Introduction

A Contract is an agreement between Barnard College and another party that is intended to have a binding obligation and be legally enforceable. Contracts contain the terms and conditions under which goods or services are furnished by either party. Effective Contracts provide a common understanding and the essential terms and mutual obligations defined within the agreement that exist between the parties. In addition to formal documents commonly understood to be Contracts, documents such as purchase orders, service agreements, leases, and letters or memoranda of agreement, understanding, and intent are Contracts if there is a College interest at stake and something of value is exchanged.

Below you will find a discussion of the various parts of a legal contract along with "pre-approved language" for some paragraphs. "Pre-approved language" is specific language that you may use in a Barnard Contract. Any alteration of pre-approved language, other than the filing in of blanks, must be approved again by one of the officers listed above.

1. Flow Charts on Contracting at Barnard

   Is a Contract Necessary?

   ![Flowchart Image]
First Steps in Contracting at Barnard

1. Decide to Purchase a Good or Service (verify funds are available)
   - Working with the Purchasing or other Department (i.e., IT, RM, etc.) Choose Vendor (using Bidding process if necessary)
2. Determine if Contract is Necessary (see flowchart)
3. Contract Reviewed by Department Chair, Dean, or VP
4. Negotiate Document
5. Send Contract to Director of Purchasing for review with Checklist
   - Director of Purchasing determines and facilitates, if necessary, additional review and approvals (i.e. RM, IT, GC, etc.)

Key

- GC = General Counsel
- RM = Risk Manager
- IT = BCIT
2. **Contract Recitals**

Sometimes it is important to list a few sentences about why the agreement is being entered into.

Sample language:

Whereas the parties agree they want to do business together ...

Whereas Company represents that it has the skills and personnel required by Barnard College to accomplish ...

Therefore the parties agree to the following terms and conditions:

Please ensure Recitals are accurate.

3. **Basic Contract Terms and Conditions**

All contracts should contain the basic information necessary to understand the intent of the parties. This section of the contract is generally the part that is negotiated between the Barnard College
Representative and the Other Party’s representative. Below is a list of the issues that should be considered and reviewed for accuracy:

1. The names of the parties;

2. The dates, or term of the agreement, and any intent to renew;

3. The responsibilities and obligations of the parties;

4. The terms of payment, if any;

5. The procedure for early termination of the agreement;

6. A signature line for the authorized individuals executing the agreement.

4. Specific Clauses Included in Most Agreements

1. Indemnification.

An indemnification clause is designed to shift the risk of something going wrong to one party or another. To indemnify or “hold harmless” is to agree that if one of the contracting parties or a third party suffers damages (physically or in their business) as a result of the activities in the contract one party will accept the financial responsibility for the damages as a matter of contract. Sometimes indemnification clauses include payment of legal costs associates with defending against a lawsuit from a third party.

Sometimes indemnity clauses do not actually contain the word “indemnify” but may contain language such as “the College is responsible for damages” or “the College will reimburse the other contract party for...”. Additionally, clauses that read “Barnard College guarantees” or “Barnard College warrants” may also be construed as creating an indemnification.

Pre-approved language:

To the fullest extent permitted by law, Other Party shall defend, indemnify and hold harmless College, its officers, employees, current and former trustees, agents and representatives from and against any and all claims, demands, damages, liabilities, expenses, losses of every nature and kind, including but not limited to attorney’s fees and costs, (collectively, “Claims”) sustained or alleged to have been sustained in connection with or arising out of the performance hereunder of Other Party, its agents, employees, subcontractors and consultants, even in the event College is alleged or found to be partially negligent. However, Other Party shall not be obligated to so indemnify College in the event College is proven to be solely negligent.

Any changes to indemnification must be approved by the General Counsel.
2. **Insurance**

**Clauses requiring Barnard College to provide proof of insurance**

The College requires certain levels of insurance coverage to be provided by other parties contracting with the College. The coverage required varies depending on the type of work, the level of risk to College buildings and people surrounding the work, and the amount of the contract. Questions about the College’s insurance requirements should be directed to the Gail Beltrone, VP Campus Services, Risk Manager.

**Clauses requiring Barnard College to provide proof of insurance**

Contract provisions calling for Barnard College to carry specific types or amounts of insurance or requiring the College to provide a Certificate of Insurance may require insurance coverage amounts in excess of our actual policies. Before agreeing to provide insurance please contact, Gail Beltrone, VP Campus Services, Risk Manager.

Pre-approved language:

*To be provided by Gail.*

3. **Choice of Laws/Governing Law**

Contracts often contain a clause saying which state’s laws apply to the interpretation and construction of the contract. Each state has law that will determine which state’s law actually applies when there is no such clause and the result depends on the circumstances. Therefore, it is strongly advised that such paragraphs be removed from any contract signed on behalf of the College UNLESS the law of New York is used. Before agreeing to the law of a state other than New York, contact Jomysha Stephen, General Counsel.

