Contracting Best Practices

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What we'll cover….

- Contracting basics
- Special considerations for Tribal contracting
- Contracting best practices/USET templates

Note: this is not legal advice

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Contracting Fundamentals

Best practices are built on the basics

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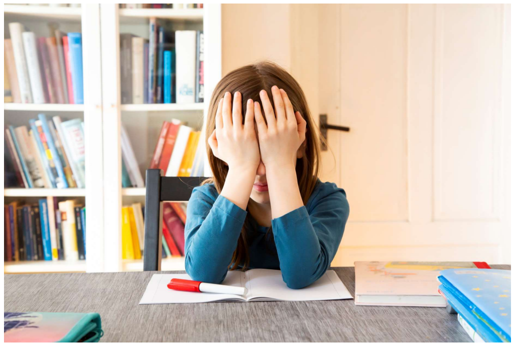
What is a contract?

- **3 Elements**:
  - Offer
  - Consideration
  - Acceptance
- A **“meeting of the minds”**
- ***Almost* anything** can go into a contract
  - As long as the parties agree in good faith and it’s not blatantly illegal
- **Goal**: mutual agreement that is as protective as possible of each party’s interests
  - Negotiation is expected
  - Often involves compromise

Why is my contract 20 pages long??



- Hopefully that's an exaggeration, but a contract should account for all reasonably foreseeable contingencies
- Ideally, you won't need to *use* much of what's actually in the contract (dispute resolution, etc.)
  - But if you *do* need that, it's best to be on the same page
  - Setting expectations at the outset helps to **limit friction** later on
- If it's not in the contract, you'll be subject to the "**default rules**" under applicable state law or common law, and these are not always going to be the most fair or friendly to you
  - On the flipside, if you don't like a default rule, you can (usually) change it via contract!

Contracting Basics – Key Takeaways

- Contracts are **strategic tools**, not just legal formalities
- The fundamentals (offer, acceptance, consideration) are simple—but their **application is highly contextual**
- Contracts are long because they **anticipate problems and reduce uncertainty**
- If it's not in the contract, **you may not be able to rely on it later**
- **Over-inclusion is often safer than omission** (within reason)
- Default law will fill gaps—but **not always in your favor**
- Contracts give you the ability to **actively shape the governing rules**
- Clear expectations upfront support a true **meeting of the minds** and reduce downstream conflict

Tribal Contracting

Protecting Tribal sovereignty while ensuring contracting best practices

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Tribal Contracting – Special Considerations

- **Data Sovereignty** – Protect data on behalf of yourself and others
- **Sovereign Immunity Waivers**
  - Necessary, but should be carefully limited
  - Also consider: forum, governing law
- **Risk Allocation** – Protect against overexposure of Tribal assets
  - Warranty – protect against behavior of your contracting partner
  - Indemnity – protect against behavior of third parties
- **Funding Disruptions**
  - Important contingency Tribal organizations and Tribal governments that rely heavily on federal funding

Tribal Contracting – Key Takeaways

- **Core Areas Where Sovereignty Is at Stake**
- **Sovereign Immunity** → What is being waived, and how narrowly?
- **Forum + Governing Law** → Who decides disputes, and under what rules?
- **Data Sovereignty** → Who owns and controls Tribal information?
- **Risk Allocation** → Who bears liability and exposure?
- **Funding Dependencies** → What happens if federal support changes?

