

Know the Path, Avoid the Pitfalls: Arranging Contracts for E-Resources

Thursday, March 7th

10:00 pm - 11:00 am (EST)

Objective: From considerations of artificial intelligence, to non-disclosure ("NDA"), to mergers of academic institutions, contracts for e-resources are some of the most complex agreements contracts libraries have to negotiate. This sixty-minute session will review the essential elements and hidden risks of contracts for e-resources. Written materials will include sample RFP language, an assessment checklist, and sample contract language.

This session will cover:

- A review of institutional priorities for e-resource contracts (including ethics, safety, privacy, service stability, balance of liability, assignment, budget contingencies, communications, breach/disruption response, confidentiality, and intellectual property)
- How to assess and inventory your institution's priorities for e-resource contracts
- How to develop RFPs for e-resources that turn priorities into procurement criteria
- How to assess if vendor proposals meet stated criteria
- How to ensure criteria are confirmed in final contracts

Who should attend: anyone who is responsible for the purchase of e-content including procurement officers, directors, and library media specialists from library systems, academic libraries, public libraries and school libraries. The session will consider the perspectives of institutions bound by state procurement requirements, as well as those with fewer constraints and resources.

Presenter: Stephanie "Cole" Adams (she/her).

Introduction

I was admitted to practice law in 2001 and have been working with the drafting and negotiation of e-resource contracts for educational institutions and libraries now for over 20.

During that time, I have also worked on issues such as:

- Contract litigation in state and federal court
- Copyright litigation in federal court
- Trademark proceedings in federal and state courts, and WIPO
- Trade secret litigation and protection
- NYSED and USDOE education regulatory compliance
- Business terminations
- Bankruptcies
- Risk and liability management during emergency response
- Non-compete and non-solicitation issues
- Student privacy issues (FERPA, ED 2-d)
- Academic integrity matters (both faculty and student)
- Data security compliance and risk management
- User information subpoenas served on higher education institutions during the Napster, DirectTV, and RIAA years (remember those?)
- Subpoenas for library user information (still happening)
- Cooperation contracts for education and library consortia
- Many of the emerging flavors of legal concern related to AI (Except patent-related matters. I don't work on patents)

I rely on all that experience when I am working on a contract for e-resources.

But perhaps the most useful thing I bring to the table when helping a client develop a Request for Proposal (or "RFP") or negotiate an e-resource contract is what I learned working with the CFO of a former employer: Mike Jaszka at Niagara University.

Mike was (and is) a very practical guy. We had a very paisley-vs-plaid relationship; not a lot in common, from politics to how we spent our free time. But as happens in the best of work relationships with diverse teams, mutual respect and common goals helped us work together.

Working with Mike and his team, I learned to coordinate legal advice with the practical considerations of procurement and "getting the job done." This included prep work to develop a budget for not only the cost of contracts but the ancillary costs (and work) that come with them: identifying what exactly is being paid for, developing a plan to obtain a quote for those services (and nothing more), and worst-case scenario preparation.

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These materials are not legal advice; as with all templates pertaining to legal matters, consult your attorney for how the laws and other factors in these materials apply to your institution.

The other person who helped me on this path was Niagara's Library Director, Dave Schoen. Dave always knew (and still knows, I bet) what he wants from a contract, which meant that as the attorney, it was my job to listen to him, and then make sure that contract would deliver for him.

Between Dave and Mike, I worked for many years in a framework that approached e-resource contracts this way:

What is the scope we need?

What are the library ethics governing that scope?

What aspects of the institution's mission govern that scope?

What is the budget for the resource, and for how many years?

What people must be served by this, and does the contract position us to optimally support them?

Is the proposed service and contract compatible with current operations and policy?

What could go wrong? If something goes wrong, could it cause the University harm? If yes, how do we limit that harm?

The skills I sharpened working with Dave and Mike and his team put me on a path for approaching the negotiation of e-resource contracts with a blend of practicality, foresight, and clarity.

