
KNOW THE PATH, AVOID THE PITFALLS: ARRANGING CONTRACTS FOR E- RESOURCES

Presentation by Stephanie (Cole) Adams,
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ABOUT THE SPEAKER

Attorney Stephanie (Nickname: Cole) Adams was raised in New Hartford, NY (class of '91), where during high school, she worked at the local public library.

Ms. Adams' law firm, based in Buffalo, offers services to libraries, museums, and other cultural institutions throughout New York State. She is the writer for ESLN's "Ask the Lawyer" service and a frequent presenter on library issues.

Ms. Adams practices law in both state and federal courts of New York.

**PART I:
INSTITUTIONAL
PRIORITIES FOR
E-RESOURCE
CONTRACTS**



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?

ETHICS

Contract should enable adherence to ALA Code of Ethics (<https://www.ala.org/tools/ethics>).

The most relevant provision of the Code may be:

We uphold the principles of intellectual freedom and resist all efforts to censor library resources.

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.

We respect intellectual property rights and advocate balance between the interests of information users and rights holders.

All institutions that choose to follow the ALA Code of Ethics.

If applicable, attach a copy.

<p>Contract should enable adherence to your institution's unique Code of Ethics or other governing statement of library user rights.</p>	<p>All institutions, or a library within an institution, that adopts its own Code of Ethics.</p>	<p>If applicable, attach a copy.</p>
<p>Contract should enable adherence to any <u>consortium's</u> or other affiliation's unique Code of Ethics, if the services will be available to the consortia or affiliate.</p>	<p>All institutions who participate in resource-sharing with other institutions</p>	<p>If applicable, attach a copy.</p>
<p>Are there any other ethical considerations that the contract must specifically provide for?</p>	<p>Any other ethical requirements that an institution decides <u>apply</u>.</p>	<p>If applicable, attach a copy.</p>
<p>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.)</p>	<p>Varies per institution.</p>	<p>If applicable, attach a copy.</p>

		comments
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:
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		
<p>What internal policies must this contract follow?</p> <p>For example: Relevant library policies, ADA, FERPA, data security, DMCA, Fair Use, etc.</p>	All.	List all:
<p>Are there any external funding terms (grants, donations) that will impact use of this contract?</p>	All.	List any relevant grant or external funding:
<p>What personnel or departments will follow this contract to use the service it provides?</p>	All.	List all:
<p>Will any resources need to be spent on training personnel on the e-resource?</p>	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.	
Does the budget support a multi-year contract? If not, is a one-year term or annual renewal required?	This is a fundamental contract consideration.	
Is the e-resource to be provided per a strategic plan, plan of service, or other initiative?	This can be important context.	If yes, reference the document and section.

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>

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
SERVICE STABILITY/DISRUPTION		
<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

Does the institution, and therefore access to the e-resource provided per the contract, have to conform to **Americans with Disabilities Act (ADA)**?

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.

This is an important consideration for legal counsel; if assurance of accessibility is required, the RFP and contract should require it of the vendor.

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**?

If education records are created or accessed per the contract, the vendor must be so designated per FERPA.

<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>	
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<p>Does the institution have to follow New York State ED 2-d (regarding data security of private information), and will personal or private information as defined by that 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 ED-2d</p>	
<p>Will personal data as defined by the European Union General Data Protection Requirement ("GDPR") be generated or accessed as part of this contract?</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 GDPR.</p>	

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

Will students or other non-employee users store their intellectual property (works authored by them) with the provider of the e-resource?

If so, how is their ownership and control of such content assured by the contract?

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.

All.

<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.	

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.

Priority	Applies to	Relevant to your institution? If yes, insert your notes, relevant information, and comments
SERVICE/COMMUNICATION		
<p>What is the level of service, accessibility, and communication required of the vendor?</p> <p>Does the need for the resource require 24-7 immediate service, or can there be a longer wait time without compromising institutional needs?</p>	All.	

CONFIDENTIALITY

Does your institution want the terms of its contract to remain private?

NOTE: Such confidentiality is only feasible if your institution is not subject to FOIL or FOIA.

Private institutions.

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		
<p>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.</p>		



PART II: HOW TO DEVELOP RFPS FOR E- RESOURCES THAT TURN PRIORITIES INTO PROCUREMENT CRITERIA

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**.

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.
- 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.



PART III: HOW TO
ASSESS IF
VENDOR
PROPOSALS MEET
STATED CRITICAL
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?	

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.

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?

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?

<p>[Only if applicable] Does the vendor represent and warrant compliance with the European Union General Data Protection Requirement (GDPR)?</p>	
<p>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).</p> <p>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.</p>	

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?

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? <i>NOTE: 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?

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

Is there assurance as to how user data purged after termination?

How is institutional data to be obtained after termination?

All confidentiality obligations regarding user and institutional data should continue after termination. This is a fundamental contract provision.

RED FLAGS

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.

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.

Does the vendor insist on choice of law, jurisdiction, or venue out of your state? This should be considered by legal counsel.

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).

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.



THANK YOU!