

Terms and Conditions/Question and Response Document No. #1
Request for Proposals
Consulting and Technical Services (CATS) II
RFP #060B9800035
October 28, 2008

This list of Questions and Responses is being issued to clarify certain information contained in the above referenced RFP. The statements and interpretations of RFP and contract requirements that are stated in the following questions of potential Offerors are not binding on the State, unless the State expressly amends the RFP. Nothing in the State's responses to these questions is to be construed as agreement to or acceptance by the State of any potential Offeror's statement or interpretation of RFP and contract requirements.

1. Question: Can the State please clarify the meaning of the word "supersede" in RFP Section 1.1.3. As written, this could prohibit any Agency from redefining, increasing or decreasing specific CATS II RFP terms or conditions via project specific language provided in a future TORFP. It is recommended removal of the words "or supersede."

Response: The State does not agree with removing the words "or supersede." The wording as written is intended to make certain that the terms and conditions of the RFP take precedence over the TORFP.

2. Question: It is widely understood by private industry that overly aggressive contract liability provides unacceptable legal and financial exposure to vendors. Mitigation to this risk is normally reflected in price and for many minority and small businesses; it may prevent these companies from being able to participate.

Would the State consider reducing the maximum Limitation of Liability for the contract to two (2) times the total amount of the TORFP out of which the claim arises, given the understanding that the State may also, in its sole discretion, decrease the ceiling established hereunder in any TORFP issued pursuant to this RFP?

Response: The limitation of liability requirement as prescribed by the RFP shall remain at up to five times the total amount of the TORFP.

3. Question: Would the State be willing to accept a Letter of Credit at the beginning of a project for the total retainage amount of the TOA as a viable option to subtracting retainage as a percentage of project invoices? The State would be able to call on this letter of credit (if necessary) at any time during the course of the project.

Response: No, Letters of Credit will not be acceptable as a form of retainage.

4. Question: RFP Section 1.21 Mandatory Contractual Terms stipulates that vendors who submit a *proposal* “*shall be deemed to have accepted the terms of this RFP and the Master Contract, attached as Attachment A*”. However, the remaining text in Section 1.21 allows vendors to pose exceptions to the RFP or Master Contract within the Executive Summary, but then also states that “*a proposal that takes exception to these terms may be rejected.*” Can the State clarify whether or not vendors can pose exceptions to the Master Contract terms in the Executive Summary?

Response: The RFP requires that if an offeror takes exception to a term or condition of the RFP that the exception be clearly identified in the Executive Summary of the technical proposal. It does not suggest that the State will consider such exception; rather it states that a proposal that takes exception to these terms may be rejected. The State cannot negotiate separate terms with offerors. Most of the terms and conditions contained in the RFP are dictated by State law and the State has little if any room for negotiations.

5. Question: Alternatively, since the State tends to totally reject any of a Vendor’s necessary exceptions into the Master Agreement, will the state allow Agencies to invite inclusion of Master Contractor’s Terms and Conditions at the TORFP/RFR level on a task order by task order basis?

Response: No, exceptions to terms and conditions must be addressed prior to the award of the Master Contract.

6. Question: Who is the controlling authority to accept or reject a Vendor’s request to include terms and conditions it requires to in order to protect its Intellectual Property at the TORFP/RFR level? Is it the Department of Information Technology, or the State Agency who releases the TORFP/RFR?

Response: It is the procuring State Agency who shall negotiate these types of requests with all Master Contractors who submit responses to a TORFP/RFR. However, it is the Department of Information Technology who ultimately approves the award.

7. Question: RFP Section 5, TORFPs/RFR/s states “A TORFP/RFR may specify terms in addition to the terms specified herein. Such additional terms may include warranties, deliverables, and acceptance test requirements. A TO Agreement may not limit the State’s rights as provided by law, in this Contract, or in the RFP and may not change the terms of this Contract or the RFP.” May a Contractor request inclusion of certain terms and conditions at the TORFP level in order to protect its intellectual property? For instance, State TORFP’s may require a Vendor to perform Benchmarking or Measurement studies to analyze gaps

between peer groups. Such services will require terms and conditions that are not in any CATS II document.