This approach has become more important with every passing year, as e-resource vendors and contracts—responding to pressures in the market and good old-fashioned opportunism—continually switch up their approaches to critical contract terms governing privacy, portability, and data security.

With AI has an emerging wild card in the field, along with standard concerns such as what happens during a merger, budget crisis, or bankruptcy, planning and attention to the details in e-resource contracts are critical.

It is my firm belief that a good e-resource contract doesn't start with just comparison shopping; it starts with a library or other institution (or consortium) pre-identifying their needs and putting them into a well-articulated RFP. The RFP should set out, without ambiguity, the ethics, portability, compatibility, privacy, security, back-up, and other protections the library will require from the contract.

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These materials set out how to assess and document your institution's needs, how to distill them into an RFP, and how to assess prospective service contracts for adherence to your institution's priorities.

Whenever possible, it is best to have an e-resource reviewed by an attorney. That said, no attorney (unless they are also a librarian) knows better than a librarian the priorities for a particular contract; to get the best legal advice, the attorney needs input from the client. For this reason, these materials are designed as a series of worksheets, so librarians can fill in the different sections, and share the results with their institution's attorney to develop needs-informed content for the development of a contract or RFP.

I would like to thank ESLN for giving me the opportunity to assemble these materials. I strongly believe that the collective power held by educational institutions and libraries, harnessed properly, can use the power of the market to hold e-resource vendors to the institutional values of user privacy, data security, appropriate data sharing, use of open-source resources, and inter-compatibility of proprietary systems.

Librarians all over the country are working to resist the commercial exploitation of user data--especially when such exploitation is coupled with business tactics (including those put into motion through contracts) that squelch innovation.

I hope these resources can both add to the worthy effort and help in the practical, day-to-day work of arranging for and working with e-resource contracts.

—Cole

Stephanie A. Adams, Esq.
Buffalo, New York
March 3, 2024

Part I: Institutional priorities for e-resource contracts

This section lists standard priorities for e-resource contracts, but not all standards will apply to all institutions, and not all institutions will regard each item that applies to them as a high priority.

The purpose of the below grid is to list the priority, the source of the priority, and to what institutions or people it applies to. When a "priority" is actually a "requirement" (as in, non-negotiable and required by law, or so fundamental to a functional contract that it might as well be), it is noted.

To help you identify which priorities your institution needs to have assurance of in an e-resource contract, there is a column for users to check the box and make a note about the priority. When helpful, this can be filled in and provided to your attorney, who can both verify your answers, and ensure they are supported in the contract.

Chart of standard priorities for library e-resource contracts

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
ETHICS		
<p>Contract should enable adherence to ALA Code of Ethics (https://www.ala.org/tools/ethics).</p> <p>The most relevant provision of the Code may be:</p> <p><i>We uphold the principles of intellectual freedom and resist all efforts to censor library resources.</i></p> <p><i>We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted.</i></p> <p><i>We respect intellectual property rights and advocate balance between the interests of information users and rights holders.</i></p>	All institutions that choose to follow the ALA Code of Ethics.	If applicable, attach a copy.

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
Contract should enable adherence to your institution's unique Code of Ethics or other governing statement of library user rights.	All institutions, or a library within an institution, that adopts its own Code of Ethics.	If applicable, attach a copy.
Contract should enable adherence to any consortium's or other affiliation's unique Code of Ethics, if the services will be available to the consortia or affiliate.	All institutions who participate in resource-sharing with other institutions	If applicable, attach a copy.
Are there any other ethical considerations that the contract must specifically provide for?	Any other ethical requirements that an institution decides apply.	If applicable, attach a copy.
Is there a Code of Conduct or set of terms all vendors must abide by and that applies to this service? (divestment terms, environmental/green commitments, etc.)	Varies per institution.	If applicable, attach a copy.
SCOPE		
Identify the scope of resources to be available through the contract.	This is a fundamental contract provision.	Insert the scope, as thoroughly as possible:
Who is/are the end-user(s) on the e-resources to be obtained?	This is a fundamental contract consideration.	Describe the different types of end-users:

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
What is the desired length of the contract? What is the desired start date of the contract? What is the desired end date of the contract?	These are fundamental contract considerations.	desired length: desired start date: desired end date:
INTERNAL OPERATIONS AND POLICY		
What internal policies must this contract follow? For example: Relevant library policies, ADA, FERPA, data security, DMCA, Fair Use, etc.	All.	List all:
Are there any external funding terms (grants, donations) that will impact use of this contract?	All.	List any relevant grant or external funding:
What personnel or departments will follow this contract to use the service it provides?	All.	List all:
Will any resources need to be spent on training personnel on the e-resource?	All.	If needed, set out the training, and when it could occur, so the contract can accommodate it:
BUDGET & PLANNING		
What is the budget for this contract?	This is a fundamental contract consideration.	

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
<p>Does the budget support a multi-year contract?</p> <p>If not, is a one-year term or annual renewal required?</p>	<p>This is a fundamental contract consideration.</p>	
<p>Is the e-resource to be provided per a strategic plan, plan of service, or other initiative?</p>	<p>This can be important context.</p>	<p>If yes, reference the document and section.</p>
SAFETY and RISK		
<p>Does this contract provide access or function to resources critical to safety?</p> <p>For example: are users pointed to this e-resource for resources on health, emergency response, or routine needs?</p>	<p>This is a fundamental contract consideration.</p>	
<p>Will the vendor have access to any other systems, maintained by either the institution or another party, to allow access to the e-resources?</p>	<p>All.</p>	
<p>What is the desired process for user concerns related to materials available via the e-resource contract?</p> <p>For example: intellectual property concern, plagiarism, illegal content</p>	<p>Any approach should be compatible with applicable library ethics.</p>	
<p>Based on identified risks, what is the level of insurance required of the vendor, and what should it cover?</p>	<p>This should be determined after assessing all risks and what amounts would make the institution whole in the event of a worst-case scenario.</p>	
SERVICE STABILITY/DISRUPTION		

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
<p>What are the potential consequences of service disruption?</p> <p>If the consequences can create harm, what is the expected level of back-up or restoration required?</p>	<p>This is a fundamental contract consideration.</p>	
LEGAL COMPLIANCE		
<p>Does the institution, and therefore access to the e-resource provided per the contract, have to conform to Americans with Disabilities Act (ADA)?</p> <p>Note: Almost all libraries, schools, higher education institutions must follow both the ADA. Further, all such institutions must follow the New York State Human Rights Law, which bars lack of access on the basis of disability. Therefore, accessibility should be assured in any contract for e-resources.</p>	<p>This is an important consideration for legal counsel; if assurance of accessibility is required, the RFP and contract should require it of the vendor.</p>	
<p>Does the institution have to conform to the Family Education Rights Privacy Act (FERPA), and if they do, will the contract enable vendor access to protected education records?</p>	<p>If education records are created or accessed per the contract, the vendor must be so designated per FERPA.</p>	
<p>Does the institution have to follow New York State's SHIELD Act (regarding data security or private information), and will personal or private information as defined by the SHIELD Act be generated by or accessed by the vendor?</p>	<p>This is an important consideration for legal counsel; if such records will be part of the service, the contract must have assurances as required by SHIELD.</p>	
<p>Does the institution have to follow New York State ED 2-d (regarding data security of private information), and will personal or private</p>	<p>This is an important consideration for legal counsel; if such</p>	

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
information as defined by that act be generated by or accessed by the vendor?	records will be part of the service, the contract must have assurances as required by ED-2d	
Will personal data as defined by the European Union General Data Protection Requirement ("GDPR") be generated or accessed as part of this contract?	This is an important consideration for legal counsel; if such records will be part of the service, the contract must have assurances as required by GDPR.	
TRAINING		
What is the level and type of training expected from the vendor?	This is only relevant if training is needed, but it can be critical.	
Will the vendor be on site at your institution for training or other services?	If yes, the contract should address risks created by on-site activity.	
INTELLECTUAL PROPERTY		
<p>Will students or other non-employee users store their intellectual property (works authored by them) with the provider of the e-resource?</p> <p>If so, how is their ownership and control of such content assured by the contract?</p> <p>Generally, in an e-resource contract, such data are "user data" or "student data" and ownership of these data is a critical consideration at the RFP stage.</p>	All.	

