

## ATTACHMENT 2: GENERAL TERMS AND CONDITIONS

### 1. Offer

The Request for Proposals (RFP) is a request for offers, not an offer, nor a contract. A proposal submitted pursuant to the RFP is an offer. Issuance of a purchase order by the STO is acceptance of the offer made in the proposal. The purchase order is the only contract between the parties, and will include any agreement executed by the parties, the RFP, Vendor's proposal and other documents the STO considers appropriate (Agreement). For purposes of this RFP, the terms "purchase order", "contract" and "Agreement" shall have the same meaning, unless the context clearly indicates otherwise. The purchase order is the final expression of the intent of the parties and no modification thereof shall be binding unless contained in a change order to the purchase order.

### 2. Binding Obligation

- 2.1 By signing and submitting its proposal, the offer, the Vendor warrants that the proposal complies with all requirements of the RFP; that any purchase order issued to it pursuant to the RFP shall create a valid and binding obligation of the Vendor, its subcontractors, agents and employees, enforceable in accordance with its terms; and that the Vendor shall take all actions reasonably necessary to provide the Services.
- 2.2 The purchase order issued shall be in the name of the Vendor submitting the proposal, and all payments will be paid to the Vendor submitting the proposal, unless otherwise specified in the RFP or the proposal.

### 3. Vendor Warranties

Vendor represents and warrants that:

- 3.1 it will provide the Services in a timely, professional manner, using reasonable care and caution in accordance with the purchase order. If the Vendor's performance is not in conformity with the purchase order, as amended, the Vendor will be considered in breach of this warranty;
- 3.2 each of the representations and warranties Vendor made in its proposal, the Agreement or otherwise in writing, shall be true and correct in all material respects during the course of the purchase order. In the event anything represented or warranted changes, the Vendor shall immediately notify the STO;
- 3.3 it will comply with all applicable federal, state and local laws, rules, regulations, requirements and/or industry standard operating procedures;
- 3.4 it will obtain at its own expense any and all permits, approvals, consents and waivers of any entity required in connection with the Services, unless otherwise agreed in writing by the STO;
- 3.5 it will maintain records connected to the Services and purchase order a minimum of two (2) years from final purchase order end date, including all extensions and renewals in a form sufficient to permit audit by the STO or its authorized agent. During the term of the purchase order and the two (2) year period following the purchase order end date, STO shall have the right to audit the records at Vendor's location during regular business hours upon request by the STO;
- 3.6 the Services and any ancillary goods provided under the purchase order will conform to the RFP specifications, be fit for the intended purpose, be free and clear of all liens, claims and encumbrances of any kind, and be free from defect in material or workmanship;
- 3.7 neither it nor its employees, representatives or agents have any interest, nor shall acquire any interest, direct or indirect, which would compromise the performance or provision of

- the Services or constitute a conflict of interest. Any such interest shall be promptly reported in detail to the STO;
- 3.8 it will notify the STO as soon as practicable in the event the Vendor has a change in its financial position or organization structure;
  - 3.9 it has not employed any company or person other than a bona fide employee working solely for the Vendor or a company regularly employed as its marketing agent to solicit or secure the purchase order and that it has not paid or agreed to pay any company or persons any fee, commission, percentage, brokerage fee, gifts or any other consideration contingent upon or resulting from the award of the purchase order;
  - 3.10 nothing in the purchase order shall be construed to prohibit the STO or the State of West Virginia from initiating, participating in or collecting moneys in a cause of action in connection with the Services under the antitrust laws of the United States and State of West Virginia; and
  - 3.11 If the Services include software or other tangible or intangible item, that it has full legal right to grant the license or permit use under the purchase order and that use will not infringe or violate any patent, copyright, trade secret or other proprietary right of any person. Vendor shall defend and indemnify the STO against any third party claim to the extent attributable to a violation of this warranty.

#### **4. Order of Precedence**

In the event of conflict among the documents comprising the purchase order, the order of precedence is the Agreement executed by both parties, including all referenced forms, amendments and attachments, the RFP and the Vendor's proposal.