Response: A Master Contractor may request such additional terms, however the State may not agree to them particularly if they are in conflict with the RFP terms and conditions.

8. Question: RFP Section 6.2, 2nd paragraph states “To the extent that any products created as a deliverable under this Contract are not works for hire for the State, the Contractor shall state why it believes that it should not thereby relinquish, transfer, and assign to the State all of its rights, title, and interest (including all intellectual property rights) to all such products created under this Contract. What kind of a statement is the State looking for from the Contractor to protect its IP rights?”

Response: The sentence stated in the question is self explanatory.

9. Question: If Contractor includes pre-existing IP in its Deliverables, which were neither developed nor created for the State, does the copyright and assignment in and to the project deliverables suffice?

Response: The State does not understand the question, please clarify.

10. Question: Would such a statement allow Contractor to retain all right, title and interest in and to its Intellectual Property?

Response: The State does not understand the question, please clarify.

11. Question: Where would such a statement be allowed? In the Attachment A Contract, in the TORFP? Please clarify and advise.

Response: The statement would be included in the technical proposal in response to a TORFP.

12. Question: RFP Section 7.2 states, in part “To the extent that any products created under this Contract are not works for hire for the State, the Contractor hereby relinquishes, transfers, and assigns to the State all of its rights, title, and interest (including all intellectual property rights) to all such products created under this Contract, and will cooperate reasonably with the State in effectuating and registering any necessary assignments. What is the process within the State of Maryland for “registering any necessary assignments”?”

Response: Offerors should seek own legal counsel to determine the process.

13. Question: How does the State prevent the process of registering and/or assigning Vendor’s pre-existing Intellectual Property which is included in product deliverables but was not developed for the State as a Work Product when works are not for hire?

Response: The State does not understand the question, please clarify.

14. Question: There are many “Rate-Based” services you are asking for us to propose on. There is one other service we would ask that you accept proposals for, Research and Advisory Subscription Services. If you would consider this additional type of service, there are specific Terms & Conditions that we would like to propose. These specific Terms & Conditions are appropriate for a Subscription-Based Research & Advisory Service and are not covered by a pure CATS rate-based contractual relationship. Would the state accept this additional service type to be proposed along with specific Terms & Conditions?

Response: The State does not consider this type of service within the scope of CATS II.

15. Question: Does RFP Section 2.2.1.2 serve as notice to the Contractor to mean that the State shall have sole ownership of ALL WORK PRODUCTS pertaining to the Contractor’s work for the State?

Response: RFP Section 2.2.1.2 refers to ownership of custom software developed under a TO Agreement for the State.

16. Question: RFP, Section 2.2.1.2, is there flexibility in contract negotiations on this requirement should this contractor receive a contract award?

Response: Please refer to Section 6.6 of Attachment A.

17. Question: RFP Section 2.2.1.3 (Source Code), the State indicates that for all custom software provided to the State pursuant to any TO Agreement, the TO Contractor shall either provide the source code directly to the State in a form acceptable to the State, or deliver two copies of each software source code and software source code documentation to a State-approved escrow agent. This agency practices joint ownership rights in developments as a matter of policy. However, we invite the State to use, modify and reproduce the service deliverables for internal purposes without authorizations from us. Would the State find such language in the Master Contract objectionable?

Response: Yes, the State would find such language objectionable. Please refer to Section 6.6 of Attachment A.

18. Question: Attachment A – CATS II Contract Sections 6 (Patents, Copyrights, Intellectual Property) and 7 (Rights to Records), the State cites that the Contractor agrees that at all times during the term of this Contract and thereafter, works created as a deliverable under this Contract and services performed under this Contract shall be “works made for hire” as that term is interpreted under U.S. copyright law. This agency does not perform its services on a “works made for hire” basis. All of our software (a) runs on Windows; and (b) is developed using our compilers. If the software deliverable runs on Windows, it will necessarily contain a great deal of code from the development toolkit or it would not interface with the operating system. We may not therefore, grant any ownership in the redistributable code from our development tools; to do so would result in

the State owning codes included in all of our commercial products. Does the State understand why “works made for hire” is not an option? Would the State consider an alternative if this contractor were to receive a contract award?