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
<p>Will employees who by agreement retain use of their intellectual property (works authored by them) store intellectual property on the e-resource?</p> <p>If so, how is their ownership and control of such content assured by the contract?</p> <p>(Generally, in an e-resource contract, such data are “user proprietary data” and ownership of these data is a critical consideration at the RFP stage.)</p>	All.	
<p>Will your institution store its intellectual property (works authored by the institution and any employees who do not retain their copyrights) with the provider of the e-resource?</p> <p>If so, how is the institution’s ownership and control of such content assured by the contract?</p>	All.	
<p>Does your institution regard all data collectivity generated by its use of the e-resource as property of the institution?</p> <p>Generally, in an e-resource contract, such data are “institutional data” and ownership of these data is a critical consideration at the RFP stage.</p> <p>Ethics, privacy, and certain commitments may merit ensuring institutional data are not exploited by the vendor or any third parties.</p>	All.	
<p>What is the intended use of the e-resources to be obtained via the contract?</p> <p>The contract will need to contain assurance that the vendor has the ability to provide access and use consistent with all intended purposes.</p>	All.	

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
PORTABILITY and COMPATIBILITY		
After termination, does your institution need to be able to migrate institutional data to another service?	If this is important, the contract should provide for this per terms that are operationally and budgetarily feasible.	
Does your institution wish to be able to use other services in conjunction with the e-resource? For example, if you license a database, would you want to use another service to search or database?	This is an important consideration as non-disclosure terms are sometimes used in e-resource contracts and data management contracts to limit inter-operability.	
ASSIGNMENT		
Does your institution want to bar assignment of the contract in the event of a buy-out, merger, or dissolution? In other words, if the company wants to sell or transfer your contract to another provider, is that a problem?	This is an important consideration if your institution carefully vets vendors before agreeing to be affiliated with them.	
SERVICE/COMMUNICATION		
What is the level of service, accessibility, and communication required of the vendor? Does the need for the resource require 24-7 immediate service, or can there be a longer wait time without compromising institutional needs?	All.	
CONFIDENTIALITY		
Does your institution want the terms of its contract to remain private?	Private institutions.	

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
NOTE: Such confidentiality is only feasible if your institution is not subject to FOIL or FOIA.		
PROTECTIONS AFTER TERMINATION		
How is user data purged after termination?	All.	
How is institutional data to be obtained after termination?	All.	
All confidentiality obligations regarding user and institutional data should continue after termination.	This is a fundamental contract provision.	
OTHER		
The content in this table may be used to generate an RFP for an e-resource contract. Please include your other concerns, priorities, and questions for your potential contract and attach any recent articles or research relevant to any of your needs, questions, or concerns.		

A note on working with legal counsel: legal counsel want to ensure their client has a contract that is clear, provides for what the client expects, and is enforceable. By providing the above information, a client helps legal counsel contribute to an RFP that can set the stage for a contract that checks all those boxes.

Part II: How to develop RFPs for e-resources that turn priorities into procurement criteria

If you conduct a search for an e-resource and RFP, and large array of “Requests for Proposals” and summaries of the same turn up.

This makes sense, as “e-resource” is a dynamic term without a standard definition in law. In addition, between state and local government mandates, and grant and donor terms, there is no one way to structure an RFP.

Typically, RFPs are viewed as a way for an institution to set out a scope of service, and then select the most affordable qualified vendor who can provide it.

But an RFP is also a way to lay the foundation, early in the contract process, for contract terms that meet identified institutional priorities.