Contracting Best Practices

Planning ahead can set you up for success

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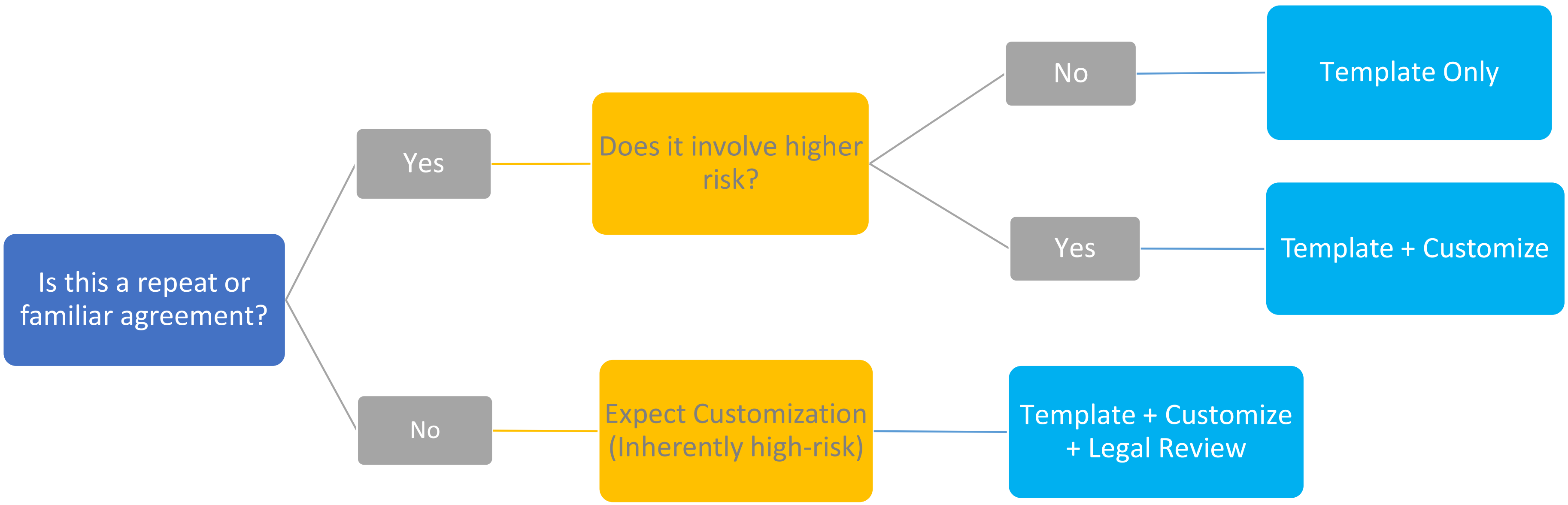
Template vs. Customize



Checklist – Ask These 4 Questions

✅ 1. Is this a repeat agreement?

- Yes → Template
- No → Review more closely

✅ 2. Does this expose Tribal assets to risk?

- Yes → Customize
- No → Template likely sufficient

✅ 3. Are Tribal-specific factors present?

  - Federal funding
  - Travel/attendance (events)
  - Data sovereignty
  - Jurisdiction
- If yes → Customize key provisions

✅ 4. What happens if something goes wrong?

- If unclear → Customize

USET Template Contracts

- USET has templates for our most common types of agreements:
  - Contracts for **Products/Services** and **Professional Services**
    - Versions with language tailored to contracting with **Tribal Nations**
  - **Subrecipient** Agreements
  - Addenda – standardized **amendments** to existing agreements
  - **Venue** Agreements for Conferences/Events
    - Language for enhanced protection against **unforeseen circumstances** (force majeure)

Data Sovereignty: *USET Example*

IV. INFORMATION AND DATA OWNERSHIP

- A. Any information or data shared or otherwise provided by USET to Contractor under this Contract remains the property of USET.
- B. Notwithstanding the foregoing, any Tribal Nation-specific data will remain the property of the applicable Tribal Nation unless the Tribal Nation grants USET an ownership interest in such data. **Thus, any data specific to Contractor as a Tribal Nation shall remain the property of Contractor unless Contractor grants USET an ownership interest in such data.**
- C. Upon termination or expiration of this Contract, Contractor will return to USET all records, notes, documentation, and other items relating to or provided by USET or any other USET member Tribal Nation that was used, created, or controlled by Contractor during the term of this Contract.

V. INFORMATION AND DATA SHARING AND CONFIDENTIALITY

- A. Contractor and any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing Contractor will not at any time or in any manner directly or indirectly use for their personal benefit or divulge, disclose, or communicate in any manner any information that is proprietary to USET or otherwise confidential.
- B. Contractor and any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing Contractor will protect such information and treat it as strictly confidential.
- C. Neither USET nor Contractor will disclose any Tribal Nation-specific data unless USET determines in consultation with the Tribal Nation that disclosure is mandated by law or required by an overseeing government agency, the Tribal Nation has provided written permission for disclosure, or the data is available to the public. **Contractor may choose to disclose its own Tribal Nation-specific data.**
- D. This provision will continue to be effective after the termination or expiration of this Contract.

