



Contracting with the Georgia Department of Administrative Services

Please be advised that the Georgia Department of Administrative Services (the "Department"), as a state agency, is unable to agree to certain revisions to the standard state contract. Revisions that would provide an unfair competitive advantage, including but not limited to those that materially change the terms or the requirements of the solicitation, will be rejected by the State. Please note that this guidance is not all-inclusive, and the Department reserves the right to negotiate all terms and conditions. If a supplier and the Department are unable to come to mutually agreeable terms, the supplier will not be awarded a contract. The following provisions are also applicable to State offices, agencies, departments boards, bureaus, commissions, institutions, agencies, boards, commissions, and other entities of the state procuring goods and/or services pursuant to O.C.G.A. § 50-5-50 et. seq.

1. Indemnification and/or hold harmless

Any provision that requires the Department to pay all losses another party may incur. State agencies are prohibited from agreeing to indemnify third parties. Indemnification provisions have been determined to violate the prohibition against pledges of the State's credit and the prohibition against gratuities by the State (Ga. Const. Art. VII, Sec. IV, Par. VIII; Ga. Const. Art. III, Sec. VI, Par. VI; 1980 Op. Att'y Gen. 80-67; 1974 Op. Att'y Gen. 74-115. Indemnification provisions have also been determined to be invalid as unauthorized attempts to contractually waive the State's sovereign immunity. 1980 Op. Att'y Gen. 80-67.

The first constitutional provision provides that the credit of the State shall not be pledged or loaned to any individual, company or association. Debt as used in the constitution is defined in terms of an annual budget cycle that relies on annual appropriations of the legislature. Under this definition, a "pledge" would include agreeing to obligations of funds beyond the current fiscal year. The second constitutional provision relates to the "gratuities clause" which prohibits state entities from granting any donation or gratuity (gift) to a third party or forgiving any debt or obligation owed to the public. The gratuities clause essentially requires that the state entity receive a substantial benefit for the grant or use of its assets (whether using property or personnel). Finally, by virtue of the doctrine of sovereign immunity, suit may not be maintained in the courts against a state entity without the express consent of the State.

2. Patent and Copyright Indemnification

The Attorney General has taken the position that it is the sole legal advisor for the state and state entities may not agree to be represented by third parties, even when the matter involves the third party defending its patent rights.

3. Warranty/Guarantee

Any provision that requires the Department to unconditionally assure or promise a certain result or outcome. The Attorney General has advised that warranty provisions requiring State agencies to provide a warranty violate the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. The reason is that resources may have to be expended to satisfy such warranty or guarantee.

4. Governing law of or venue in any state other than Georgia.

Contracts with state entities must be governed by the laws of the State of Georgia. State law provides that the Attorney General has exclusive authority and control over all matters of litigation or potential litigation involving State agencies. As a result, venue for any action or dispute arising in contract shall be proper is Superior Court Fulton County, Georgia. O.C.G.A. § 50-21-1(b). Furthermore, any contract with State entities shall be construed in accordance with the laws of the State of Georgia, without giving effect to the conflicts of law provisions.

5. Requirements that the Department pay taxes, interest, liquidated damages, penalty fees or cancellation charges, litigation costs, or attorney's fees.

- **ATTORNEY'S FEES/COSTS.** The Department will not agree to pay attorney's fees or costs. The rationale is that such a payment would be a violation of the constitutional gratuities clause.
- **DAMAGES.** The inclusion of indirect or incidental as types of damages payable by the Department is not acceptable. The UCC regards these as distinguishable from consequential damages because they are usually meant to include out of pocket expenses directly attributable to the breach (i.e., travel expenses).
- **INTEREST.** The Department will not agree to pay interest. The Attorney General has advised the Department that payment of interest would be prohibited by the gratuities clause of the constitution and that the Department lacks statutory authority to agree to the payment of interest. Atty. Gen. Position Paper dated August 8, 1978; Bently v. State Board of Examiners, 152 Ga. 836 (1922).
- **LATE PAYMENT/CANCELLATION CHARGES.** The Department does not agree to pay late payment charges. This policy stems from an opinion of the Attorney General that late payment charges are in the nature of penalty/gratuity which the State is constitutionally prohibited from paying.
- **TAXES.** The State is exempt from most taxes and generally will not agree to contract language which requires the payment of taxes. The Department will not agree to reimburse the supplier for the payment of taxes. However, the Department will agree to language that states "the Department will pay taxes lawfully imposed upon it".

6. Binding arbitration

The Department will not agree to binding arbitration. Based on the State's sovereign immunity and the Attorney General's authority over civil litigation, the Department is not authorized to agree to binding arbitration. The Attorney General has exclusive authority and control over all matters of litigation or potential litigation involving State agencies, and neither the 1983 Georgia Constitution nor any Act of the General Assembly authorizes the Department to limit the type or scope of judicial action, or the result obtainable therefrom by the State. Provisions which effectively waive the right of the Attorney General to bring actions on behalf of the State are prohibited.

7. Any provision requiring the Department to be bound by terms and conditions that are unknown at the time of signing the agreement.

Unknown obligations may violate various laws such as the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. As a practical matter, entering into contracts that call for an unspecified sum of money to change hands make it extremely difficult to budget. Such provisions in a contract would be void as a matter of law, and should be avoided at the time the contract is entered.

