Contracting Issues Under UPP 1-06
Issues to be Covered

1. Speaker Agreements
2. After-the-Fact Contracting
3. Master Agreements
4. Statements of Work vs. Bilateral Agreements
5. Specificity in Drafting Statements of Work
6. Questions, Suggestions, Complaints
Speaker Agreements—In General

- Speaker agreements appear to have created the most difficulty in implementation of the changes to UPP 1-06
- In part, this is because of the need to deal with the Non-Resident Entertainer Withholding requirement under Wisconsin state law
- In part, this is because OGC and Finance tried to make the process a little simpler and, in doing so, changed long-standing practices that had been working pretty well
- If we take the process step-by-step, speaker agreements will become significantly easier
Speaker Agreements—Questions to Answer

You need to know the following before you get started with the agreement:

• Is this presentation being made as part of a for-credit course offering limited to enrolled students and faculty, or is it instead a one-time presentation being made available to a broader audience not part of a for-credit course?

• Will the speaker accept the University’s standard contract language?

• What is the total compensation expected to be paid, including stipend or honorarium, airfare, local hotel costs, meals, and local travel expenses?

• If the total compensation exceeds $2,500, is the speaker a Wisconsin resident, a U.S. resident from outside Wisconsin, or a resident of a foreign country?
Speaker Agreements—For-Credit Presentations

If the presentation being made as part of a for-credit course offering limited to enrolled students and faculty, special agreements not available on the OGC Forms Web site are required. **Do not use the standard speaker agreements for this purpose.**

The Wisconsin Department of Revenue has tried in the past and may try in the future to charge the 6% withholding obligation on the University if you use the speaker agreements for presentations made as part of a for-credit course limited to enrolled students and faculty.
If this is a one-time presentation being made available to a broader audience not part of a for-credit course, you will need to use either a University Purchase Order with the Speaker Statement of Work (SOW) or one of the standard agreements available on the OGC Forms Web page at http://www.marquette.edu/ogc/forms/index.shtml and a University Purchase Order if over $1,000.

Which of these you use depends on the total amount of compensation to be paid to the speaker, the state and country of residence of the speaker, and whether the speaker will accept the University’s standard contract language.
Speaker Agreements Under $1,000

If the total compensation expected to be paid, including stipend or honorarium, airfare, local hotel costs, meals, and local travel expenses, is less than $1,000, use the Speaker Agreement under $1,000 from the OGC Forms Web page. No changes to the form agreement are permitted. All blanks with asterisks (*) must be completed.
Speaker Agreements Under $1,000

No OGC review and no University Purchase Order are required. Get the speaker added to MFS as a vendor if necessary, have the speaker complete a Form W-9, have the person with authority to obligate the funds sign the Agreement, and send the completed Form W-9, Agreement, and completed Direct Invoice Voucher (DIV) to Accounts Payable.
Speaker Agreements Under $2,500

If the total compensation expected to be paid, including stipend or honorarium, airfare, local hotel costs, meals, and local travel expenses, is less than $2,500, use the Speaker Statement of Work from the OGC Forms Web page and a University Purchase Order. No changes to the form SOW are permitted.
Speaker Agreements Under $2,500

The Speaker SOW with a University Purchase Order does not require OGC review. Get the speaker added to MFS as a vendor if necessary, fill out the Statement of Work (all fields with an asterisk must be completed and a Form W-9 must be on file), have the speaker sign the SOW, have the person with authority to obligate the funds sign the SOW, create a purchase order, and send the SOW to Purchasing.
Speaker Agreements Over $2,500

If the total compensation expected to be paid, including stipend or honorarium, airfare, local hotel costs, meals, and local travel expenses, is greater than $2,500, use the Speaker Agreement from the OGC Forms Web page and a University Purchase Order. OGC review is required.

If the speaker requires changes to the Speaker Agreement, or if the speaker requires his or her own form of agreement to be used, the requested changes or form of agreement to be used must be identified when the materials are submitted to OGC.
Speaker Agreements—Total Compensation

Be sure to calculate total compensation correctly.

You may choose to estimate expenses, including the amount of expenses in the stipend, and let the speaker pay his or her expenses directly. If you do this, list only the total amount to be paid under the stipend amount, which should match the Total Compensation amount.

You may choose to estimate expenses and pay them directly on behalf of the speaker. If you do this, correctly estimate the expenses using actual quotes and list all airline, hotel, and other expenses to be reimbursed on the Speaker Agreement and list the total under Total Compensation. Obtain receipts from the speaker and make arrangements for payment as normally required.
Speaker Agreements—Non-Resident Entertainer Rider

If the total compensation expected to be paid, including stipend or honorarium, airfare, local hotel costs, meals, and local travel expenses, is greater than $3,200, and the speaker is not a resident of the State of Wisconsin, also include the Non-Resident Entertainer Rider from the OGC Forms Web page with the Speaker Agreement. OGC review is required.
Speaker Agreements—Non-Resident Entertainer Rider

Get the speaker added to MFS as a vendor if necessary (a completed Form W-9 must be on file. Fill out the Speaker Agreement and Non-Resident Entertainer Rider (all fields with an asterisk must be completed), have the speaker and a person with the authority to obligate funds sign the Speaker Agreement, have the person with authority to obligate the funds sign the Speaker Agreement, and send the Speaker Agreement with a Contract Processing and Approval Form to OGC. Once OGC has approved, create a purchase order and send the Speaker Agreement to the Purchasing Department.
After the speech or presentation has been made, be sure to receive on the Purchase Order in MFS. The check will be mailed to the speaker after the event. Should a check be requested for hand delivery to the speaker on the day of the event, all of the required documentation must be on file in Accounts Payable by at least 10 days before the event.