#### **5. West Virginia Contractual Requirements**

All applicable STO and State of West Virginia contractual requirements shall be incorporated into any Agreement executed as a result of the RFP. The STO-96 must be executed by the successful Vendor and any other party the STO may use for the Services unless the Vendor has negotiated terms and conditions with the STO that so comply. Contractual requirements and prohibitions of the State and STO are not subject to negotiation. Vendors desiring any additional or alternative terms and conditions be considered by the STO shall offer them in writing at the end of their proposals in the Miscellaneous Section. However, the proposal shall not be conditional on acceptance of the proposed additional or alternative terms and conditions; and the **requirements of the STO-96 are not negotiable and nothing requires the STO to consider the offered matters.**

#### **6. Term**

The term of the purchase order issued as a result of the RFP, including any extensions, shall be for the period(s) specified in the RFP and stated on the purchase order. The purchase order may be renewed or extended only if specified in the purchase order. In the event STO has not issued a new purchase order by the end of the last renewal of the purchase order issued pursuant to the RFP, the term is further extended for a "reasonable time" period to enable the STO to solicit proposals for the Services.

#### **7. Notice to Proceed**

After the period specified in the Notice of Intent to Award has expired, any protests made in accordance with the procedures specified in *RFP VENDOR PROTESTS* have been concluded, any required negotiations have been concluded and the purchase order has been issued, the Purchasing Agent will notify the successful Vendor to proceed with work on providing the Services. Verbal authorizations are not binding.

**8. STO Right to Cancel**

The STO reserves the right to cancel and terminate any purchase order resulting from the RFP, in whole or in part, with or without cause, and without penalty upon thirty (30) days written notice to the Vendor at any time. Charges accruing to the date of cancellation or non-funding will be paid in accordance with the purchase order.

**9 STO Not Liable for Costs**

The STO and the State of West Virginia shall not be liable for any costs, expenses, loss of profits, or damages whatsoever incurred by Vendor caused directly or indirectly by the STO canceling the purchase order, canceling the RFP, accepting or rejecting a proposal, in whole or in part, and waiving minor deviations.

**10. References**

The STO reserves the right, at any time, to request Vendor references be given or updated and references for any person working to provide the Services be given or update.

**11. Funding**

Performance under the purchase order awarded pursuant to the RFP is contingent upon continued legislative authorization. In the event legislative authorization and/or appropriation is withdrawn or otherwise unavailable for the Services, the purchase order awarded pursuant to the RFP shall be null and void and of no effect after June 30 of that year without charge or penalty of any type to the STO.

**12. Changes**

12.1 During the term and any renewals or extensions of the purchase order awarded pursuant to the RFP, Services may be changed, modified, upgraded, expanded or eliminated in whole or in part upon the written mutual agreement of the parties in order to comply with applicable federal, state and local laws, rules, regulations, policies and court actions which constitute binding precedent in West Virginia, and which alter the Services or purchase order. Any such alteration shall be viewed as binding and shall warrant good faith renegotiation of the compensation paid to the Vendor by the STO and of such other provisions of the purchase order that are affected. In the event the parties are unable to agree, the STO may terminate the purchase order, in whole or in part, and/or obtain the Services from another Vendor without penalty of any type.

12.2 The Vendor shall immediately notify the STO of any anticipated change in the Services or to the purchase order, as amended. No change in the Services or the purchase order, unless immediately required by operation of law, may be implemented without prior notice, negotiation and issuance of a change order to the purchase order by the STO.

12.3 Any change in the Vendor's name, address or account information shall require issuance of a change order to the purchase order by the STO.

12.4 Any change, modification, upgrade, expansion, addition or amendment to the purchase order must be reflected in a written addendum and processed as a change order to be binding.

12.5 The purchase order and any change order shall not be effective until issued by the STO, approved and signed by an authorized STO employee, approved as to form by STO counsel and placed in the U.S. Mail by the STO.

12.6 NO WORK SHALL BE COMMENCED AND NO CHANGE SHALL BE IMPLEMENTED BY THE VENDOR UNTIL SUCH TIME AS THE VENDOR RECEIVES AN APPROVED PURCHASE ORDER OR AN APPROVED WRITTEN CHANGE ORDER FROM THE PURCHASING AGENT.

**13. STO Network Access**

Vendor shall not access any part of the STO network without prior written authorization. The Vendor may require or desire access to the STO network in order to provide the Services, in which case the Vendor shall advise the STO of the nature and purpose of the access needed and when access is required and by whom. In such case, the Vendor agrees to execute any STO required documents prior to initializing any access to the STO network. The Vendor agrees to ensure that all of its agents, employees or subcontractors that may access the STO network are fully-trained professionals who will not compromise the STO network. The Vendor further agrees it is liable for any damages suffered by the STO or the State of West Virginia as a result of the breach of any agreement by or an act of any of its agents, employees and subcontractors.

