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Re: GUIDELINES FOR DONATIONS OF CONSTRUCTION-RELATED PROFESSIONAL SERVICES,
DONATIONS OF CONSTRUCTION PROJECTS, AND DONATIONS OF LABOR OR MATERIALS
TO BE USED IN A CONSTRUCTION PROJECT

Jennifer:

As requested, this is a summary of the laws and policies applicable to donations of construction-related professional services, donations of construction projects, and donations of labor or materials to be used in a construction project. In all cases, such donations must be approved and supervised by the campus architect or his/her delegatee. The campus architect will ensure that proper documentation, insurance, and other legal requirements are met. Additional approvals may be required from the President or the Regents, depending on the value of the donation or whether a license or ground lease is executed in conjunction with the donation (a ground lease or license could be required, for example, if the donor will enter onto University property to construct the donation at the donor's cost). The campus architect will also ensure that all necessary approvals are obtained from the President and the Regents.

This memorandum addresses pure donations, where a donor receives no consideration from the University in return for a donation. Many donations are characterized as an offer to provide construction, services, materials, or equipment "at cost," meaning that, in order to receive the "donation," the University must make a payment to the donor. Those types of donations are also addressed.

Laws and Policies Applicable to Construction

1. Professional Services. If any consideration is paid by the University, persons or firms providing professional services, including architectural, engineering, environmental, land surveying, and project management services must be selected (with some exceptions) through a procedure described as quality-based selection. The procedure can require interviews with at least three firms and advance publication of an advertisement identifying the services and the underlying project. A “donor” who is receiving any payment of any kind (including reimbursement for out-of-pocket costs), no matter how small, may not be used unless the donor is deemed to be the best qualified of those interviewed for the work. If paid consideration, the donor must sign a pre-approved standard University form of agreement (which will also require indemnity, insurance and, if applicable, payment of prevailing wages).

If consideration is not paid for professional services, then the University need not select the most qualified firm, and need not publish advertisements or conduct interviews. Although the University does not have a prescribed form of contract for a pure donation of professional services, the campus architect or his/her delegatee may require the donor to execute a contract with appropriate provisions, including any insurance required by University policy, deemed necessary to protect the University’s interests.

Use of faculty and students to provide professional services to a project is not strictly prohibited, although it may be subject to certain conditions. For instance, with respect to design services, construction management services, and inspection services, University policy¹ provides:

Design. University policy is to have design work for major capital improvement projects performed by design professionals unless an exception to have the work performed by Facility personnel is specifically approved by the Chancellor or Vice President Agriculture and Natural Resources.

Design of all other projects, including minor capital improvement projects, may be performed by either Facility personnel, design professionals, or Facility personnel supplemented by consultants.

The Lawrence laboratories, because of laboratory requirements, may perform any design work with laboratory personnel.

¹ Capital Improvement Program Management Policy last revised on 11/1/1993. Available at <http://www.ucop.edu/facil/fmc/facilman/volume1/rpcap.html>

Contract Administration. University policy is to have contract administration performed by either design professionals or by Facility personnel. When the design of a major capital improvement project is performed by a design professional, then that design professional shall perform the contract administration unless an exception to have the contract administration performed by Facility personnel is made by the responsible Facility administrator. The Facility may perform contract administration on all other projects designed by a design professional.

Inspection Responsibility. University policy is for the Facility to determine proper responsibility for inspection.

Other issues may arise (with respect to conflicts of interest or employment law) when the donor of professional services is a University employee, including a faculty member. The Office of the President and the Office of the General Counsel should be consulted regarding any such donation prior to its acceptance. Additionally, donations should not generally be accepted from persons who are not properly licensed to perform professional services, such as students, unless supervised by a licensed professional who takes responsibility for the unlicensed donor's work.

Also, a donor of professional services may be prohibited (because of a conflict of interest) from bidding on, or being awarded, any contract or agreement that incorporates any advice or recommendations (including designs) provided in conjunction with donated professional services. For instance, if a donor donates the design for a building, the donor would be prohibited from bidding for a contract to construct the building.

2. Construction. If any consideration is paid by the University to the "donor" (e.g., a donor who says he or she is performing "at cost" and donating the value of his/her time), certain procedures must be followed. The donor must sign a standard form contract (different standard forms are required depending on the amount of the contract), which may require, among other things, insurance, payment and performance bonds, and payment of prevailing wages. The donor must also be a licensed contractor.

Additionally, any time a donor is paid consideration, the contract with the donor may be subject to competitive bidding. Competitive bidding is usually required for projects owned entirely by the University that cost over \$50,000. The \$50,000 threshold is based on the cost of construction (not design or other non-construction costs), including labor and materials, of the underlying project, not the cost of the individual contract. A \$5,000 construction contract can be subject to competitive bidding if the contract is for work on a project costing over \$50,000. Also, thresholds are based on the cost to the University. If the cost to the University for a project is \$50,000 or less, a contractor can perform work that cost the contractor \$100,000 without competitive bidding.

