

**A Research Librarian's Guide to
Negotiating E-Resource Contracts in New York State**
Version 1.0

Greetings! This *Guide* is to assist librarians at research and academic institutions with the negotiation of e-resource contracts.

Subscription contracts generally contain numerous standard terms an institution may want to push back on. This *Guide* focuses on provisions related to:

- ✓ Pricing transparency
- ✓ Avoiding redundancy
- ✓ Nondisclosure
- ✓ Privacy
- ✓ Data security
- ✓ Copyright/fair use
- ✓ Creators' rights
- ✓ Accessibility

The *Guide* is arranged in three sections:

- An **Assessment Checklist** for initial assessment of a vendor's standard contract;
- A **Model RFP** for when an e-resource might be subject to competitive bidding;
- A template **Contract Addendum** for modifying a vendor's standard contract to address library-aligned priorities (like privacy). This section also includes model language for presenting the Addendum to a vendor, an in-house purchasing agent, or legal counsel.

Because some organizations have already developed criteria for similar objectives, each resource below includes the ability to add such criteria.

As with all template materials, the Contract Addendum in this *Guide* should be used with legal counsel whenever possible.

Information on how to send feedback to improve the future 2.0 version of this *Guide* may be sent through WNYLRC's *Ask the Lawyer Resources* page.

Thank you.

A. Assessment Checklist

Factor	Why it's important; what can be done	Words to be alert for and/or negotiation tips
<p>Does the contract contain a clause barring disclosure of the contract terms, including pricing?</p> <p>ANSWER: Y / N</p>	<p>This type of clause makes determining the fairness of pricing more difficult.</p> <p>Solution: request removal of clause.</p>	<p>“Disclose” and “[non]disclosure”</p> <p>“Pricing”</p> <p>“Confidential[ity]”</p> <p>“Exclusivity”</p> <p>“You agree not to share the terms of this contract with any third party.”</p>
<p>Does the contract contain a clause allowing the vendor to assign the contract without consent?</p> <p>ANSWER: Y / N</p>	<p>This type of clause makes it more likely the institution could end up with another vendor.</p> <p>Solution: request removal of clause.</p>	<p>“Assignment” and “assignability”</p> <p>“The obligations of this contract may be assigned by the Vendor to a third party.”</p> <p>“If Vendor is purchased, merged with, or otherwise transferred to another company, you agree to the transfer of this contract to that entity.”</p>
<p>Does the contract contain a clause allowing the vendor to share library user information with third parties and/or sub-contractors?</p> <p>ANSWER: Y / N</p>	<p>This type of clause makes it more likely that private user information can be breached or misused.</p> <p>Solution: request removal of clause OR require written disclosure and consent to all third parties.</p>	<p>“Vendor may share your information with sub-contractors and other third parties as needed to provide access to the service.”</p> <p>“Vendor does not sell or grant access to your information/patron information unless it is needed to provide the service.”</p>
<p>Does the contract and/or description of services enable the</p>	<p>The ability to assess if free or already purchased materials are being paid for is critical for</p>	<p>Words that show the contract does enable this:</p>

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<p>library to determine if it is paying for access to redundant materials?</p> <p>ANSWER: Y / N</p>	<p>defending the cost paid for the subscription.</p> <p>Solution: If the contract or service cannot enable this assurance, identify how it can be added prior to signing contract.</p>	<p>“[Vendor] will identify material available without additional charge to customer and not charge any fee for access to such content unless vendor is adding features to such content.”</p>
<p>Does the contact expressly state that it does not limit any right the Library has under Copyright Act Sections 107, 108, and 110, and the Americans With Disabilities Act of 1990 (the “ADA”)?</p> <p>ANSWER: Y / N</p>	<p>This is important for preserving rights of fair use (107), library copies (108), and for a variety of educational and other uses (110).</p> <p>Solution: If the contract or service cannot enable this assurance, it can be added: “Nothing in this Contract is intended to limit any right [Customer] has under Copyright Act Sections 107, 108, and 110 or under the Americans With Disabilities Act.”</p>	<p>“Client will pay pro-rata for access to excerpts.”</p> <p>“Client will not modify, alter, or create derivative works of any content from the service.”</p> <p>“Client will not allow any modification, add-on, or utility that modifies Licensed Content.”</p>
<p>Does the vendor provide assurance of protecting the copyrights of content creators, including but not limited to authors?</p> <p>ANSWER: Y / N</p>	<p>This is important for respecting the rights of authors to be compensated fairly.</p> <p>Solution: If the contract does not provide this assurance, it can be added: “[Vendor] represents and warrants that the authors of content on this [resource type] are properly credited, and content is by permission.”</p>	<p>This is a case of what’s missing: if there is no assurance, explore adding one.</p>
		<p>“Data breach”</p>

