



Notes

- 1) Introductory Remarks, IT Procurement Reform Overview – Greg Urban
- 2) Terms and Conditions Approach and Results – Michael Mallinoff
 - a) Terms and Conditions Reform includes:
 - i) expediting the procurement process
 - ii) updating and standardizing solicitation templates (e.g., Request for Proposals, Invitation for Bids, Master Contract Task Order RFPs),
 - iii) updating the standard IT contract used across all agencies
 - iv) identifying regulatory and statutory updates that may be required
 - v) continue to be inclusive of small and disadvantaged businesses such as Minority Business Enterprises, Veteran Small Business Enterprises, and Small Business Enterprises
 - vi) promoting innovative technology solutions
 - b) The Terms and Conditions Reform initiative started in 2013 with a cross-agency workgroup kickoff, included white paper research, discussion with other states and groups such as NASCIO, and obtaining industry input. The process of addressing the broad scope of terms and conditions will be an ongoing, incremental process – this meeting on October 8 is the initiation of the ongoing discussion the State intends with the vendor community.
 - c) Risk vs. Reward: The State wishes to revisit its terms and conditions to jointly improve reward for both the State and industry, while minimizing the risk to the State in making changes.
- 3) Draft IT Standard Contract Overview – Doug Carrey-Beaver
 - a) DoIT received 18 responses to its Request for Invitation solicitation, of which the highest number of comments was on intellectual property, consideration and payment, and limitations of liability (see the slide deck from the meeting posted on the [Industry Partnership Panel page](#) for more information)
 - b) The draft standard IT contract was reorganized into a section for mandatory clauses and other clauses which have more negotiating leeway.
 - c) There is no unlimited liability in the new contract
 - d) Added to this contract: a section on source code escrow, required living wage section, insurance requirements, VSBE language, and compliance with HIPAA and PII issues
 - e) How many types of IT contracts should the State have?
 - i) Attendees were vocal that there are a number of categories of IT products and services, and the contracts should reflect these differences.
 - ii) Software, hardware, networking, infrastructure as a service, software as a service, IT consulting and integration services
 - iii) Software provider, “SI” consulting services,
 - iv) Amazon representative pointed out that NY is currently exploring this idea of different contracts for different IT products/services.

- v) Participant: the Cloud contracting initiative (Delaware, NJ) – published three different types of suggested T&C for SaaS offerings: infrastructure as a service, platform as a service, software as a service. This initiative, started by Delaware and New Jersey, included CIOs from 35 different states and included a number of companies that participated/contributed. The published terms and conditions covered data management, service offerings. The effort was not a full contract initiative – it focused primarily on programmatic and technical issues pertaining to “as a Service,” including among other things data breaches and how payments would be structured.
- 4) Attendee Demographic Questions
- a) Industry attendees responded to questions regarding the business they are in, and ranked which topics were most important to them. See the [meeting slide deck](#) for the list of questions and audience responses.
- 5) Discussion Topics
- a) Public Negotiation - How rules of fairness in public procurement can still support terms and conditions negotiations
Doug C-B: -Proposals are released, there is a public Q&A, and then information is exchanged. In the contract feedback, some companies wanted to add a Statement of Negotiation - what does this mean?

No member of the audience had a specific response to the question, possibly indicating that the “Statement of Negotiation” was a term of art. However, a general discussion did ensue.

Participant: When companies submit a proposal, the proposal may not match the RFP. Perhaps a Statement of Negotiation means to create a document that combines the requirements in the RFP plus the proposal; and then use this document to resolve any discrepancies so that neither the RFP nor the proposal does not always overrule the other in all cases. Both parties would agree which portions of the proposal trump the RFP and vice versa.

Participant: Some of this is the order of precedence issue – the RFP is always listed at the highest level, so anything that’s put into the proposal could be overridden by the RFP and this is never the intent of the proposer. It’s hard to say that the RFP always overrides the requirements in the proposal.

Doug C-B: How would you negotiate the precedence of the RFP versus the proposal when there are multiple offers?

Participant: Recommendation –use the downselect process.

Participant: Particularly for offerings that are already packaged (including “as a service” offerings), a lot of services cannot be changed for just one customer.

Participant (going back to the topic of RFP over proposal) - The evaluation committee looks at the proposal and says it meets our needs – any negotiation would be for the Terms & Conditions and not the basic requirements.

