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November 19, 2013

Debbie Davenport, Auditor General
Office of the Auditor General
2910 North 44th Street, Suite 410
Phoenix, Arizona 85018

Re: Preliminary Report - Review of Selected State Practices for Information Technology Procurement

Dear Ms. Davenport:

Thank you for providing the revised report on the review of state practices for Information Technology (IT) procurements. We have reviewed the report in its entirety and provide the following responses to the findings/recommendations:

1.1 The Auditor General finds that the Department should develop terms and conditions templates for IT procurements, as well as policies, guidelines and training for the use of said terms and conditions. The finding of the Auditor General is agreed to and the audit recommendation will be implemented.

The Department is in agreement with the finding and will proceed with implementation. We think it is important to note, though, that implementation will require significant effort to undertake the actions outlined in the finding. A high level of subject matter expertise, knowledge, and time is necessary to develop the envisioned skills. Consequently, we anticipate needing to address a number of matters over time (e.g., staff recruitment/retention, compensation and training) in order to have successful outcomes.

Until implementation is complete, the Department will continue to promote its current policy for IT Terms and Conditions that was formulated in collaboration with the vendor community and the Attorney General's Office (TB 046; Attachment 1).

2.1 The Auditor General finds that the Department should assess intellectual property language in its standard terms and conditions, using federal regulations as a baseline, and subsequently provide training for procurement officers. The finding of the Auditor General is agreed to and the audit recommendation will be implemented.

Thank you for the opportunity to provide the Department's comments on the Preliminary Report.

Sincerely,

Brian C. McNeil
Director



ARIZONA DEPARTMENT OF ADMINISTRATION
STATE PROCUREMENT OFFICE

TECHNICAL BULLETIN No. 046

TITLE **Information Technology Terms and Conditions Usage**
REVISION **Number 0**
DATE **05/03/12**

I. Authority

A. Applicable Statute

- A.R.S. § 41-2511 Authority of the Director
A.R.S. § 41-2512 Delegation of Authority by the Director
A.R.S. § 41-2585 Contract Clauses
A.R.S. § 41-2553 Procurement of Information Systems and Telecommunications Systems

B. Applicable Administrative Code

- A.A.C. R2-7-201 State Procurement Administrator; Duties and Qualifications
A.A.C. R2-7-202 Delegation of Procurement Authority to State Procurement Units
A.A.C. R2-7-203 Agency Chief Procurement Officer
A.A.C. R2-7-601 Contract Clauses
A.A.C. R2-7-606 Terms and Conditions

II. Definitions

- A. Agency Chief Procurement Officer. The person within a state governmental unit, identified by the agency head, who is acting under specific, written authority from the State Procurement Administrator in accordance with R2-7-202.
- B. Contract Clause. A written requirement within a contract that provides appropriate remedies, adjustments in pricing or performance and other provisions.
- C. Uniform Terms and Conditions. Contract clauses that are required for all state contracts, usually mandated by statute or rule.
- D. Special Terms and Conditions. Contract clauses that are in addition to the required Uniform Terms and Conditions and address contract performance requirements throughout the life cycle of the Contract.
- E. Information Systems and Technology. A system of hardware, software or vendor support costing more than one hundred thousand dollars that processes information or data by electronic data processing methods and devices.
- F. State Procurement Office. An office that acts under the authority delegated to the State Procurement Administrator.
- G. State Governmental Unit. Any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation of this state.

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REVISION **Number 0**
DATE **May 3, 2012**

III. Policy

- A. **Purpose.** The purpose of this policy is to ensure the proper utilization of authorized terms and conditions for the procurement of information technology goods and services.
- B. **Authorized Use.** State governmental units may utilize State Procurement Office established information technology terms and conditions, only after seeking written authorization and approval from the State Procurement Administrator.
1. If authorization is provided by the State Procurement Administrator, the State governmental unit shall ensure that the subject terms and conditions are inserted within the solicitation or contract's special terms and conditions to ensure maximum protections as provided by the contract's order of precedence.
- C. **Appropriate Situations for Use.** Utilization and application of the information technology terms and conditions, shall be reserved for those procurements including, but not limited to the following:
1. Significant dollar investments, enterprise wide deployments, or large scale integration and implementation procurements that meet or exceed the threshold as stated and defined in A.R.S. §41-2553; or
 2. The complexity of the technical requirements, and potential impact of award on state government operations, is so great, that it is determined, without the flexibility afforded by using these terms and conditions, the State governmental unit may not possibly negotiate a favorable outcome;
 3. The need to ensure increased competition from multiple qualified vendors.

IV. Effective

This Technical Bulletin is hereby authorized and effective this 3rd day of May, 2012, unless otherwise revised or repealed.