Factor	Why it's important; what can be done	Words to be alert for and/or negotiation tips
<p>Does the contract provide assurance of immediate notice to the customer and impacted users in the event of data breach?</p> <p>ANSWER: Y / N</p>	<p>In New York, this is important for compliance with the laws governing data breach (at both private and governmental institutions).</p> <p>Solution: If the contract does not include this assurance, it can be added: "In the event of a data breach resulted in access to or acquisition of user information (name, address, unique user number, contact information) [Vendor] shall notify [Customer] with 24 hours, and shall provide notice to impacted users as required by law in New York."</p>	<p>"Hacking"</p> <p>"User Information"</p> <p>"Client Information"</p> <p>"Confidential Information"</p> <p>"Personal Information"</p> <p>"Library Records"</p>
<p>Does the contract refer to any linked terms?</p> <p>ANSWER: Y / N</p>	<p>This is important because linked terms are often considered part of the contract.</p> <p>If "yes," those terms should be assessed and included in the contract review process, after which they should be stored together with the executed copy of the contract.</p>	<p>Look out for hyperlinks in contracts, invoices, quotes, and proposals.</p> <p>Be alert for references to "General Terms and Conditions" and look out for anything "incorporated by reference."</p>
<p>Does the contract enable the vendor to change the terms without consent, including any linked terms?</p> <p>ANSWER: Y / N</p>	<p>This is important because the vendor could change important items without notice.</p> <p>If "yes," such a clause should be struck or replaced with a requirement that written consent of the customer is required.</p>	<p>"Vendor reserves the right to alter these terms with notice."</p> <p>"Vendor reserves the right to alter these terms without notice."</p> <p>Clauses like this often hide in content that is linked.</p>

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<p>Does the contract use a choice of law, or venue for dispute, outside of New York?</p> <p>ANSWER: Y / N</p>	<p>This is important because the services will be accessed in New York, it is costly to litigate outside of a home state, and New York State law is a reliable basis for protecting privacy and security.</p> <p>If another state (or country) is listed, it should be replaced with New York.</p>	<p>Be alert for references to “choice of law” or “venue” in other states and even other countries.</p>
<p>Does the contract acknowledge that library user records are required by law to be kept confidential?</p> <p>ANSWER: Y / N</p>	<p>This is important because the library will be enabling access as part of library services, and by law (CPLR 4509), all library user records are confidential.</p> <p>Solution: Add the following language: “All user records are confidential and will not be disclosed to any third party without express written consent of the user, or per a duly issued court order or subpoena.”</p>	<p>Awareness of this point is useful for limiting the ability of the vendor to share patron and institutional data with third parties (“Did you know that by law, library records in New York are confidential?”)</p>
<p>What other recital of terms, values, or priorities must this service also meet?</p> <p>ANSWER: Y / N</p>	<p>This is a chance to select any additional collection of ethics or criteria to this list and add consideration of those factors to the process.</p> <p>ATTACH OTHER TERMS</p>	<p>Many academic consortia have articulated standards regarding intellectual property, interoperability, non-exclusivity, security, privacy, and use of AI; your own list can be added to this.</p>

A note about using this checklist with a procurement specialist, sector officer, IT, or in-house legal counsel:

This checklist is designed to alert procurement services, functional officers, IT, and/or contract support services throughout the institution about priorities the library must enforce in this contract, and how to address flagged concerns.

This checklist provides a chance for an early discussion regarding critical items that must be assured in the contract or only accepted after due consideration of the risk imposed by a factor not being changed.

Ideally, the checklist is reviewed prior to the issuance of an RFP, or, if no RFP has been issued, is submitted together with a proposal from the vendor, and reviewed with the office assisting with the procurement.

B. Model RFP Language

NOTE: Because they are highly specific services and are generally priced under the financial thresholds that trigger competitive bidding, most digital subscription services are not subject to an RFP. However, in the rare instance when they are, this language is for inserting in the institution's standard RFP template after a recital of the precise services desired. This is also useful language for working with developers who may offer ancillary products to be used in association with database use.

RFP Language:

The successful bidder will present a contract meeting the following criteria:

- The institution is not barred from sharing pricing data by any nondisclosure or confidentiality agreement
- Pricing data for comparable institutions is shared upon request;
- Assurance that user information is not shared with any unauthorized third party;
- Assurance that no provision in the contract is meant to limit any of the institution's rights under Copyright Act Sections 107, 108, and 110 or under the Americans with Disabilities Act;
- Assurance of data breach notification within 24 hours and notice to impacted users as required by applicable laws in New York;
- The contract is governed by the laws of the state of New York and the venue for any dispute is New York;
- Assurance that the rights of content creators are respected;
- the ability for the institution to independently verify that it is not being charged for material that is otherwise available for free;
- Assurance of ongoing compliance with the latest WCAG standards;
- Adherence to the [insert any applicable standards].