Response: When procuring a COTS solution, the State would not expect the purchase to be considered a works for hire rather a license to use the software. In the case of customized software solution, which would be considered a works for hire, most likely the State might not consider a proposal in response to a TORFP if the State would not own the code to develop the software.

19. Question: Attachment A – CATS II Contract Section 8 (Confidentiality), the State’s confidentiality section contains a clause that “all confidential or proprietary information and documentation relating to either party (including without limitation, any information or data stored with the Contractor’s computer systems) shall be held in absolute confidence by the other party.” Contractor proposes a period of five years after initial disclosure. Does the State agree to this limitation?

Response: The State shall follow the requirements as outlined under the Public Information Act, Title 10, Subtitle 6, Part III of the State Government Article of the Annotated Code of Maryland.

20. Question: Contractor also proposes the right to use any technical information it derives from providing services related to its products for problem resolution, troubleshooting, product functionality enhancements and fixes, for its knowledge base. Contractor agrees not to identify the State or disclose any of the State’s confidential information in any item in the knowledge base. Is this language objectionable to the State?

Response: The State objects to this language.

21. Question: Attachment A – CATS II Contract Section 26 (Indemnification), the State cites that the Contractor shall hold harmless and indemnify the State against liability for any costs, expenses, loss, suits, actions, or claims of any character arising from or relating to the performance of the Contractor or its subcontractors under this Contract. The State’s indemnification provision under this section is too broad and is already covered under its indemnification provision contained in Section 6. This agency agrees to defend the State against third-party copyright infringement claims in performance of the low-risk type of consulting services that would be performed under this Agreement. Is the State satisfied with the level of indemnification that this agency proposes?

Response: No, the level of indemnification will remain as stated in the RFP.

22. Question: Attachment A – CATS II Contract Section 27 (Limitation of Liability), the State outlines that for breach of this Contract, negligence,

misrepresentation or any other contract or tort claim, Contractor shall be liable as follows:

A. For infringement of patents, trademarks, trade secrets and copyrights as provided in Section 6 ("Patents, Copyrights, Intellectual Property") of this Contract;

B. Without limitation for damages for bodily injury (including death) and damage to real property and tangible personal property;

C. For all other claims, damages, loss, costs, expenses, suits or actions in any way related to this Contract, regardless of the form, Contractor's liability per claim shall not exceed five (5) times the total amount of the TORFP out of which the claim arises; provided however, the State may, in its sole discretion, decrease the ceiling established hereunder in any TORFP issued pursuant to this RFP. Third party claims arising under Section 26 ("Indemnification") of this Contract are included in this limitation of liability only if the State is immune from liability. Contractor's liability for third party claims arising under Section 26 of this Contract shall be unlimited if the State is not immune from liability for claims arising under Section 26.

Except as otherwise specifically provided in this paragraph, whatever the legal basis for the State's claims, our total liability (and that of our contractors) will be limited, to the maximum extent permitted by applicable law, to direct damages up to the amount you have paid under the applicable TORFP for the services giving rise to the claims. In the event services or any service deliverables are provided to the State on a gratuitous or no-charge basis, our total liability to the State will not exceed US \$5000. The limitations contained in this paragraph will not apply with respect to the following:

- (i) our obligations under the Limitations of Liability Section;
- (ii) our liability for damages for gross negligence or willful misconduct, to the extent caused by us or our contractors and awarded by a court of final adjudication; and
- (iii) our obligations under the Confidentiality Section.

Is this language agreeable with the State?

Response: No, the State will not consider the requested change.

23. Question: RFP Section 1.1; Attachment A – CATS II Contract, Item 5, TORFPs/RFRs. Certain jurisdictions have recognized that the Master contract should provide default terms that need to be flexible for the needs and risk/rewards of a particular task order. Will DoIT consider including a mechanism to allow the parties to agree to certain terms to supersede the Master Contract where mutually agreed? For example, LoL is typically set at the TO level; in fact, in CATS I LoL is set at the TO level.