MODEL RFP FOR E-RESOURCES

1.0 OVERVIEW

The **INSTITUTION NAME** (“Institution”) invites qualified parties (“Respondents”) to submit a quote to provide e-resources per the Objective and Scope set out in this document.

It is desired to have services in place by **DATE, for a term of DURATION, through DATE.**

2.0 OBJECTIVE

The Institution provides e-resources as part of its mission to **INSERT MISSION.**

This request for proposal is for e-resources to be available to **END USER TYPE(S).**

Such provision must be implemented and carried out in a manner that ensures compatibility with **INSERT NAMES AND LINKS TO ALL RELEVANT CODES ETHICS.**

3.0 SCOPE OF WORK – E-RESOURCES

The selected respondent(s) will provide the following e-resources: **INSERT.**

E-resources are to be available on demand, without interruption, via **INSERT**.

All data generated by users and held on Respondent resources is to remain the property of the user, not to be released to any third party without express written permission of Institution and the user.

All data submitted to Respondent per the Institution's contract with Respondent not otherwise owned by an end user is to be the sole property of Institution, not to be released to any third party without express written permission of Institution and the user. All such data must be exportable upon request of Institution; Respondent must list charges for such export if it is to be subject to charge.

Institution will not enter into any terms of confidentiality or exclusivity with Respondent as part of the contract. Final contract may not be assignable by either party without written consent of the other.

Preference may be given to vendors who agree to choice of law, jurisdiction, and venue in New York State.

4.0 SCOPE OF WORK – IMPLEMENTATION AND TRAINING

Under the general supervision of Institution's staff, the selected respondent will **make available the e-resources**.

[Optional] Training for up to # of Institution's staff will be made available as part of the service contract. Training will be **via teleconference AND/OR in person**.

Timing

Provided a contract is reached at least twenty days prior, the selected vendor is expected to make the services available by **DATE**.

5.0 RFP TIMELINE

The Institution aspires, but does not represent or warrant, to follow the below timeline for selection of a qualified vendor.

Event	Date
RFP Issued	DATE
Proposals Due	DATE

6.0 RFP PROCESS CONDITIONS

The vendor agrees to adhere and accept the following conditions:

[INSERT THE STANDARD RFP DISCLAIMERS AND CONDITIONS OF YOUR INSTITUTION]

7.0 PROPOSAL REQUIREMENTS

Each vendor responding to this request shall submit a cover letter signed by a person with authority to bind your company along with answers to all questions listed in section 9.0 below to:

INSERT

If your company is owned or partly owned by a board member, employee, or other influential person at Institution, or a relative of same, please disclose this relationship in the letter.

8.0 RFP SUPPLIER QUESTIONS AND ANSWERS

Please e-mail any questions that you may have pertaining to this RFP to INSERT.

9.0 VENDOR QUESTIONS

Each vendor responding to this request shall submit answers to the following:

- a) What is the legal name of your business?
- b) How is your business organized (corporation, LLC, etc.)?
- c) Are you registered to do business in the State of New York?
- d) Please describe your company’s methods of protecting user privacy and intellectual property.

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- e) What is your plan for back-up of user data and to limit disruptions of service?
- f) What is your plan to stay current with respect to ADA accessibility?
- g) What is your response plan for data breach leading to third-party access or acquisition of user or institutional data?
- h) Who is the primary contact in the event that our institution has a concern about services?
- i) Please describe your company's policy and approach to handling user or third party-submitted content concerns.
- j) Please list if your company is a registered M/WBE in New York.