Jean A. Clark, FNIGP, CPPO, CPPB, C.P.M.
State Procurement Administrator

This publication is not intended or represented to be the official record of laws and regulations covered under statutes, A.R.S. 41-2501 et seq., and administrative rules and regulations A.A.C. R2-7-101 et seq., that constitute the Arizona Procurement Code ("Code"). In the event of a discrepancy between this publication and applicable statute and rule, statute and rule shall prevail.

INFORMATION TECHNOLOGY SPECIAL TERMS & CONDITIONS

LIMITATION OF LIABILITY

[New Provision -May be used on case-by-case basis at State's discretion]

First Party Limitation of Liability

Contractor's liability for first party damages to the State arising from this Contract shall be limited to _____ time(s) the maximum-not-to-exceed amount of this Contract. The foregoing limitation of liability shall not apply to: (i) liability, including indemnification obligations, for third party claims, including but not limited to, infringement of third party intellectual property rights; (ii) claims covered by any specific provision of the Contract calling for liquidated damages or other amounts, including but not limited to, performance requirements; or (iii) costs or attorneys' fees that the State is entitled to recover as a prevailing party in any action.

INDEMNIFICATION

Contractor shall indemnify, defend with counsel reasonably approved by the State, and hold harmless, the State, its departments, agencies, boards, commissions, universities, officers, agents and employees (collectively, the "Indemnitee") from and against any and all claims, actions, damages, costs (including attorneys' fees), and losses arising under this Contract, including, but not limited to, bodily injury or personal injury (including death) or loss or damage to tangible or intangible property, but excluding damages arising solely from the gross negligence or willful misconduct of the Indemnitee. This indemnification obligation includes any claim or amount arising out of, or recovered under, the Workers' Compensation Law or arising out of the failure of Contractor to comply with any federal, state or local law, statute, ordinance, rule, regulation or court decree. Contractor shall have control, subject to the reasonable approval of the State, of the defense of any action on such claim and all negotiations for its settlement or compromise, provided, however, that when substantial principles of government or public law are involved, or when involvement of the State is otherwise mandated by law, the State may elect, in its sole and absolute discretion, to participate in such action at its own expense with respect to attorneys' fees and costs, but not liability, and the State shall have the right to approve or disapprove any settlement, which approval shall not be unreasonably withheld or delayed. The State shall reasonably cooperate in its defense and any related settlement negotiations.

IP INDEMNIFICATION

Indemnification - Patent and Copyright. With respect solely to Materials provided or proposed by Contractor or Contractor's agents, employees, or subcontractors (each a "Contractor Party") for performance of this Contract, Contractor shall indemnify, defend and hold harmless the State, its departments, agencies, boards, commissions, universities, officers, agents and employees (collectively, the "Indemnitee"), against any third-party claims for liability, including, but not limited to, reasonable costs and expenses, including attorneys' fees, for infringement or violation of any patent, trademark, copyright or trade secret, by such Materials or the State's use thereof.

In addition, with respect to claims arising from computer hardware or software manufactured or developed solely by a third party, Contractor shall pass through to the State such indemnity rights as it receives from such third party (the "Third Party Obligation") and will cooperate in enforcing them; provided, however, that (i) if the third party manufacturer fails to honor the Third Party Obligation, or (ii) the Third Party Obligation is insufficient to fully indemnify the State, Contractor shall indemnify, defend and hold harmless the State against such claims in their entirety or for the balance of any liability not fully covered by the Third Party Obligation.

The State shall reasonably notify the Contractor of any claim for which Contractor may be liable under this section. If the Contractor is insured pursuant to A.R.S. § 41-621 and § 35-154, this section shall not apply. Contractor shall have control, subject to the reasonable approval of the State, of the defense of any action on such claim and all negotiations for its settlement or compromise, provided, however, that when substantial principles of government or public law are involved or when involvement of the State is otherwise mandated by law, the State may elect, in its sole and absolute discretion, to participate in such action at its own expense with respect to attorneys' fees and costs, but not liability, and the State shall have the right to approve or disapprove any settlement, which approval shall not be unreasonably withheld or delayed. The State shall reasonably cooperate in the defense and any related settlement negotiations.

If Contractor believes at any time that any Materials provided or in use pursuant to this Contract infringe a third party's intellectual property rights, Contractor shall, at Contractor's sole cost and expense, and upon receipt of the State's prior written consent, which shall not be unreasonably withheld, (i) replace an infringing Material with a non-infringing Material; (ii) obtain for the State the right to continue to use the infringing Material; or (iii) modify the infringing Material to be non-infringing, provided that following any replacement or modification made pursuant to the foregoing, the Material continues to function in accordance with the Contract. Contractor's failure or inability to accomplish any of the foregoing shall be deemed a material breach of this Contract.