Response: The State will not consider the request; please see the response to Question #1.

24. Question: Attachment A – CATS II Contract, Item 27, Limitations of Liability (LOL). A 5X contract value cap on damages is excessive and does not provide an appropriate balance between risk and reward for the Master Contract. The LoL is best set at the TO level. In addition, while we are willing to accept responsibility for damages that arise directly from our actions, up to the limitation of liability, consequential damages are unforeseeable and outside of our control. It is customary for government and commercial IT contracts to include a mutual disclaimer of consequential damages and cap direct damages at the value of the contract for design or implementation projects and 12 months fees for outsourcing projects.

Will DoIT consider changing the limitation of liability in Section C as described above and adding the following language as Section D to address consequential damages to protect the State and the Contractor?

In no event shall either party be liable for any consequential, incidental, indirect, special or punitive damage, loss or expenses (including but not limited to business interruption, lost business, lost profits, or lost savings) even if it has been advised of their possible existence.

Response: No, the State will not consider the requested change. Please note that the limitation of liability will be set for each TORFP released under CATS II depending on the services being provided.

25. Question: RFP Section 2.7.2(B) - 2.7.4 The insurance provisions contain certain requirements that are not available in the insurance market and/or would be inappropriate to flow down to small subcontractors performing limited scope on the project. Will DoIT consider modifying the insurance provisions as follows?

2.7.2 B) General Liability- The Master Contractor shall maintain the following insurance on an occurrence and /or aggregate basis as applicable for Master Contractor's liability for claims arising as a result of the Master Contractor's operation under this RFP with minimum limits of:

\$500,000-General Aggregate Limit (other than products/completed operations)

\$500,000-Products/completed operations aggregate limit

\$250,000- Each Occurrence Limit

\$250,000-Personal and Accidental Injury Limits

\$ 50,000-Fire Damage Limit

\$ 5,000-Medical Expense

2.7.3 The State shall be named as an additional insured on the required General Liability policy. Certificates of insurance evidencing this

coverage shall be provided prior to the commencement of any activities under the Contract. Insurers shall endeavor to provide not less than thirty (30) days advance notice of any cancellation of the required policies, the Master Contractor must provide the State with an insurance policy from another carrier at least thirty (30) days following the renewal of the insurance policy then in effect. All insurance policies must be with a company licensed to do business in Maryland.

2.7.4 The Master Contractor shall require that any subcontractors that are utilized to fulfill the obligations of any TORFP obtain and maintain types and limits of insurance that Master Contractor deems appropriate to the subcontractors' participation in the Services and shall provide the State with the same documentation as is required of the Master Contractor in any given TORFP.

Response: This requirement has been amended, see Amendment #3 to the RFP.

26. Question: Attachment A – CATS II Contract, Item 2.1 Order of Precedence. The order of precedence puts the RFP ahead of the proposal. Will DoIT consider revising the order of precedence so that the proposal precedes the RFP, since it is the later prepared document? If not, would it at least consider putting them on an equal level?

Response: The order of precedence shall remain with the RFP ahead of the proposal.

27. Question: Attachment A – CATS II Contract, Item 2.2 Change Orders. Will DoIT consider inclusion of an appropriate change order process that establishes the procedure for the parties to agree on scope, pricing, schedule and other factors for additional work?

Response: There is an established change order process for CATS I that will be followed under CATS II. The process includes a requirement that both the State and the Master Contractor sign a modification to the TO Agreement mutually agreeing on scope, price and schedule.

28. Question: Attachment A – CATS II Contract, Item 4.3 Consideration and Payment. We acknowledge that DoIT should have the right to withhold payment for services or deliverables that are not in compliance with the Contract. The language in this provision, however, goes much further and provides an unreasonable right to withhold payment for work that is in compliance or even unilaterally reduce the fees without any limitations. Moreover, it is tied to subjective rather than objective criteria. Will DoIT consider modifying the sentence as follows:

In addition to any other available remedies if the Contractor materially fails to perform its obligations as required under this Contract, the Procurement Officer may refuse or limit approval of any invoice for payment, and may cause payments to the Contractor for non-conforming

services or deliverables to be withheld until such time as the Contractor meets the required performance.