**14. Confidential Information**

In the event the Vendor has access to private and/or confidential information and/or data maintained by the STO or to which the STO has enabled access, Vendor agrees to maintain the confidentiality and security of the information and/or data and shall defend, indemnify and hold harmless the State of West Virginia and the STO against any and all claims brought by any party attributed to actions of breach of confidentiality by the Vendor, or any of its employees, agents, subcontractors or others permitted access by the Vendor. Vendor agrees to execute and be bound by the STO *Non-Employee Non-Disclosure and Confidentiality Agreement*, if requested by the STO. In the event HIPAA type of information is to be accessed by Vendor, Vendor agrees to execute and be bound by any document required by the STO.

**15. Disclosure by STO**

Vendor consents and agrees that any document or data it submits to the STO is a public document and may be copied and disseminated, without requiring any approval or authorization from the Vendor, unless exemptions under the West Virginia Freedom of Information Act (FOIA), W. Va. Code §29B-1-1 et seq., apply. If the Vendor believes a FOIA exemption is applicable, it shall so state on the document.

**16. Indemnification**

Vendor shall indemnify and defend the West Virginia State Treasurer and his or her officers and employees for any and all losses, costs, claims, causes of action, suits, judgments, injuries, liabilities, penalties, damages and expenses including, without limitation, attorneys' reasonable fees and litigation expenses (each a Loss and, collectively, Losses) suffered, incurred or sustained by the STO or to which the STO becomes subject, resulting from, arising out of or relating to the purchase order, including, but not limited to: (1) Any claims or losses by any subcontractor, persons or firm performing or supplying any part or all of the Services in connection with the performance of the contract; (2) any claims or losses resulting to any person or entity injured or damaged by the Vendor, its officers, employees, agents or subcontractors; (3) any failure of the Vendor, its officers, employees, agents or subcontractors to observe state and federal laws, including, but not limited to, labor and wage laws; (4) a breach or nonperformance by Vendor of its duties, obligations, representations, warranties or covenants under the purchase order; and (5) any gross negligence or willful misconduct of the Vendor or its officers, employees, agents, representatives, subcontractors, delegates or affiliates, except to the extent the Losses are directly and solely caused by the gross negligence or willful misconduct of the STO or its officers, employees, agents or representatives. This right of indemnification inures solely to the West Virginia State Treasurer and shall not be assigned to or assumed by any other person or entity.

**17. Acceptance**

All Services, which includes any goods, delivered pursuant to the purchase order must be accepted by the STO.

**18. Failure to Perform**

- 18.1 Failure to perform in accordance with the purchase order issued pursuant the RFP shall be cause for the Vendor to be found in default.
- 18.2 If the STO rejects the Services, in whole or in part, or if the STO determines performance does not comply with the purchase order, the STO shall notify the Vendor in writing of the rejection or non-compliance. The notice shall include a list of the issues, such as discrepancies with specifications or warranties, defects, lateness or nonconformance.
- 18.3 After notice of failure to perform has been sent, in its sole discretion, the STO may elect to exercise its right to terminate the purchase order or to have the Vendor remedy the problem within the time frame specified by the STO. Failure to cure within the time frame specified by the STO shall constitute default.
- 18.4 In the event of a default, the Vendor shall be liable for any damages suffered by the STO resulting from Vendor's default. The STO may: (1) obtain the Services from another entity, charge the reprocurement cost to the Vendor and terminate the purchase order; or (2) elect to have the Vendor deliver substitute Services.
- 18.5 The STO shall be obligated only for the Services rendered and accepted prior to the date of the notice of termination.
- 18.6 The STO may offset any expenses incurred as a result of the Vendor's default against any charges accruing to the STO as of the date of termination of the purchase order. If any progress payment has been made and the STO determines Vendor is in default, within thirty (30) days of the notice of termination the Vendor shall return to the STO all payments received to that time.
- 18.7 Nothing shall preclude the STO from any other remedies to which it may be entitled.

**19. Assignment**

The Vendor shall not assign, convey, transfer or delegate the purchase order, or any part thereof, nor any of its responsibilities and obligations or moneys due under the purchase order without the express written consent to the STO.

**20. Bankruptcy**

In the event the Vendor files for bankruptcy protection, the STO may, in its sole discretion, consider the purchase order null and void and terminate the purchase order without notice.