Pre-approved language:

*All disputes regarding the construction, interpretation and the parties’ obligations under this Agreement shall be governed by the laws of the State of New York, notwithstanding any of that state’s laws to the contrary. The venue and jurisdiction for the resolution of any such disputes shall be in the State or Federal courts located in the state of New York.*

4. **No Assignment**

This paragraph prohibits either party from legally assigning to another their own obligations to perform requirements of the contract unless written consent is given to the assignment. This is an important clause to have in most contacts.

Pre-approved language:
Neither party shall assign or delegate its rights and obligations under this Agreement without the prior written consent of the other party.

5. **Severability and Savings Clause**

This paragraph states that if a part of the contract is legally interpreted in a way that makes it illegal to enforce, the rest of the contract will remain legally enforceable.

Pre-approved language:

The terms of this Agreement are severable such that if any term or provision is declared by a court of competent jurisdiction to be illegal, void, or unenforceable, the remainder of the provisions shall continue to be valid and enforceable.

**Or**

The invalidity in whole or in part of any provision of the Agreement shall not affect the validity of other provisions.

6. **Relationship of the Parties/Independent Contractor Status**

This paragraph states that the parties are not creating an employment or agency relationship with each other. It allows each party to only be responsible for its own performance without becoming responsible for the actions of the other party as a matter of law. This clause also guards against the other party alleging that the contract constituted a joint venture or other employment arrangement that would make certain employee benefits and insurance coverage available to the contracted party.

Pre-approved Language:

Other Party is an independent contractor and not an employee or agent of Barnard. Other Party shall be solely responsible for any unemployment or disability insurance payments, or payments that may be required by Federal, State or local law with respect to any sums paid to Other Party hereunder. Other Party shall not be entitled to any College Employee benefit of any nature whatsoever. Furthermore, the arrangements contemplated by this agreement shall not be deemed to constitute a partnership or joint venture between Other Party and Barnard College.

7. **Force Majeure**

This paragraph is important especially when the contract deals with conduct that needs to occur in a timely fashion or on a date certain in order to achieve the full value of the agreement. The language below does not favor one party over the other and does not provide for any ability to get the contract performed.

Pre-approved Language:

In the event that either party is unable to perform its obligation under this Agreement as a result of a force majeur, neither party shall be liable to the other for direct or
consequential damages resulting from lack of performance. “Force Majeur” shall mean fire, earthquake, flood, act of God, strikes, work stoppages, or other labor disturbances, riots or civil commotions, litigation, war or other act of any foreign nation, power of government, or governmental agency or authority, or any other cause like or unlike any cause above mentioned which is beyond the control of either party.

8. Non-Waiver

This paragraph allows each party to make it clear that failure to enforce the breach of one provision of the contract does not waive the right to enforce the breach of other provisions of the contract.

Pre-approved Language:

Either party’s failure to insist upon the performance of any term of the Agreement shall not be construed as a waiver of that party’s present or future right to such performance and each party’s obligations in respect thereto shall continue in full force and effect.

9. Notice

This provision is needed in every contract that has language in it calling for one party to give notice to the other. It clearly states how to give notice and to whom. Especially if there is a provision for renewal of the term, a way of terminating the agreement prior to its termination date, or a need to have a contact to discuss performance, this paragraph should be included.

Pre-approved Language:

Any notice under this Agreement shall be in writing and be delivered in person or by public or private courier services or certified mail with return receipt requested or by facsimile. All notices shall be addressed to the parties at the following addresses or at such addresses as the parties may from time to time direct in writing;

College:  
[Department Contact]  
Barnard College  
3009 Broadway  
New York, NY 10027  
Phone: (212) 854-

With a copy to:  
Office of the General Counsel  
Barnard College  
3009 Broadway  
New York, NY 10027  
Phone: (212) 854-2088

Consultant/Vendor:  
[Enter Full Address of Consultant/Vendor]

Any notice shall be deemed to have been given on the earlier of: (a) actual delivery or refusal to accept delivery, (b) the date of mailing by certified mail, or (c) the day facsimile delivery is verified. Actual notice, however and from whomever received, shall always be effective.

10. Entire Agreement
This paragraph negates the legal effect of any agreement to do something that is not included in the written document. This is very important to include when negotiations have occurred over e-mail, telephone, and/or letters leading up to a final signed agreement.

**Pre-approved Language:**

This Agreement constitutes the entire agreement and there are no oral or other representations regarding the subject of this Agreement that are binding to either party. All changes to this Agreement must be signed in writing, signed by both parties. It is understood and agreed that e-mail correspondence shall not constitute “a writing” to this agreement unless expressly included herein.

11. **Signature Authority**

This paragraph prevents someone who is not authorized to sign a contract from binding Barnard College or the other party to the contract.

**Pre-approved Language:**

The parties warrant that they have the authority to enter into this Agreement and that entering into this Agreement is not restricted or prohibited by any existing agreement to which they are parties.