In lieu of an invoice, send a copy of the contract with the University Purchase Order number posted to the first page to Accounts Payable. Indicate the dollar amount to be paid, because some contracts have more than one payment.
After-the-Fact Contracting

OGC will not review or approve agreements for which goods have already been delivered or services have already been completed. At this point, if the provider of the goods or services wishes to be paid, the provider will have to accept the standard terms and conditions on the applicable University Purchase Order.

Do not submit agreements for OGC review where you know that goods have already been delivered or services have already been completed. If for any reason it does not appear that a University Purchase Order is not appropriate to establish payment authority and provide any applicable terms and conditions for the purchase of the goods or services, discuss the situation with an OGC attorney.
Master Agreements

Master Agreements are an excellent way to reduce the number of contracts forms that must be prepared and that require OGC review.

Consider Master Agreements with respect to any vendor with whom you (or you together with other University offices and operations) will use three or more times over the course of a fiscal year. Most commonly, the University has Master Agreements with local hotels and restaurants at which the University hosts meetings, receptions, or activities.
Master Agreements—Setup Options

Master Agreements can be set up three ways:

If the vendor will accept the University Purchase Order terms and conditions, a Master Purchase Order may be issued in the full budgeted amount for purchases from that vendor.

If the invoices under the Master Agreement are all to be paid out of a single RC, there can be one Master Agreement and a single University Purchase Order that will authorize payment of all invoices under the Master Agreement.
Master Agreements—Set-up Options

If the invoices under the Master Agreement are paid from more than one RC, there can be one Master Agreement against which Orders are prepared and signed, and separate University Purchase Orders are issued to authorize payment for each individual order.

OGC can assist in preparing the proper form of any Master Agreement that you might wish to have.
Statements of Work vs. Bilateral Agreements

Bilateral agreements are the typical contracts negotiated between two contracting parties and signed. Under UPP 1-06, all bilateral contracts that provide for payments to or by the University in amounts over $1,000 or that do not use standard form University agreements on the OGC Forms Web page require OGC review and approval before becoming final.

Statements of Work are the forms available on the OGC Forms Web page that provide the details of goods or services to be provided to, and paid for by, the University pursuant to a University Purchase Order. Because the terms and conditions are already pre-written and are limited to pre-approved transactions, no OGC review is required.
Specificity in Drafting Statements of Work

Even though no OGC review is required, it is necessary that Statements of Work be reasonably specific in terms of the who, what, where, when, and how of the work to be performed, for three reasons.

First, because Marquette is a tax-exempt, not-for-profit educational institution, it may only pay the “fair value” of the goods or services provided in support of its educational mission. The SOW for every contract must therefore not only provide sufficient detail to establish its connection to the University’s educational mission but it must also specify the work so that an auditor can determine whether the amount to be paid is reasonable and fair under the circumstances.
Specificity in Drafting Statements of Work

For example, many consulting agreement Statements of Work specify a fixed amount to be paid, have no defined deliverable (such as a report), and, while they identify the subject matter of the consulting engagement, fail to specify exactly what the consultant is supposed to do. These SOWs will create problems in an audit.

Start by answering all of the Who, What, Where, When, and How questions of the engagement. If the details cannot be determined at the time that the SOW is being prepared, use an hourly rate with a not-to-exceed amount instead of a fixed price.
Specificity in Drafting Statements of Work

Second, the University is liable for FICA taxes and for withholding additional FICA taxes unless the agreement is for an “independent contractor” and not for an “employee.” The IRS looks at several factors to establish an independent contractor, but one of the most important is whether the engagement has a defined scope of work that the independent contractor can perform without detailed oversight by the party paying for the work. If the SOW fails to specify exactly what work is to be performed, the IRS will conclude that the independent contractor is really an employee and hold the University liable for employment-related taxes.
Specificity in Drafting Statements of Work

Third, the University cannot refuse to pay the independent contractor for breach of contract or default unless the SOW provides in reasonable detail the activities that the independent contractor was required to perform. The University cannot establish breach unless it can show first that there was a contractual obligation to perform a specific activity or task, that it was not performed, and that the University suffered damages as a result. OGC has been forced to advise University offices and colleges in the past to pay vendors who have failed to perform as expected because the SOWs in their agreements failed to specify the specific things that the independent contractors were required to complete.
Questions, Suggestions, or Complaints?