Response: No, the State will not consider the request.

29. Question: Attachment A – CATS II Contract, Item 11 Disputes. The language in this Section is the “short form” of the alternative language provided under *COMAR 21.07.01.06*. Will DoIT consider using the “long form” alternative, which provides greater specificity and understanding of the process for dispute resolution?

Response: No, Attachment A – CATS II Contract, Item 11 Disputes will remain in the short form.

30. Question: Attachment A – CATS II Contract, Item 16, Termination for Default. We accept the terms set forth in this Section as required by COMAR. Will DoIT consider adding additional provisions that would establish clear expectations upon termination, as well rights for the Contractor to terminate for the uncured material breach of the State? We recommend the following language as Sections 16.1 and 16.2:

16.1 Termination for Nonpayment by the State. Contractor may terminate this Agreement if the State fails to timely pay a valid invoice as set forth in Section 4 and such breach is not cured within thirty (30) calendar days of notice thereof. During the cure period and at all times while the Agreement remains in force both parties shall continue to perform their obligations.

16.2 Payment on Termination. Upon the termination of the Agreement the parties will work in good faith to settle all amounts due between them. Contractor shall be entitled to payment for:

- a. work performed through the termination date except for any work that was not in compliance with the warranties or Specifications described herein;
- b. any capital costs incurred for materials that were procured and delivered to the State for the benefit of the Project; and
- c. reasonable and substantiated demobilizations costs, except in cases of termination for the material breach of Contractor.

Response: Attachment A – CATS II Contract, Item 16, Termination for Default, the clause is mandatory under COMAR and will not be changed.

31. Question: Attachment A – CATS II Contract, Item 18, Delays and Extension of Time. The current Contract language would require the Contractor to bear the risk and cost of delays that were caused by events outside of its reasonable control, including delays caused by the non-performance of the State. Will DoIT consider clarifying these provisions to indicate that Contractor is not entitled to any changes to price or

schedule for delays caused by Contractor or its subcontractors or suppliers?

Response: Attachment A – CATS II Contract, Item 18, Delays and Extension of Time, the clause is mandatory under COMAR and will not be changed.

32. Question: Attachment A – CATS II Contract, Item 19, Suspension. Will DoIT clarify that in the event that it suspends performance for its convenience the Contractor shall be entitled to an equitable adjustment to its fees to account for the unavoidable costs associated with deployed resources?

Response: Attachment A – CATS II Contract, Item 19, Suspension, the State will not consider the clarification.

33. Question: Attachment A – CATS II Contract, Item 26, Indemnification. While we are willing to indemnify the State from certain claims made against the State for damages arising where we were negligent, these provisions go far beyond this standard and effectively require the Contractor to be an insurer for the State without regard to whether the Contractor has done anything wrong.

Will DoIT consider modifying Section 26.1 as follows and clarifying Section 26.4 accordingly?

The Contractor shall hold harmless and indemnify the State against liability for any costs, expenses, loss, suits, actions, or claims of any third party for personal injury, death or property damage arising from or relating to the negligent or willful acts of the Contractor in the performance of this Contract. Contractor shall require all subcontractors to provide such indemnification rights to the State in its subcontracts.

Response: Attachment A – CATS II Contract, Item 26, Indemnification. The State will not consider the modification.

34. Question: RFP Section 2.2.12; Attachment A – CATS II Contract, Item 6.2, Patents, Copyrights, Intellectual Property. We acknowledge and agree that the State should be the owner of the intellectual property that is being developed for it with taxpayer money. We would not require any ownership rights in such work product, but rather request that the State provide a license back in such work product (but not in any State Confidential Information) to allow us to continue to bring the same level of value to future clients that we intend to bring to Maryland. Will DoIT consider adding the following language at the end of Section 6.2?

Contractor shall have a perpetual, nontransferable non-exclusive paid-up right and license to use, copy, modify and prepare derivative works of the deliverable(s) subject to any restrictions of any third-party materials embedded in the deliverables. All other intellectual property rights in the deliverables remain in and/or are assigned to Contractor.