Participant: Sometimes RFPs are too prescriptive – when this happens, the company has to choose whether to meet the requirements as written in the RFP or making a partially non-compliant proposal that provides what the company thinks is a better solution. For instance, the IFB – requires very specific detailed responses that must meet item-per-item. An RFP theoretically gives the vendor the opportunity to let the vendor propose a solution that should meet the needs of the State.

Doug C-B: One way to address this would be for the companies to ask questions during the Q&A period. The State has to provide answers to anyone willing to ask questions, but we have heard companies are reluctant to ask questions because of Intellectual Property or general competitive concerns.

Participant: Most of the time my company submits a compliant proposal so they don't get thrown out. But perhaps the State should look at allowing a company to submit an alternate proposal.

Another Participant: If alternate proposals are accepted, then other companies who submit a proposal didn't have a chance to propose to that alternate set of requirements, which isn't a level playing field. More concerned about reaching agreement on limitation of liability, intellectual property.

b) Intellectual Property

Doug C-B: Every company has its own licensing. Companies don't use the same language for intellectual property across companies in the same industry. How is the State expected to provide a good baseline when there is such wide variety between companies?

Participant Question: What is the State's intention regarding ownership? What does the State need to actually own?

Doug C-B Answer: it depends on the solicitation. The lottery may want to own gaming, where for another procurement ownership isn't required.

Participant: the State needs to understand and respond accordingly when a vendor is selling you something that has already been defined by the company that is already sold to other customers. When we're small enough we'll sign what the State wants us to sign and when we're big enough we won't sign it. In many cases the company is selling this intellectual property as the "thing" the State is buying.

Participant Question: could the state ask the vendor to provide their IP language.

Doug C-B Answer: we expect as part of the proposal a copy of the licensing agreement.

Participant: If it's product-specific that's causing the problem, the IP language can be supplied by the vendor. Have the vendor supply the IP language and use that as the basis for the contract.

Doug C-B: But do we have a level playing field if the State does that?

Participant: Each vendor supplies its own language.

Doug C-B: What if your language allows you more coverage than another?

Participant: that's each person's business

Participant: I think that a work for hire opportunity is a lot different than bringing specific IP to the project that speeds the project and lowers the cost to the State. The company doesn't want to lose the right to "own" the item that makes the product faster/smarter/better.

Participant: maybe we should revisit having more than one contract for different purposes.

Doug C-B: Using open source software has always concerned the State. Do most of you use open source software in your programs or not? Is it a problem if the state doesn't allow open source software to be used?

Participant: It depends on what you're looking for. There are open source platforms that are highly customizable that might be used to solve the problem.

Participant: Allowing the State to use the IP is one thing, but if the company brings the IP to the table and a different 3rd party modifies it, the company doesn't want that 3rd party to walk away with that IP.

Participant: Look at the federal model – federal government use the licensing that the vendor provides. Again, recognize the difference between products vs. consulting services.

c) -Limitation of Liability

Doug: Comments on the draft IT Contract regarding limitation of liability were that industry best practice is to cap at no more than 1x the contract value OR annual fees in contract. It seems like the annual fee that many companies want as limitation of liability. Can someone explain why there is a push for that? This seems to be a common thread throughout feedback

Participant: This is not a new issue. We've been talking about limitation of liability for well over a decade. Most states have figured a way around it. It's in the State's interest to

come up with a model for liability to foster competition and drive business to the small and disadvantaged businesses. It is in the State's best interest to find a solution. Other states, including Massachusetts, have found a work around.

Participant: One of our concerns on limitation of liability is the State's inability to correctly calculate the liability associated with a particular contract. If there are computations that show how we would arrive at that liability this would be better.

Doug C-B: How does a company come up with the liability amount for a contract?

Participant: the State has a wide range of legacy systems – I will make a good faith effort to integrate to that old software, but who knows what is out there? Why should I take the risk of integrating to unstable, undocumented old software? The example would be if you've remodeled your house 6 times, I can't be responsible for prior renovations not being compliant.

Participant: all the items on the page [the PPT slide] are tied together. The State needs to take into consideration that they are all related to each other. At what point does the vendor/manufacturer have responsibility for these items? If the state looks at the bullets holistically instead of one bullet at a time, this makes it much easier to assess. Particularly for SaaS this is an issue moving forward.