Any contract (where a donor is paid consideration) for work on a project costing the University \$50,000 or less may be negotiated (except for standard terms and conditions) without competitive bidding. Informal competitive bidding is required for projects costing the University up to \$100,000 and formal competitive bidding, including publication of advertisements, is required for projects exceeding \$100,000 in cost to the University.

Competitive bidding is not required for donated construction when the University does not pay anything to the donor (cash or non-cash), even if the donated construction is part of a project costing over \$50,000. Additionally, if the transaction is properly structured, a donor not receiving consideration need not be a licensed contractor, as long as the donor uses licensed contractors to perform the work.

The University needs to protect itself from the risk that a donor will not complete a promise to perform construction at no cost to the University. The University also needs to protect itself from the risk that such a donor will not pay its subcontractors, suppliers or laborers. Typically, the University protects itself by requiring the donor to execute a license agreement, whereby the donor agrees to construct (and sometimes design) the donated project. The license agreement will allow the University to review and approve any donor designs and to inspect and approve any donated construction. On occasion, the donor wishes to occupy all or a portion of a project that the donor has constructed, in which case a lease is could be required. Current practice is to require the donor to demonstrate that the donated construction is fully funded, to acknowledge in writing that the donor is solely at risk for cost overruns, to guarantee completion of construction by providing a performance bond, to guarantee payment of subcontractors, suppliers and laborers by providing a payment bond, to provide appropriate levels of insurance and, in most cases, to require payment of prevailing wages.

3. Construction Materials or Equipment. If any consideration is paid to the donor, then a gift of construction materials or equipment (e.g., a gift characterized as “at cost”) to be used in a specified construction project is subject to all requirements that construction contracts for the underlying project are subject to (with the possible exception of using a different form of contract). If consideration is not paid to the donor, then gifts of construction materials or equipment, regardless of value, may be accepted.

Certain types of ostensible donations may not qualify as donations, and may require competitive bidding, if the donation will ultimately result in future payments by the University to the donor or some entity affiliated with the donor. For instance, the donation of equipment that establishes the donor’s equipment as the “campus standard,” meaning that all similar equipment obtained in the future must be purchased by the University from the donor or its affiliate could require competitive bidding. A situation in which a vendor “donates” materials or equipment that can be installed or serviced only by the “donor” requires heightened review, because such a “donation”

may indirectly commit the University in a manner that would cause the “donation” to be viewed as part of a larger transaction that includes payment of consideration to the “donor.”

4. Labor. If any consideration is paid to an individual physically laboring (including carpentry, plumbing, inspection, and land surveying) on a University construction project costing over \$1,000, then the person performing the labor must be paid prevailing wages (and any contract for the labor must be awarded pursuant to applicable competitive bidding procedures, depending on the cost of the underlying project). However, prevailing wages are not required for University employees who are paid for their work as part of their University employment (although such employment may create legal problems if such work is not included in the employee’s job description).

Generally speaking, an individual may provide physical labor without compensation on a University construction project if the donor meets the definition of a “volunteer” as defined in Labor Code section 1720.4. Generally, employees of a contractor cannot satisfy the requirements of this definition. The Office of the President and Office of the General Counsel should be consulted before using volunteer labor pursuant to section 1720.4² which provides, in part, that prevailing wages are not required for:

(1) Any work performed by a volunteer. For purposes of this section, "volunteer" means an individual who performs work for civic, charitable, or humanitarian reasons for a public agency or corporation qualified under Section 501(c)(3) of the Internal Revenue Code as a tax-exempt organization, without promise, expectation, or receipt of any compensation for work performed.

(A) An individual shall be considered a volunteer only when his or her services are offered freely and without pressure and coercion, direct or implied, from an employer.

(B) An individual may receive reasonable meals, lodging, transportation, and incidental expenses or nominal nonmonetary awards without losing volunteer status if, in the entire context of the situation, those benefits and payments are not a substitute form of compensation for work performed.

(C) An individual shall not be considered a volunteer if the person is otherwise employed for compensation at any time (i) in the construction, alteration, demolition, installation, repair, or maintenance work on the same project, or (ii) by a contractor, other than a corporation qualified under Section 501(c)(3) of the

² Section 1720.4 shall remain in effect only until January 1, 2012, unless a later enacted statute deletes or extends that date.

Internal Revenue Code as a tax-exempt organization, that is receiving payment to perform construction, alteration, demolition, installation, repair, or maintenance work on the same project.