Data Sovereignty:
Strong vs. Risky Language

✅ Strong / Sovereignty-Protective

- "Tribal Nation data **remains the property of the Tribal Nation**"
- "No ownership interest is granted **absent explicit, written agreement**"
- "Disclosure requires **Tribal consultation or affirmative Tribal consent**"
- "Contractor must **return all data upon termination**"
- "Confidentiality obligations **extend to all subcontractors and affiliates**"
- "These obligations **survive termination of the contract**"

⚠️ Risky / Non-Protective

- "Data may be used by contractor **as necessary**"
- Silence re: ownership of Tribal data
- "Contractor **may share information** with third parties"
- Absence of requirements to return data, delete data, protect data after termination
- Confidentiality obligations apply *only* to "the contractor"

Sovereign Immunity:
USET Example

XI. SOVEREIGN IMMUNITY

- A. Contractor agrees to a **limited waiver** of sovereign immunity **for purposes of resolving disputes arising under this Contract** pursuant to Section XIII.
- B. Contractor **expressly preserves its sovereign immunity for all other matters**.

Sovereign Immunity:
Strong vs. Risky Language

✅ **Strong / Sovereignty-Protective**

- "Limited waiver of sovereign immunity **solely for disputes arising under this Contract**"
- "Waiver applies **only for purposes of dispute resolution** as defined in [Sec. X]"
- "Sovereign immunity is **expressly preserved for all other matters**"
- "Nothing in this Agreement shall be construed as a **general waiver of sovereign immunity**"

⚠️ **Risky / Non-Protective**

- "Contractor **waives sovereign immunity**"
- "Contractor consents to jurisdiction" *(without limits)*
- "Any disputes may be brought in **any court of competent jurisdiction**"
- Silence on immunity *(no clause at all)*

Governing Law:
USET Example

XII. APPLICABLE LAW

- A. This Contract shall be governed by and construed in accordance with **the laws of Contractor if Contractor has established controlling laws or, if no such controlling laws have been established**, the laws of the State of Tennessee, without reference to conflict of law provisions.
- B. The obligations, rights, and remedies of the Parties hereunder shall be determined in accordance with **the laws of Contractor if Contractor has established controlling laws or, if no such controlling laws have been established**, the laws of the State of Tennessee.

Governing Law:
Strong vs. Risky Language

✅ Strong / Sovereignty-Protective

- "This Contract shall be governed by **the laws of the Tribal Nation** [Contractor], where such laws have been established"
- If Tribal law is not established, the parties agree to a **clearly defined fallback law**
- "Governing law applies to **all obligations, rights, and remedies**"
- "Application of law is **limited to the terms of this Agreement**"
- Conflict of law provisions are **expressly excluded**

⚠️ Risky / Non-Protective

- "This Contract shall be governed by **state law only**" *(no Tribal option)*
- "Governing law **to be determined** by the court"
- "**Any applicable law** may apply"
- "Governing law applies only to interpretation" *(but not remedies or enforcement)*
- Silence on governing law *(no clause at all)*

Dispute Resolution: *USET Example*

XIII. DISPUTE RESOLUTION

- A. In the event a dispute arises from or relates to noncompliance with this Contract or interpretation of the terms and conditions of this Contract and the Parties are unable to settle the dispute between themselves, the Parties will meet and confer through non-binding mediation within 30 business days of a written request for mediation submitted by either Party.
  - i. The Parties will share the costs of mediation equally.
  - ii. If one Party believes that the possible noncompliance creates a threat to public health or safety, that Party may proceed directly to arbitration or litigation under this Section.
- B. If non-binding mediation does not resolve a dispute that arises from noncompliance with this Contract or interpretation of the terms and conditions of this Contract, either Party may:
  - i. Initiate binding arbitration (if agreed to by the other Party) in accordance with the Commercial Rules of the American Arbitration Association and thereafter enforce an award ordered in arbitration in a court of competent jurisdiction as described in this Section; or
  - ii. Initiate an action in a court of competent jurisdiction as described in this Section.
- C. A court of competent jurisdiction for purposes of this Section shall be **Contractor's court if Contractor has established a tribal court with jurisdictional authority over the matter(s) or, if no such tribal court has been established, the appropriate court** within the State of Tennessee, whether a state or federal court. With regard to any such litigation, proceeding, or other legal action, the Parties hereby:
  - i. Consent to service of process in accordance with the rules and statutes governing service of process or in accordance with the notice provisions contained herein; and
  - ii. Agree to waive to the full extent permitted by law any objection that they may now or hereafter have based on personal jurisdiction or venue, including but not limited to forum non-conveniens.
- D. The failure of either Party to enforce any provision of this Contract shall not be construed as a waiver or limitation of that Party's right to subsequently enforce and compel strict compliance with every provision of this Contract.
- E. The rule requiring construction or interpretation against the drafter is waived. The Contract shall be deemed as if it were drafted by both Parties in a mutual effort.