Notwithstanding the foregoing, Contractor shall not be liable for any claim for infringement based solely on any Indemnitee's:

- (i) modification of Materials provided by Contractor other than as contemplated by the Contract or the specifications of such Materials or as otherwise authorized or proposed in any way by Contractor or a Contractor Party;
- (ii) use of the Materials in a manner other than as contemplated by this Contract or the specifications of such Materials, or as otherwise authorized or proposed in any way by Contractor or a Contractor Party; or
- (iii) use of the Materials in combination, operation, or use with other products in a manner not contemplated by the Contract, or, the specifications of such Materials, or as otherwise authorized or proposed in any way by Contractor or a Contractor Party.

Contractor certifies, represents and warrants to the State that it has appropriate systems and controls in place to ensure that State funds will not be used in the performance of the Contract for the acquisition, operation or maintenance of Materials in violation of intellectual property laws.

INTELLECTUAL PROPERTY

Ownership of Intellectual Property. Any and all intellectual property, including but not limited to copyright, invention, trademark, trade name, service mark, or trade secrets created or conceived solely pursuant to or as a result of this Contract and any related subcontract (collectively, the "Intellectual Property"), shall be work made for hire and the State shall be the owner of such Intellectual Property. The agency, department, division, board or commission of the State of Arizona requesting the issuance of this Contract shall own (for and on behalf of the State) the entire right, title and interest to the Intellectual Property throughout the world. Software and other Materials developed or otherwise obtained by or for Contractor or its affiliates independently of this Contract ("Independent Materials") do not constitute Intellectual Property. If Contractor creates derivative works of Independent Materials, then the elements of such derivative works created pursuant to this Contract shall constitute Intellectual Property owned by the State. Contractor shall notify the State, within thirty (30) days, of the creation of any Intellectual Property by it or its subcontractor(s). Contractor, on behalf of itself and any subcontractor(s), agrees to execute any and all document(s) necessary to assure ownership of the Intellectual Property vests in the State and shall take no affirmative actions that might have the effect of vesting all or part of the Intellectual Property in any entity other than the State. The Intellectual Property shall not be disclosed by Contractor or its subcontractor(s) to any entity not the State without the express written authorization of the agency, department, division, board or commission of the State of Arizona requesting the issuance of this Contract.

[New Provision -To be located elsewhere in solicitation documents]

Notwithstanding the foregoing, if the State elects, in its sole and absolute discretion, to relinquish its ownership interest in any or all of the Intellectual Property, the State shall have the rights to use, modify, reproduce, release, perform, display, sublicense or disclose such Intellectual Property within State government and operations without restriction for any activity in which the State is a party (collectively, "Government Purpose Rights").

WARRANTY

Warranties

Liens. The Contractor warrants that the Materials supplied under this Contract are free of liens and shall remain free of liens.

Quality. Unless otherwise modified elsewhere in the terms and conditions, the Contractor warrants that, for one year after acceptance by the State, the Materials shall be:

- Of a quality to pass without objection in the trade under the Contract description;
- Fit for the intended purposes for which the Materials are used;
- Conform to the written promises or affirmations of fact made by the Contractor; and
- Fully compatible with the State's computer hardware and software environment.

Fitness. The Contractor warrants that any Materials supplied to the State shall fully conform to all requirements of the Contract and all representations of the Contractor, and shall be fit for all purposes and uses required by the Contract.

Inspection/Testing. The warranties set forth in subparagraphs 7.1 through 7.3 of this paragraph are not affected by inspection or testing of or payment for the Materials by the State.

Compliance with Applicable Laws. The Materials and services supplied under this Contract shall comply with all applicable Federal, state and local laws, and the Contractor shall maintain all applicable license and permit requirements.

Contractor represents and warrants to the State that Contractor has the skill and knowledge possessed by members of its trade or profession and Contractor will apply that skill and knowledge with care and diligence so Contractor and Contractor's employees and any authorized subcontractors shall perform the Services described in this Contract in accordance with the Statement of Work.

Contractor represents and warrants that the Materials provided through this Contract and Statement of Work shall be free of viruses, backdoors, worms, spyware, malware and other malicious code that will hamper performance of the Materials, collect unlawful personally identifiable information on users or prevent the Materials from performing as required under the terms and conditions of this Contract.

Survival of Rights and Obligations after Contract Expiration or Termination.

Contractor's Representations and Warranties. All representations and warranties made by the Contractor under this Contract shall survive the expiration or termination hereof. In addition the parties hereto acknowledge that pursuant to A.R.S. § 12-510, except as provided in A.R.S. § 12-529, the State is not subject to or barred by any limitations of actions prescribed in A.R.S. Title 12, Chapter 5.

Purchase Orders. The Contractor shall, in accordance with all terms and conditions of the Contract, fully perform and shall be obligated to comply with all purchase orders received by the Contractor prior to the expiration or termination hereof, unless otherwise directed in writing by the Procurement Officer including, without limitation, all purchase orders received prior to, but not fully performed and satisfied at the expiration or termination of, this Contract.