10.0 SELECTION PROCESS

[INSERT YOUR INSTITUTION'S POLICY]

Part III: How to assess if vendor proposals meet stated criteria and confirm critical requirements are in final contracts

Contract Criteria NOTE: Confirm assurance with legal counsel whenever possible	Section of RFP or Contract in which the Criteria are clearly assured
ETHICS	
Does the contract enable adherence to ALL applicable codes of ethics?	
SCOPE	
Does the contract set out the full scope of services?	
TERM	
Start date:	
End date:	
Duration:	
Does contract auto-renew? If so, for how long?	
RFP (if applicable)	
Does the contract incorporate the RFP and vendor's response? Does it enable termination by Institution if the response was inaccurate?	
PRICE	
Payment(s): Due: Total cost of full contract:	
If signed on behalf of a consortium, is there the ability to alter pricing based on a member leaving the group?	
INTERNAL OPERATIONS AND POLICY	
Is the contract compatible with all previously identified internal policies? For example: Relevant library policies, ADA, FERPA, data security, DMCA, Fair Use, etc.	

Contract Criteria NOTE: Confirm assurance with legal counsel whenever possible	Section of RFP or Contract in which the Criteria are clearly assured
Is the contract compatible with any external funding terms (grants, donations) that will impact use of this contract?	
Does the contract support any required training needed to use the e-resources?	
If signed on behalf of a consortium, is there clarity on who addresses technical concerns?	
BUDGET & PLANNING	
Does the contract stay within identified budget constraints?	
Does the contract require contingent budgeting in the event of service disruption or data breach?	
If needed, is there a contingent termination clause based on revenue loss?	
SAFETY and RISK	
If the contract provides access or function to resources critical to safety, is there a plan in the event of disruption?	
If the vendor will have access to any other systems maintained by either the institution or another party, does the contract indemnify the institution for any risks? If such indemnification is needed, is there adequate insurance to back it up?	
Is the vendor's process for user concerns related to materials compatible with Institution's approach? (Any approach should be compatible with applicable library ethics.)	
Does the proof of insurance (if required) meet the identified criteria?	
SERVICE STABILITY/DISRUPTION	
Does the contract represent and warrant that the vendor has the represented level of back-up or restoration required?	
If the service is critical, is there an alternate identified? Does the contract enable refund or reduction of fees in the event of disruption?	

Contract Criteria NOTE: Confirm assurance with legal counsel whenever possible	Section of RFP or Contract in which the Criteria are clearly assured
LEGAL COMPLIANCE	
Does the contract represent and warrant that vendors services will comply with the Americans with Disabilities Act (ADA) ?	
[Only if applicable] Does the contract address maintenance of education records as required by the Family Education Rights Privacy Act (FERPA) ?	
[Only if applicable] Does the contract represent and warrant that the vendor follows New York State’s SHIELD Act? What is the response plan for data breach?	
[Only if applicable] Does the vendor represent and warrant compliance with the European Union General Data Protection Requirement (GDPR) ?	
Does the contract try to put liability/cost for any violations of the above on the Institution? If so, that should be changed to require the vendor to accept the responsibility (unless the risk is found to be within institutional tolerances). NOTE: This is often buried in a big “as is” LIMIT OF LIABILITY clause; such a clause should be carefully read, and lawyers should push back on the limits. This is often coupled with the attempted use of confidential arbitration and waiver of legal claims.	
TRAINING	
Does the contract provide assurance of the training required?	
If the vendor will be on site at your institution for training or other services, does the contract provide assurance of workers’ compensation coverage and general liability insurance?	
INTELLECTUAL PROPERTY	
If students or other non-employee users will store their intellectual property (works authored by them) with the provider of the e-resource, is their ownership and control of such content assured by the contract?	