A note about using this Model RFP with a procurement specialist, sector officer, IT or in-house legal counsel:

This Model RFP language is designed to alert procurement services, functional officers, IT, and/or contract support services throughout the institution about priorities the library must enforce in a final product selection and contract.

This Model RFP language provides a chance for an early discussion regarding critical items that must be assured in the final contract.

C. Template Contract Addendum

NOTE: This Addendum is designed to be used with your vendor’s standard contract; it is an overlay that modifies objectionable terms in the original. Because contracts are interpreted based on a variety of factors, it is best of the original contract plus this Addendum is reviewed by your institution's attorney.

Digital Information Services Contract Addendum

[NAME of the academic library entering the subscription agreement] is a charitable not-for-profit institution [and a public institution] with an obligation to safeguard charitable [and public] resources.

1. Prior to finalizing any contract for service, the Vendor shall complete the third column in the chart below:

Pricing Transparency Goal	Important information needed	Vendor Answer and resulting change to contract.
Ability to disclose pricing	Does the contract include a nondisclosure clause or other requirement to not share pricing information?	YES NO If YES, this is removed, per this Addendum.
Avoid Redundant Payments	How does the service ensure there is no payment for content available in the public domain or otherwise generally available?	There is no charge for content in the public domain or otherwise generally available OR Because of the value added by being searchable in the database, there is a reduced charge of _____ for content in the public domain or otherwise generally available. OR

Pricing Transparency Goal	Important information needed	Vendor Answer and resulting change to contract.
		You will be charged the same for materials in the public domain or otherwise generally available.
Enabling ADA Compliance	Does the database allow for ADA adaptation of content without additional costs?	<p>YES, the database allows for ADA adaptation of content without additional costs.</p> <p>OR</p> <p>NO, the database does not allow for ADA adaptation of content without additional costs.</p> <p>If NO, this is removed, per this Addendum.</p>
Fair Use	Does the database allow the ability to copy excerpts without further charge as allowed by 17 USC § 107 (“fair use”).	<p>NO, excerpts must be paid for per the contract.</p> <p>YES, excerpts of up to _____ words are automatically allowed.</p> <p>YES, but your institution must attest to it being fair use.</p> <p>If NO, this is removed, per this Addendum.</p>
Copyright Act Sections 108 and 110, Americans with Disabilities Act	Does the contract assure the customer that it in no way limits rights under Copyright Act Sections 108 and 110 or the Americans with Disabilities Act?	<p>YES</p> <p>NO</p> <p>If NO, this Addendum is changing this to YES.</p>

Pricing Transparency Goal	Important information needed	Vendor Answer and resulting change to contract.
No re-sale of user data	Does your contract assure us that no user data will be shared or sold with any other third party without express written disclosure and written consent by us?	YES NO If NO, this Addendum is changing this to YES.
Authors' rights	Does your contract assure us that authors' rights are respected and all permissions needed to provide access to content have been obtained?	YES NO If NO, this Addendum adds such assurance.

2. When completed and signed by both parties, this Addendum is a part of the Contract and overrides any provision contrary to it in the Contract.

3. The above information and assurances pertaining to avoiding redundant payments, enabling transparency in pricing, honoring the ADA, honoring fair use, barring re-sale or sharing of user data, and requiring nondisclosure of contract terms our material elements of this contract. Any misrepresentation in this contract shall be grounds for immediate termination of the contract, and the institution may seek remuneration equal to the amount of any payment in excess of represented ratios.

For [Institution]: _____

For [Vendor]: _____

Language for presenting this Addendum to a vendor:

Dear [NAME of rep],

Thank you for working with me to send a proposal for [database services].

Accompanying this letter, please find a “Digital Information Services Contract Addendum” used by [institution] to ensure good stewardship of resources and to be able to defend pricing during our internal budget discussions.

Please review and fill in the third column in the Addendum so that I may present it to our financial decision-makers and make the case for entering into this contract for database services.

Because this addendum is a required step before we consider the contract, please alert me as to any concerns.

Thank you,

NAME
TITLE

A note on using this Addendum with a procurement specialist, sector officer, IT or in-house legal counsel:

In the event your academic institution has an in-house counsel or regularly retained lawyer who reviews contracts prior to signature, it is wise to review the Addendum and invite them to customize it for your institution.

Similarly, if your institution has an in-house procurement department that oversees all purchases, reviewing this Addendum with them can find ways to integrate the criteria into the procurement process, and to give you added leverage during contract negotiations (“*My procurement director says...*”).