8. Best efforts provisions that require the expenditure of any funds or efforts necessary to meet the obligations of a contract, even if such efforts exceed the dollar amount of the contract.

Best efforts provisions have been held to be warranties and/or guarantees. Such provisions violate the prohibition against pledging the State's credit. (Refer to discussion of warranties above for more information).

9. Contractual provisions that require the Department to waive potential claims against a third party or otherwise limit the liability of such party

The Department does not have the authority to prejudice the rights of the State to sue or otherwise enforce a contract by agreeing to a limit on or a waiver of liability. (Refer to discussion of arbitration, above, for more information).

10. Contractual provisions which require the Department to accept the risk of loss of items or goods during delivery.

As a rule, the Department does not accept risk of loss until receipt of the items or goods.

11. If the agreement is a result of an RFQ or an RFP, the Department does not allow vendors to disclaim warranties.

The rationale is that a purchase resulting from a competitive process should provide for specific products or services to be provided to the Department to fit a particular need/purpose. To allow a supplier to disclaim a warranty of fitness in such a case would defeat the competitive process.

12. Contractual clauses that require the Department to purchase insurance policies or provide coverage for third parties.

State law provides for the Department of Administrative Services to procure insurance for State entities. The Department is covered by the Tort Claims Act and the State of Georgia Broad Form Insurance that is administered by the Department of Administrative Services.

13. No Automatic renewals for agreements obligating state appropriated funds.

Contracts may not allow for automatic renewals when state funds are/would be obligated in subsequent fiscal years. 1974 Atty. Gen. Op. 74-115. Contracts may be renewed at the sole discretion of the Department. The Attorney General has taken the position that a contract may be renewed prior to the end of the fiscal year if all of the funds are available and are unencumbered during that same fiscal year. 1980 Atty. Gen. Op. 80-163.

14. Multiyear Contracts:

Pursuant to O.C.G.A. 50-5-64, Multiyear agreements must meet the following requirements:

(1) The contract shall terminate absolutely and without further obligation on the part of the user agency or the Department at the close of the fiscal year in which it was executed and at the close of each succeeding fiscal year for which it may be renewed as provided in this Code section;

(2) The contract may be renewed only by a positive action taken by the user agency or by the Department on behalf of the user agency, and the nature of such action shall be determined by the department and specified in its standard contract;

(3) The contract shall terminate immediately and absolutely at such time as appropriated and otherwise unobligated funds are no longer available to satisfy the obligations of the user agency under the contract. The determination of the occurrence of such unavailability of funds shall be made by the user agency in its sole discretion and shall be conclusive;

(4) The contract shall state the total obligation of the user agency for the fiscal year of execution and shall further state the total obligation which will be incurred in each fiscal year renewal term, if renewed; and

(5) The contract shall provide that title to any supplies, materials, or equipment shall remain in the vendor until fully paid for by the user agency.

15. No upfront payments for goods/services

The Department is not authorized to make payment prior to receipt of goods/services. (Pursuant to the State of Georgia Accounting Procedures Manual, payables for normal operating expenditures should be recognized when the goods and services have been received. Accounting Manual Reference: Section: Vendor Management; Subsection: Payment Method).

16. Drug Free Workplace

Pursuant to O.C.G.A. § 50-24-3 and § 50-24-4, the Department must include specific certifications regarding the provision of a drug free workplace and prohibition against engaging in certain activities relating to unlawful drug-related activities. This language is non-negotiable.

17. Confidentiality

Any confidentiality provisions in a contract must be subject to the Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq., as the Department is a public agency of the State of Georgia. Additionally, the Department generally considers pricing information to be subject to public disclosure. See *State Rd. & Tollway Auth. V. Elec. Transaction Consultants Corp.*, 306 Ga. App. 487 (2010).

18. No Boycott of Israel

Pursuant to O.C.G.A. §50-5-85, the state shall not enter into a contract with a total value of \$1,000 or greater with an individual or company if the contract is related to construction or the provision of services, supplies, or information technology unless the contract includes a written certification that such individual or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel.

19. Joint Ownership of Intellectual Property

The State is constitutionally prohibited from becoming a joint owner or stockholder in or with any individual, company, association, or corporation. Therefore, the Department is prohibited from agreeing to joint ownership of intellectual property. (Ga. Const. Art. VII § IV, Para. VIII).

20. Contract clauses that impose obligations on the Department by reference

The Department will not agree to contract provisions that incorporate additional obligations by reference, including but not limited to, references to policies located at a specific web address. Any and all terms of the contract which are modified or amended shall be binding upon either Party so long as such changes are agreed to in writing by the Parties and executed by the designated individuals authorized to amend or modify the contract.

21. E-Verify

Pursuant to O.C.G.A. § 13-10-91, a public employer shall not enter into a contract for the performance of services unless the contractor registers and participates in the federal work authorization program. If a supplier is providing services under a contract with a total compensation amount of \$2,500 or greater, (even if such services will be performed outside of the State of Georgia), DOAS requires a notarized affidavit from the supplier attesting to the following:

- (A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;
- (B) The user identification number and date of authorization for the affiant;
- (C) The affiant will continue to use the federal work authorization program throughout the contract period; and
- (D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

Additional information regarding the State's E-Verify requirements can be found at:

<http://www.audits.ga.gov/NALGAD/IllegalImmigrationReformandEnforcementAct.html>