**21. Subcontractors and Employees of Vendor**

- 21.1 Vendor is solely responsible and liable for payment of all financial matters in connection with its employees, contractors and subcontractors, including, without limitation, wages, salaries, taxes, withholding payments, workers' compensation, Social Security, penalties, fees, fringe benefits, insurance premiums, contributions to insurance, pension plans, licensing fees, and filing of any and all necessary documents, forms and returns pertinent to all of the foregoing. Vendor shall indemnify and hold harmless the STO, and shall defend the STO against any and all claims pertaining to the foregoing.
- 21.2 If required by the STO, Vendor shall disclose the names and addresses of any subcontractors it anticipates using in connection with the Services. Vendor shall obtain prior written authorization from the STO for any change in a subcontractor or a subcontract. Vendor submitting the proposal is the sole point of contact with regard to all matters involving the purchase order, including those involving subcontractors, and shall remain solely responsible for all Services provided under the purchase order. Vendor shall assume prime contractor responsibility for all Services under the purchase order.

**22. Independent Contractor**

The relationship of the Vendor and the STO shall be that of an independent contractor and no principal-agent or employer-employee relationship is contemplated or created by the parties. The Vendor, as an independent contractor, is solely liable for the acts and omissions of its employees, representatives and agents. Vendor shall be responsible for selecting, supervising and compensating any and all individuals employed to provide the Services. Neither the Vendor nor any of its employees, contractors or subcontractors shall be deemed to be employees of the STO for any purpose whatsoever.

**23. Fees and Payments**

- 23.1 Fees paid will be based upon the amounts stated on the Cost Proposal form.
- 23.2 All payments shall be in arrears after acceptance of the Services, with the exception of software licenses, which may be paid after issuance of the purchase order and before delivery and/or installation, and subscriptions and software maintenance, which may be paid in advance on an annual or quarterly basis.
- 23.3 Payments will be made as specified in the purchase order and in reliance of the Vendor's representations.
- 23.4 All shipping, handling, and other fees or expenses must be paid by the Vendor unless otherwise stated in the purchase order.
- 23.5 Progress payments may be made only if the purchase order authorizes them and ties them to performance benchmarks.
- 23.6 A minimum of a 10% retainage must be withheld for every progress payments. The last payment, including any retainage, will be made after acceptance of the Services by the STO.
- 23.7 Unless otherwise agreed in writing, the Vendor shall submit invoices for Services rendered to the STO at the address on the face of the purchase order. Invoices must be labeled "Invoice" and be in accordance with the purchase order.
- 23.8 Late payment interest and penalties shall be payable only in accordance with West Virginia law.
- 23.9 The STO reserves the right to continuously monitor and assess the performance of the Vendor and any of its subcontractors to ensure consistency with the objectives of the STO and compliance with the purchase order. If the STO, in its sole discretion, determines the Vendor or any of its subcontractors is not performing 100% of its obligations under the purchase order, the STO may penalize the Vendor by stopping, reducing or withholding any payments due under the purchase order until such time as the Services are deemed satisfactory by the STO. The STO shall not be obligated for the difference between any reduced or withheld payments and the amounts otherwise due under this Agreement, nor shall it be obligated to pay interest thereon. The STO may, in its sole discretion, pay such difference upon resolution of the issues, but nothing in the purchase order shall be construed to require such payment, nor shall the difference be considered a lien or claim against the STO or the State of West Virginia.

**24. Applicable Law**

The laws of the State of West Virginia shall govern all rights and duties under the RFP, the proposal and the purchase order, including, without limitation, the validity of the purchase order. All actions brought by either party in connection with the RFP or the purchase order shall be filed in Charleston, West Virginia.

**25. STO Policies**

- 25.1 Vendor shall advise its employees that the State of West Virginia and the STO require a smoke free and drug free work place and prohibit any discrimination on the basis of race,

color, national origin, ancestry, sex, religion, age, physical condition, disability or political affiliation.

25.2 The Vendor, its officers, employees, agents and subcontractors agree to comply with the Civil Rights Act of 1964 and all other applicable laws (federal, state and local), rules, ordinances and regulations.

**26. Taxes**

The Vendor shall pay any applicable sales, use, income, property or other tax arising out of the purchase order and the Services performed. The State of West Virginia and the STO are exempt from any taxes regarding the Services and under no circumstances shall either be held liable for any obligation of the same.