the identification of the contracting party in the heading of the CPS. The Social Security Number of an individual or the Tax Identification Number of a corporation must be entered, as appropriate, in order for the University to properly report the compensation paid under the CPS.

In the case of a contract with an individual, the first name, middle initial (if any), and last name previously entered in the heading are typed/printed beneath the line on which the contractor signs. It is important that the contractor signs his/her name as it is typed. If the typed name reads “John H. Jones” and the contractor signs “Jack Jones,” it will be necessary to return the contract for the contractor to sign it as “John H. Jones.”

In the case of a contract with a partnership or corporation, the individual signing the contract must indicate his/her status within the organization. A partner would indicate “Partner,” while an officer of a corporation empowered to sign contracts obligating the corporation would indicate the office held, such as “President.” The appropriate UAH Vice President will sign the CPS on behalf of the University.

The Office of Counsel at 824-6633 is always available to assist with any questions regarding completion of the CPS.