Dispute Resolution: *Strong vs. Risky Language*

✅ Strong / Sovereignty-Protective

- "Parties will attempt to resolve disputes through good-faith negotiation and non-binding mediation **prior to escalation**"
- "Binding arbitration is available **only upon mutual agreement** of the Parties"
- "Primary forum shall be the **Tribal Nation's court**, where established"
- "Non-Tribal courts are used **only as a defined fallback** if no Tribal forum exists"
- "Jurisdictional consent is **limited to the scope of this Agreement**"
- "Nothing in this Section shall be construed as a **broad waiver of sovereign immunity**"
- **"**Failure to enforce a provision does **not constitute waiver of rights**"
- **"**Agreement shall be interpreted as the result of **mutual drafting by both Parties**"

⚠️ Risky / Non-Protective

- "Any disputes shall be resolved in **state or federal court**" *(no Tribal option)*
- "Disputes may be resolved in **any court of competent jurisdiction**" *(no forum control)*
- Mandatory arbitration **without Tribal consent**
- No mediation or informal resolution step *(straight to escalation)*
- Broad "consent to jurisdiction" without limits
- No connection to sovereign immunity or governing law
- No clause preserving rights or limiting waiver
- Silence on dispute resolution process *(no clause at all)*

Risk Allocation – Warranties: *USET Example*

I. PROJECT

- A. Contractor will provide products and/or services as described in Exhibit A, and Contractor shall have the specific duties and responsibilities described in Exhibit A (Project).
- B. Contractor is solely responsible for management of work time and quality of products and/or services to ensure completion of the Project as set forth in Exhibit A.

XIV. CONTRACTOR REPRESENTATIONS

- A. Contractor certifies by signing this Contract that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.
- B. Contractor warrants that it shall provide its products and/or services and meet its obligations under this Contract in a timely and workmanlike manner meeting the highest standards in Contractor's industry and in accordance with generally accepted professional practices. Contractor is responsible for ensuring the good quality of all products and/or services provided under this Contract, and production of products and/or services that are not of adequate quality or that are untimely shall be considered a breach of this Contract and cause for termination pursuant to Section XVI.
- C. Contractor warrants that USET will have good title to any and all goods and deliverables Contractor provides to USET under this Contract free and clear of any and all liens or security interests of any kind and that all such goods and deliverables shall be new and in good condition and shall be operable, suitable, and sufficient for the purposes provided.
- D. Contractor warrants that it will fully comply with all applicable Tribal, federal, state, and local laws, rules, and regulations in performance of this Contract and will ensure the same of any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing Contractor in connection with this Contract. **Should Contractor have questions regarding whether a law of general applicability applies to Contractor as a Tribal Nation for purposes of activities carried out under this Contract, Contractor will contact USET, and the Parties will assess its applicability together.**

Risk Allocation – Warranties:
Strong vs. Risky Language

✅ Strong / Sovereignty-Protective

- "Performance standards will be **reasonable and consistent with industry practices**"
- "Contractor warrants performance **within its control and scope of work**"
- "Contractor warrants compliance with **applicable laws, as determined in consultation between the Parties when necessary**"
- "Contractor is responsible for **quality of deliverables it provides directly**"
- "Contractor ensures subcontractor compliance **to the extent reasonably within its control**"

⚠️ Risky / Non-Protective

- "Contractor warrants performance to the **highest industry standards**" *(undefined, subjective)*
- "Contractor guarantees all work will meet **all applicable laws**" *(no acknowledgment of Tribal sovereignty or jurisdictional limits)*
- "Contractor is responsible for **all acts and omissions of subcontractors or affiliates**" *(unlimited third-party exposure)*
- "Contractor guarantees all deliverables will be **error-free or fully sufficient for any purpose**" *(overbroad promise)*

