

## **Assumption of Risk Agreement – Prolific Academic (Prolific)**

### **A. SUMMARY OF REQUEST**

Business Services has received a request from faculty/staff in one or more of your College's units/departments to purchase the Prolific Academic ("Prolific") service to assist in their research. Business Services has reviewed the "Prolific Academic Researcher Terms of Service" (hereafter the "Agreement"). You may find a copy of that agreement at this link: [Researcher Terms](#).

Please note that the Agreement itself contains multiple links to a number of documents, all of which are part of the Agreement. The Agreement includes verbiage that is either problematic from a business perspective, is unacceptable under State of Wisconsin purchasing requirements, and/or that UWL generally does not accept, thus necessitating you to make a discretionary business judgment determination.

### **B. PURPOSES OF DOCUMENT:**

The purposes of this document are as follows:

- To record and explain the opinion of Business Services regarding the payment mechanism and terms and conditions associated with the Prolific service.
- To provide you with the opportunity to acknowledge the potential risks of using the Prolific service as described under the Business Services Opinion and to afford your College and its Departments the ability to assess such risks and to assume responsibility for such risks if you decide to still move forward with the use of the Prolific service.

### **C. BUSINESS SERVICES OPINION:**

#### *1. Opinion Regarding the Payment Mechanism for Use of Prolific Services*

- Based on Business Service's understanding of the nature of transactions made through Prolific, and the definition of recurring payments as 'automatically pulling out the payments every month', it is our opinion that Prolific purchases do not meet the definition of 'recurring' purchases.
- **Therefore, the department is hereby notified that, in line with other UWL purchases, the University PCard must be the method of payment for Prolific services.** Purchases made with this card must comply with Department of Administration and UWL procurement policies and procedures and UWL's P-Card User Manual.
- Under 'Best Judgement' purchasing procedures, the department is reminded to routinely consider alternate crowd sourcing platforms if they would provide better value to the department, through lower pricing, preferred Terms and Conditions, or added/ higher level of services.

#### *2. Opinion Regarding the Agreement's Terms & Conditions*

- While Business Services understand that Prolific is an important, cost-effective tool for performing research, Agreement contains terms which are either outside the University's contracting authority or carry the potential to subject the University to liability beyond what is covered by the State of Wisconsin's self-insurance.
- Like most "terms of use" or "participation agreements," the Prolific Agreement contains terms that are highly advantageous to the provider. The most troublesome legal terms found in the current version of the Prolific Agreement are as follows:

- Section 1 contains language suggesting that Prolific may amend any term/condition of the Agreement at any time at its sole discretion upon notice to its registered users.
    - Section 1 is a problem because it may commit the researcher (and thereby the University) to terms and conditions in the future that we originally would not have agreed to when first contracting with Prolific, whether that be for business or financial reasons, risk/liability reasons, or reasons tied to Wisconsin state law.
    - For example, Section 1 would potentially allow Prolific to add language stating that any dispute be settled by binding arbitration in the State of Washington (or a different state other than Wisconsin), and that such non-Wisconsin-based courts would have jurisdiction over the matter. Such potential future contractual term could be construed as a waiver of the State of Wisconsin's sovereign immunity, an act that is technically beyond the powers given to the University by the State of Wisconsin. Further, funding a litigation or arbitration matter outside of the State is an expensive proposition, as we are without a ready source of legal counsel.
  - Section 8 contains language limiting Prolific's liability but requiring the researcher to indemnify Prolific. Section 8 is a problem because we are required to indemnify Prolific for claims made against Prolific related to our use of the Prolific Academic platform. This term would act to obligate the University to be responsible for the debts of another entity, outside of the liability protection provided by the State of Wisconsin.
- It is common for this type of agreement that the provider will not modify/negotiate any terms of its standard template agreement. To date, Purchasing and Contracts have been unsuccessful in even identifying someone at Prolific who would be in charge of such negotiations.
  - In past discussions with the Department of Justice, UW Purchasing agents have been told that it is a "business decision" to accept liability in excess of State protection, and a "business decision" to agree to fund litigation or arbitration in a forum other than Wisconsin. Business Services would suggest that such a decision to use Prolific only occur if the department and the researcher understands the following:
    - UWL's Contract Administrator can negotiate contracts with other providers of similar services who are not so insistent on including these problem terms. While these services may be more costly, their use is approved by the University with liability falling under the State's protection.
    - Using Prolific Academic may result in the researcher being personally sued by Prolific or another party for claims resulting from that use. Because the University has not been successful in entering a separate agreement with Prolific related to use of Prolific Academic, neither Prolific nor a third party would necessarily associate the researcher with the University. Assuming that the research in question was within the scope of the researcher's employment, the University would request legal representation for the researcher from the Department of Justice to defend the claim. However, it is unclear whether any such claim would proceed against the University or the researcher personally, or how such out-of-state litigation/arbitration might be funded (based on the above).
    - There is no central source of funds committed to payment of any indemnification judgment or other expenses associated with defending a claim outside of the State of Wisconsin. For this reason, at minimum, a researcher should have written departmental approval of his or her use of Prolific, seeing as the Department may be asked to cover these costs if a claim is made. If the Department is uncomfortable with this responsibility, the Department can also contact Risk Management to review the option of acquiring additional insurance to cover the potential liability related to a researcher's use of Prolific.
    - Under no circumstances should any FERPA or HIPAA protected data be shared without the approval of UW System Legal.
  - In addition to the troublesome "legal" terms found in the Prolific Agreement, Section 5 of the Prolific Agreement contains certain payment terms, which will require vigilant monitoring on behalf of the Researcher if the Prolific Academic services are to be used. For example, Prolific will charged monthly "Dormant Account Fees" if the Researcher Account remains inactive for a period of 18 months. If a University Researcher is permitted to use the Prolific Academic Services, that individual shall be expected

to timely pay any amounts due to Prolific when using University PCards and shall also return any unused funds to the University and close their Prolific Researcher Account prior to the account going inactive for a period of 18 months or more.

**D. ACKNOWLEDGEMENT AND ASSUMPTION OF RISK**

There is no “master” UWL account with Prolific. Since the Prolific account will be in the researcher’s individual name, there is the possibility that the researcher may be personally sued by Prolific (or another party) for claims resulting from that use. Therefore, we require the faculty researcher(s) to sign the attached Use agreement directing them to only use their UWL contact information and UWL Procurement Card (PCard). The faculty researcher(s) will be expected to timely pay any amounts due to Prolific when Using University P-Cards and shall also return any unused funds to the University and close their Prolific Researcher Account prior to the account going inactive for a period of 18 months (and thereby accumulating Dormant Account Fees).

Any costs associated with the Prolific Account, or such actions, would be chargeable to the Department’s budget. Therefore, in order to proceed with the purchase, we ask that you and the applicable Department Chair sign and return this AOR letter to Spencer Green, Assistant Controller.

If you acknowledge that you have read and understand the referenced documents and believe that it is in UWL’s best interest to use the Prolific service on behalf of the Department, subject to those terms, then please sign this document below, granting your assumption of the problematic terms, accepting the associated risks, assuring compliance with all the terms of the Agreement and this document and granting the Department permission to proceed with the purchase. Your permission to proceed shall be for the current request and also for future Prolific purchases by the Department.

**Purpose: Payment of Research Participants**

**Project Name:** \_\_\_\_\_

**Principal Investigator(s):** \_\_\_\_\_

**Requesting Unit/Department:** \_\_\_\_\_

By:

\_\_\_\_\_

DEPARTMENT CHAIR SIGNATURE

DATE

Attachments: Faculty Use Agreement