**Or**

The individual signing below hereby represents and warrants that s/he is duly authorized to execute and deliver this Agreement on behalf of Other Party and that this Agreement is binding upon Other Party in accordance with its terms.

5. **Clauses Not Permitted**

Any contract containing these clauses should be sent to the Director of Purchasing for review.

- Automatic Renewal
- Limitation of Liability
- Exclusivity
- Liquidated Damages
- Right of First Refusal

1. **Automatic Renewal**

The College does not allow contracts to contain an automatic renewal clause unless they have a provision permitting the agreement to be cancelled at will, which could include a specified number of days’ notice period prior to cancellation.

**Sample of an Acceptable Clause:**

This contract will renew automatically unless written notice of cancellation is received 30 (60, 90) days in advance of the contract anniversary date. The College has the right to
terminate this Agreement at any time for any reason or no reason with 30, (60, 90) days written notice.

2. Limitation of Liability

The College does not allow a contracting party to limit their potential liability except in rare or specific circumstances. All rights of recovery against others are automatically transferred to Barnard’s Property and Liability insurance carriers. Limiting this recovery could adversely impact the College’s insurance coverage.

Sample of Unacceptable Limitation of Liability Clauses:

The Contractor shall not be liable for any loss, damage, claim or expense greater than the value of the contract.

If we must permit the Contractor to limit their liability, following are samples of wording that might be acceptable, depending on the circumstances. Always check with the Director of Purchasing before accepting a limitation of liability clause.

Sample (1)
Each party’s liability to the other shall be limited to the amount of insurance carried by the party that may be applicable to such claims as may arise or to the fees paid for the past twelve months under the agreement, whichever shall be greater. Nothing in this limitation shall be construed to imply any limitation of liability with respect to any third party who may make a direct claim against either the College or Contractor.

Sample (2)
With respect to first party property damage claims, Contractor’s liability shall be limited to the amount of the Owner’s Property Insurance deductible or self-insured retention, whether such retention is funded by internal reserves or the Owner’s captive insurer.

Sample (3)
With respect to third party liability claims made against the College because of the acts or omissions of the Contractor, the liability of the Contractor shall be limited to the total value of insurance that may be applicable to such claims, regardless of any deductible amounts or whether or not the Contractor or the College is paid by the Contractor’s insurance. If the claim is not insured, the Contractor’s liability shall be limited to $1,000,000 or all fees paid to the contractor, whichever is greater.

3. Exclusivity

The College needs to be very careful when awarding contracts that promise the vendor that they will be the exclusive vendor for the goods and services to be provided under contract. Such an award may conflict with a contract that the College has already entered into in a different department or division, or it may conflict with other operation needs. Exclusivity agreements require an institution-wide awareness of contracts on campus, and may require fine tuning over time. No department may agree to exclusivity without the approval of the Director of Purchasing.
4. **Liquidated Damages**

When contracting for goods or services, the College does not ever want to be in the position of promising liquidated damages if it cancels the contract for any reason or no reason. Very often the contract will not use the term “liquidated damages”, but the defining language may be found under “Remedies”, “Breach of Contract”, “Termination” or untitled.

In general, there are no acceptable liquidated damages clauses. We would seek to negotiate any such clause down to provide payment only for actual costs or incurred expenses, plus any amount actually due for services or goods rendered.

**Sample of Unacceptable Liquidated Damages Clause:**

In the event this agreement is breached by College and default declared by vendor, College does agree to pay vendor as liquidated damages a sum equal to one-half of the total average weekly charge in effect on the week of the breach multiplied by the number of weeks remaining under the term of this agreement. Liquidated damages are due immediately upon breach of this agreement.

6. **Right of First Refusal**

The “Right of First Refusal” is often found in service contracts. In short, this clause gives the vendor the right to stay in place as the contracted vendor as long as it can match any competitor’s price and terms. It can be very problematic if the College wants to extricate itself from a service relationship gone sour and it creates difficulties for the College in bidding its business in the long run – companies do not want to go through the time and expense of bidding an agreement if they know their quote will be given to the incumbent. If you encounter such a clause in a vendor contract, you should attempt to remove it from the contract or it should at least be negotiated and limited to an agreement to only agree to negotiate exclusively with the vendor for a limited period prior to the expiry of the contract, and/or to permit vendor the right to participate in and subsequent re-bid/RFP of the contract as any other vendor, as long as the contract has not been terminated for cause and the vendor is not in breach of the contract.

**Following is a sample acceptable alternate clause:**

Provided that the agreement is still in effect as of [six months prior to the expiry date], the College will, for a period of 90 days commencing on that date, (1) discuss with the vendor the possibility of an extension or replacement of this agreement and (2) refrain from seeking competitive proposals from other parties. After such period, the College will be free to seek competitive proposals from and to negotiate with any person or entity providing that the vendor shall...