There is an article from DHS on cybersecurity and the insurance for security/threats that I recommend reading. [Link:

<https://www.dhs.gov/sites/default/files/publications/cybersecurity-insurance-read-out-report.pdf>]

Participant: When assessing opportunities for your company, you have to quantify the downside of the engagement as you decide whether to use your resources to go after an engagement. Other aspects of limitation of liability that are important include related consequential damages, and other nuances of the provision itself.

Doug C-B: Most companies want state to waive indirect damages. Why?

Participant: It goes back to quantifying the risk.

Doug C-B: You're protecting your shareholders, but how does the State protect itself?

Participant: This goes back to negotiation. Somehow we have to meet in the middle.

Doug C-B: Cyberinsurance- the policy the State has reviewed covers indirect damages. I don't really understand why the State should have to take the risk regarding indirect damages.

Participant: Oracle- the limitation of liability – my experience the large companies won't sign up for unlimited liability. Top tier firms won't bid.

Doug: but the state has agreed in many cases to limit liability. [Note, an earlier point in the presentation was that the draft standard IT contract did, in fact, standardize to include liability limitation clauses.]

Participant: Limitation of liability should include two aspects - the internal aspect and the aspect for what the vendor is willing to be liable for with their work. The vendor should be liable for what they are installing. The State contract should include limitation for the external factors that go into that platform. Distinguish and exclude the external factors so the vendor is solely responsible for what they are putting in their platform.

Participant: One way to engineer allocation of risk would be to use indemnification clauses to call out areas where the State is really concerned and exclude those items out of the limitation of liability. Have indemnification and limitation of liability work together to cover what the vendors are also concerned about.

Participant: Representing small company point of view, there are sections for warranty, damages, insurance, liability – if the expectation is that the company has the proper insurance and the ability to deliver what they’re promising to deliver, it’s important that the State is willing to work with us to make some of these definitions clear. We are not saying that we shouldn’t be liable for our work. But recognize the State has its own responsibilities and it often puts multiple vendors on the same project responsible for the same outcome. How is the risk divided among these vendors? Are all the companies liable for everything on that project? It feels that the State is looking for large contracts for the companies that are able to fail, because the small business can’t show financial strength to withstand a failure. Not asking the State to take all liability, but the State is sometimes asking the vendor to take all of the liability. For small business, the state will always win against the small business.

Participant: no escalation for liability – in a situation with a \$20mill limitation 3 months into the project, can any reasonable person say that the State can hold the company responsible for the total contract value at that point?

Participant: auto insurance on contracts- \$1 million – is there a standard set of insurance that is always going to be on the contract? Why are certain insurances in there depending on the contracts? For instance, don’t put in auto insurance for hardware installation.

Discussion: VIDA- limitation of liability 2.5 to 3x value of the contract

- 6) Wrap-up and going forward
 - a) DoIT seeks to make incremental changes to the draft IT contract by end of this year.
 - b) DoIT hopes to make initial regulatory and/or statutory amendment recommendations by the end of this year.
 - c) DoIT has already published (9/30) some standard templates for use by the agencies (RFP, IFB, and CATS+ TORFP templates)

d) DoIT anticipates beginning the process of working on a SaaS IT contract in Q2 2015

7) Questions and closing remarks

Greg U: Thank you for coming. We appreciate your input and look forward to moving forward together on these topics.

Participant: All the templates and the changes the State is making, appreciate them. But could you work with the agencies procurement officers better for more consistency and more sense? There are some things required in a response that just don't make sense. Templates are great but not all sections apply to every solicitation. If there could be more training with the agencies. When you ask the question back to the agency why do we have to do this, this doesn't have anything? The agencies answer "DoIT makes us do it."

Greg U: It's a point well taken. There is a movement to make procurement better, and this is already underway. This includes to provide professional development for the procurement officers.

Mary Jo Childs, Procurement Advisor to the Board of Public Works: We do have in the pipeline some formalized training, including a course specific to information technology. The State must make sure the procurement officers are using common sense. I urge all control agencies to help the procurement officers in this regard. We are doing everything we can to ensure there is consistency AND common sense among the procurement officers.

Greg U: What is important from DoIT's perspective is that we develop more of a relationship for helping the agencies instead of trying to just tell them what to do. It is a stated goal of ours to create an environment of collaboration with the agencies.