Contract Criteria NOTE: Confirm assurance with legal counsel whenever possible	Section of RFP or Contract in which the Criteria are clearly assured
If employees who by agreement retain use of their intellectual property (works authored by them) will store intellectual property on the e-resource, how is their ownership and control of such content assured by the contract?	
If your institution will store some of its intellectual property (works authored by the institution and any employees who do not retain their copyrights) with the provider, is the institution's ownership and control of such content assured by the contract?	
Does the contract expressly state that all data collectivity generated by the Institution is property of the institution ("Institutional Data")?	
Does the contract contain assurance that the vendor has the ability to provide access to and use of content consistent with all intended purposes? For example, if the intent of the service is for students to be able to generate a print copy of an article, it is assured that the vendor has the rights to allow such printing?	
PORTABILITY and COMPATIBILITY	
If your institution needs to be able to migrate Institutional Data to another service after termination, is that provided for?	
If your institution wishes to be able to use other services in conjunction with the e-resource, is it clear that is allowed? NOTE: <i>The language for such a provision will vary greatly depending on the specific need; that is why it is important to identify such needs in the pre-RFP phase.</i>	
ASSIGNMENT	
[If applicable] Does the contract bar assignment by the vendor without written consent of Institution in the event of a buy-out, merger, or dissolution?	
[If applicable] In the event your institution deems it wise, does the contract enable early termination in the event of dissolution of Institution or merger or Institution with another entity?	

Contract Criteria NOTE: Confirm assurance with legal counsel whenever possible	Section of RFP or Contract in which the Criteria are clearly assured
SERVICE/COMMUNICATION	
<p>Does the contract or RFP (if incorporated into the contract) assure the needed level of service, accessibility, and communication required of the vendor?</p> <p>Always try to get direct contact information for a real live human, and their back-up, in the contract or RFP response.</p>	
CONFIDENTIALITY and NON-DISCLOSURE	
<p>Does the contract have a confidentiality clause that could negatively limit your institution's ability to share content and Institutional Data? If so, this should be struck.</p>	
<p>Does the contract have a non-disclosure clause that could limit participation in consortia and resource sharing? If so, this should be struck.</p>	
PROTECTIONS AFTER TERMINATION	
<p>Is there assurance as to how user data purged after termination?</p>	
<p>How is institutional data to be obtained after termination?</p>	
<p>All confidentiality obligations regarding user and institutional data should continue after termination. This is a fundamental contract provision.</p>	
RED FLAGS	
<p>Does the contract contain a clause allowing the vendor to amend the terms from time to time (either with or without notice)? That should be struck.</p>	
<p>Does the contract contain a clause incorporating terms posted at another location (such as on a web site). That should be struck, OR the terms should be added to the agreement, to prevent later lack of clarity or subsequent revision without notice.</p>	
<p>Does the vendor insist on choice of law, jurisdiction, or venue out of your state? This should be considered by legal counsel.</p>	
<p>Does the contract require waiving legal claims in court in favor of confidential arbitration? This can often be to the disadvantage of small customers and should be avoided (unless your institution has a reason to favor it).</p>	

Contract Criteria NOTE: Confirm assurance with legal counsel whenever possible	Section of RFP or Contract in which the Criteria are clearly assured
If your institution has considered a “worst case scenario” that is costly (not always the case for e-resource contracts that can’t disrupt other networks, if the worst-case is unavailability for a day or two), check and make sure damages under the contract aren’t limited to the fees paid for the services.	
FINAL CHECK	
Before the contract is signed, take a last look on the federal court site PACER and the state court site NYSCEF, as well as on consumer sites, for any documentation pertaining to issues with the vendor. You never want to sign a contract the day after a major newspaper has reported something that makes the company no longer someone your institution wants to do business with.	

Conclusion

As we’ll review during the live session, there is no one map that will show all the paths and pitfalls of e-resource contracts. There are just too many variables.

That said, the items in the tables above are the big ones that have been mapped out by libraries and institutions of higher education.

The most important thing is thinking about your library’s needs and priorities before you start reviewing a contract—and **BEING READY TO PUSH BACK**.

Librarians, as ever, are on the forefront of protecting privacy, information access, and data security. Contracts for e-resources are a huge and growing part of this work. By identifying priorities up front and fighting for them (and positioning your lawyers to fight for them), that work continues.

In addition, it is important to **SHARE** your experiences with your colleagues (this is why striking those confidentiality clauses is so important). By creating shared norms for e-resource contracts that center library ethics and priorities, librarians will ensure such protections are standard clauses in the future.

Onward down the path to e-resources... May you find no pitfalls.