(2) Any work performed by a volunteer coordinator. For purposes of this section, "volunteer coordinator" means an individual paid by a corporation qualified under Section 501(c)(3) of the Internal Revenue Code as a tax-exempt organization, to oversee or supervise volunteers. An individual may be considered a volunteer coordinator even if the individual performs some nonsupervisory work on a project alongside the volunteers, so long as the individual's primary responsibility on the project is to oversee or supervise the volunteers rather than to perform nonsupervisory work.

(3) Any work performed by members of the California Conservation Corps or of Community Conservation Corps certified by the California Conservation Corps pursuant to Section 14507.5 of the Public Resources Code³.

* * *

(e) This section shall remain in effect only until January 1, 2012, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 2012, deletes or extends that date.

Gift Acceptance and Reporting⁴

As noted above, the provision of donated construction, services, materials, or equipment must in all cases be approved and supervised by the campus architect or his/her delegatee. In addition, when property is donated, the gift must be accepted and documented through the University's gift acceptance procedures.

1. Gifts of Property. Donations of improvements to University property (i.e., a donor constructing all or part of project on a campus) and donations of construction materials, equipment or supplies to be used in a construction project (where the donor does not receive any consideration for the donation) are all property gifts that must be accepted and booked as gifts of property. Any gifts of property must be documented with the gift processing unit of University Advancement on campus, which is responsible for booking the gifts so they are counted for financial statement purposes and for the purpose of providing reports to The Regents regarding private support to the University. Reports of gifts are made on a campus gift acceptance report (UDEV 100).

³ The standard California Conservation Corps agreement, which cannot be altered through negotiation, contains provisions, including indemnification provisions that require waivers of UC policy.

⁴ Thanks to Counsel Barbara Rhomberg for providing the text concerning gift acceptance, reporting and charitable deduction rules.

Donations of construction materials, equipment or supplies directly to the University, that are not installed by the donor, are considered gifts of personal property. Chancellors have been delegated the authority to accept gifts of personal property up to and including a value of \$5 million; personal property gifts of over \$5 million require Presidential approval. Chancellors may re-delegate personal property gift acceptance authority for gifts that do not exceed \$1 million⁵.

Construction materials, equipment, and supplies that are installed as part of a donated project become part of the improvement. Donations of improvements to University property are considered gifts of real property which require Regental or Presidential approval (depending on the value).⁶ In addition, in rare situations, Regental approval is required to accept a particular gift, because the gift involves some University commitment that requires Regental approval.⁷

2. Donation of Professional Services or Labor. In the case of volunteer professional services or physical labor, no formal “gift acceptance” is required for the value of the services, and they are not booked as gifts for financial reporting or private support reporting services. Approval of the campus architect or his/her delegatee is all that is required.

Charitable Deduction Rules

Donors will likely be entitled to a charitable income tax deduction for gifts of property made to the University, including tangible property such as construction materials and equipment, and real property such as donated improvements to real estate. The amount of the deduction (i.e., whether the donor can claim a deduction equal to the fair market value of the property, or whether the deduction is limited to basis) are subject to complex rules, so Advancement should be consulted before using the potential for a tax deduction as a “selling point” for a proposed donation of construction-related property.

⁵ The delegation to Chancellors to solicit and accept gifts is found in DA 2011 (March 23, 1994), available at <http://www.ucop.edu/ucophome/coordrev/da/da2011.html>.

⁶ A chart summarizing the authority to approve real estate transactions for University-Related Purposes is available http://www.ucop.edu/facil/resg/documents/authority_real_estate.pdf.

⁷ Standing Order 100.4(dd)(1). Regental approval is required if the gift “involves exceptions to approved University programs or policies” (specifically, Regental policies); “if the gift agreement creates obligations on the part of the University for expenditures for which there is no established fund source” (e.g., by requiring matching funds or mandating a certain level of University support for a program, where the benefitting department has not identified a source of funding for these obligations); “or if the gift agreement commits the University to construct facilities not previously approved” (but Regental approval is not needed if the gift agreement includes an appropriate caveat when the donor’s proposed capital project has not yet been approved by the University).

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No income tax charitable deduction is available for the value of donated services, including professional services. However, volunteers may claim a charitable deduction for their unreimbursed out-of-pocket costs incurred in the course of providing volunteer services, if such expenditures are properly substantiated (and receipted by the University). Alternatively, when businesses provide pro bono services, they may in some circumstances be entitled to claim a business deduction (and not a charitable deduction) for the out-of-pocket costs of providing the volunteer services, if the pro bono activity advances business interests through favorable public relations, business development, or training. Donors should be encouraged to consult their own tax advisors to determine whether and how their unreimbursed costs may be deductible.

Sincerely,

Stephen P. Morrell
Managing Counsel

cc: C. Patti
E. Denton
R. Gayle
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