Risk Allocation – Indemnity:
USET Example

X. INSURANCE AND INDEMNITY

- A. Contractor, **to the extent permitted by law**, shall hold harmless, defend, and indemnify USET from and against any and all claims, demands, obligations, causes of action, lawsuits, and charges, and all damages, liabilities, fines, judgments, costs (including settlement costs), and expenses associated therewith (including reasonable attorney's fees and disbursements) **that arise out of Contractor's performance, nonperformance, negligence, breach of contract or other legal requirements, or other actions arising from the acts or omissions of Contractor or** any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing Contractor in connection with this Contract.
- B. Contractor **shall maintain insurance to cover any damages** caused by an error, omission, or negligent act committed by Contractor or any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing Contractor. Contractor shall provide USET proof of such insurance upon execution of the Contract.
- C. Without limiting the foregoing, Contractor will maintain insurance coverage in at least the following amounts: Worker's Compensation at the statutory amount; General Liability, Bodily Injury - Per Incident / Annual Aggregate at $1,000,000 / $2,000,000; Automobile Liability, Bodily Injury at $1,000,000; Automobile Liability, Property Damage at $1,000,000; and, if applicable, Professional Liability Coverage at $2,000,000.
- D. USET shall bear no cost or obligation in ensuring adequate insurance and bonding pursuant to this Contract. **USET disclaims any liability for Contractor and** any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing Contractor in connection with this Contract.

Risk Allocation – Indemnity:
Strong vs. Risky Language

✅ Strong / Sovereignty-Protective

- "Contractor shall indemnify USET for claims **arising from Contractor's negligence, breach, or willful misconduct**"
- "Indemnity is limited to **losses directly caused by Contractor's actions or omissions**"
- "Contractor is responsible for subcontractors **to the extent of Contractor's control and oversight**"
- "Indemnity obligations apply **only to the extent permitted by law and consistent with any sovereign immunity limitations**"
- "Indemnity is supported by **insurance coverage appropriate to the scope of work**"
- "Damages and liability are **limited to reasonable, foreseeable risks arising from the Project**"
- "Parties agree to **allocate risk in proportion to each party's role and responsibility**"

⚠️ Risky / Non-Protective

- "Contractor shall indemnify USET against **any and all claims, damages, and liabilities**" *(no scope limit)*
- Indemnity applies to **all acts of subcontractors, affiliates, or agents** *(without limitation)*
- No requirement that damages be **caused by Contractor**
- No linkage to sovereign immunity limitations or insurance coverage
- "Arising out of performance" *(broad, undefined trigger)*
- Full disclaimer of liability, placing **all risk on Contractor**

Risk Allocation – Impossibility: *USET Example*

XVI. TERMINATION

- **C. USET may terminate this Contract if the appropriated, grant, or other relevant resources that allow USET to support this Contract cease to be available.**

XVII. FORCE MAJEURE

- A. If performance by a Party of this Contract or any obligation under this Contract is prevented, restricted, interfered with, illegal, impossible, or commercially unreasonable or would result in an unreasonable financial hardship, in each case, **by causes or events beyond such Party's reasonable control** (Force Majeure), and if such Party gives the other Party **prompt written notice** of such cause or event, then the obligations of the Party invoking this provision shall be suspended to the extent necessary by such cause or event.
- B. The term Force Majeure shall include, **without limitation**, acts of God, communicable disease outbreak, endemic, pandemic, fire, explosion, vandalism, storm or other similar occurrence, orders or acts of military or civil authority, national emergencies, insurrections, riots, wars, strikes, lockouts, work stoppages, other labor disputes, and supplier failures.
- C. An act or omission shall be deemed within the reasonable control of a Party and thus not a Force Majeure if committed, omitted, or caused by such Party or any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing the Party.
- D. The excused Party shall use reasonable efforts under the circumstances to avoid or remove the Force Majeure causes or events of non-performance and shall proceed to perform with reasonable dispatch whenever such causes are removed or ceased.
- E. Without limiting the foregoing and notwithstanding anything in this Contract to the contrary, if this Contract relates to Contractor presenting, speaking, or teaching at a conference or other event or hosting as a venue said conference or event and a Force Majeure prevents the event, including but not limited to travel bans associated with coronavirus or other communicable disease outbreaks, endemics, or pandemics or related conditions such that the registrants cannot attend, USET may cancel this Contract without penalty or liability, and Contractor shall refund any amounts advanced or paid by USET through the date of cancellation, so long as such cancellation is provided in writing at least 30 business days prior to the planned date of commencement of the conference or event.

Risk Allocation – Impossibility:
Strong vs. Risky Language

✅ Strong / Sovereignty-Protective

- "Contract may be terminated if **federal funding, appropriations, or grant resources are no longer available**"
- "Either Party may **suspend performance** due to events beyond reasonable control"
- "Force Majeure includes **government actions, funding disruptions, pandemics, and national emergencies**"
- "Obligations are suspended **only to the extent necessary due to the triggering event**"
- "Parties will **resume performance when conditions allow**"
- "Contract allows **flexibility to modify or terminate without penalty in response to external disruptions**"

⚠️ Risky / Non-Protective

- No termination right tied to loss of funding or grant or appropriation changes
- "Contractor must perform regardless of funding availability"
- Force Majeure limited only to "acts of God" *(narrow, outdated scope)*
- No recognition of government shutdowns, federal policy changes, funding disruptions
- No ability to suspend performance temporarily
- No obligation to resume performance or mitigate disruption
- Automatic penalties or liability triggered despite external impossibility or hardship

2nd example – venues/events

I. FORCE MAJEURE OR IMPOSSIBILITY

- If performance by a Party of this Contract or any obligation under this Contract is prevented, restricted, interfered with, illegal, impossible, or commercially unreasonable or would result in an unreasonable financial hardship, in each case, **by causes or events beyond such Party's reasonable control**, such Party may declare Force Majeure by giving the other Party prompt written notice that includes information about such cause or event, and the obligations of the Party invoking this provision shall thereafter be suspended to the extent necessary by such cause or event.
  - Force Majeure causes or events shall include, **without limitation**: acts of God, communicable disease outbreak, endemic, pandemic, fire, explosion, vandalism, storm or other similar occurrence, orders or acts of military or civil authority, national emergencies, insurrections, riots, wars, strikes, lockouts, work stoppages, other labor disputes, supplier failures, and the termination, pause, or unavailability of the appropriated, grant, or other federal funding source that allows USET to support this contract.
  - An act or omission shall be deemed within the reasonable control of a Party and thus not a Force Majeure cause or event if committed, omitted, or caused by such Party or any employees, subcontractors, agents, officers, representatives, affiliates, successors, assigns, or others hired by or representing the Party.
  - The excused Party shall use reasonable efforts under the circumstances to avoid or remove the Force Majeure causes or events of non-performance and shall proceed to perform with reasonable dispatch whenever such causes are removed or ceased.
- Without limiting the foregoing and notwithstanding anything in this Contract to the contrary, **if any of the following take place**, USET may cancel this Contract without penalty or liability, and Contractor shall refund any amounts advanced or paid by USET through the date of cancellation:
  - 50% or more of the registered attendees to the conference or other event come from Tribal governments and/or organizations that have in place travel bans associated with coronavirus or other communicable disease outbreaks, endemics, or pandemics or related conditions such that the registrants cannot attend;
  - 50% or more of the registered attendees to the conference or other event come from Tribal governments and/or organizations that are not able to travel to the conference or event location due to weather-related conditions; or
  - A federal funding source that allows USET to support this contract has been terminated or paused or has otherwise become unavailable.
- The Party invoking this provision **is encouraged to provide written notice within 10 business days** of becoming aware of the event. Where feasible, both Parties will make reasonable efforts to reschedule or adjust the deliverables before considering termination. The invoking Party also agrees to keep documentation of the event and its impact for audit or compliance purposes.

Risk Allocation – Enhanced Impossibility: *Strong vs. Risky Language*

✅ Strong / Sovereignty-Protective

- "Contract may be terminated if **federal funding, appropriations, or grant resources are terminated, paused, or unavailable**"
- "Provision reflects **Tribal-specific operational realities**, including: reliance on federal funding, travel limitations affecting Tribal governments"
- "Force majeure includes events that make performance **commercially unreasonable** or cause **unreasonable financial hardship**"
- "Obligations are **suspended to the extent necessary**"
- Contract includes **objective, event-specific triggers**, such as attendee inability thresholds (e.g., 50%), travel bans or restrictions, weather-related disruptions
- "Upon qualifying cancellation, **advance payments are refunded**"
- "Parties will make reasonable efforts to **reschedule** or **modify performance before termination**"
- "Clear notice, documentation, and compliance requirements are included"

⚠️ Risky / Non-Protective

- No termination right tied to **loss or pause of federal funding**
- Force majeure limited to "acts of God" only *(narrow, traditional definition)*
- No inclusion of **pandemics, travel bans, or government restrictions**
- No recognition of **commercial impracticality or financial hardship**
- No objective thresholds for event viability (e.g., attendee participation)
- Cancellation allowed, but **no refund requirement for prepaid amounts**
- No event-specific protections (e.g., conference cancellations, venue obligations)
- No ability to suspend performance or reschedule
- Automatic liability or penalties still apply despite external disruption

Questions?

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