Response: No. Please see Attachment A – CATS II Contract, Section 6.6.

35. Question: RFP Section 2.2.1.2 Custom Software, will the State accept the following additional language as underlined?

A) The State shall solely own any custom software, including, but not limited to application modules developed to integrate with a COTS, source-codes, maintenance updates, documentation, and configuration files, when developed under a TO Agreement.

Contractor requests that the State negotiate rights to the Contractor custom software as it applies to each individual TO Agreement. For the purposes of this section, should the custom software constitute “work made for hire” to the extent permissible under U. S. Copyright law the State will own the copyright in custom software created as part of a service under the TO Agreement.

If any such custom software is not works made for hire Contractor requests that the State grants Contractor an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, sublicense, distribute, and prepare derivative works based on custom software developed by the Contractor.

In some cases Contractor or its suppliers may own the copyright in custom software created as part of a Services transaction relative to a TO Agreement. Contractor grants State an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute (within State’s Enterprise only) copies of custom software.

Contractor or its suppliers retains ownership of the copyright in any of Contractor’s or its suppliers’ works that pre-exist or were developed outside of this TO Agreement and any modifications or enhancements of such works that may be made under this Contract or TO Agreement. To the extent they are embedded in any custom software, such works are licensed in accordance with their separate licenses provided to State, if any, or otherwise as provided in the preceding paragraph.

Each of us agrees to reproduce the copyright notice and any other legend of ownership on any copies made under the licenses granted in this section.

Response: The State will not accept the additional language as proposed, please refer to Attachment A – CATS II Contract, Section 6, specifically 6.6.

36. Question: RFP Section 2.2.1.3 Source Code. Would the State consider that that RFP Section 2.2.1.3 be negotiated on a TO Agreement basis to determine, based on RFP Section 2.2.1.2, the extent to which the State may “own” or license the custom software provided by the Contractor.

Response: Please refer to Attachment A – CATS II Contract, Section 6, specifically 6.6.

37. Question: CATS II Contract, Section 4.3 Consideration and Payment

Contractor believes that providing performance standards and completion criteria in each individual TO Agreement sets clearly defined expectations between the parties, eliminates potential misunderstandings, and is beneficial to both parties. Invoking a management escalation procedure, if needed, would provide for an efficient mechanism to reasonably resolve performance issues. As such, Contractor respectfully requests that Section 4.3 be modified such that if the Contractor fails to perform in accordance with the performance standards and/or completion criteria contained in the TOA, the Procurement Officer may refuse or limit approval of any invoice for payment, and may cause payments to the Contractor to be reduced or withheld until such time as the Contractor meets performance standards and/or completion criteria contained in the TOA. The Procurement Officer agrees to release payment as soon as the nonperformance is cured. During the period that the Contractor fails to meet the performance standards and/or completion criteria, the parties shall initiate a mutually agreeable management escalation procedure to be invoked for resolution which will include the identification of necessary corrective actions and a negotiated cure period. Should the Contractor's failure to perform be a result of the State not meeting its obligations detailed in the TO Agreement then the Contractor shall be paid for all services performed under a TO Agreement.

Response: The State does not agree to amend CATS II Contract, Section 4.3 Consideration and Payment. The State agrees that performance standards and completion criteria may be written into each TO Agreement. Such standards and criteria may be included in the TORFP which is incorporated in the TO Agreement. In addition, each TORFP contains delivery and acceptance/payment criteria to address performance issues and invoice approval and payment. Also, if the requesting agency feels that it is warranted, retainage requirements may also be included in the TORFP. There is an established change order process for CATS I that will be followed under CATS II. The process includes a requirement that both the State and the Master Contractor sign a modification to the TO Agreement mutually agreeing on scope, price and schedule. Should there be a dispute between the Contractor and the State concerning payment to the Contractor, that dispute shall be subject to the State dispute resolution provisions (see CEG Administrative and Civil Remedies).

38. Question: CATS II Contract, Section 6.3, Patents, Copyrights, Intellectual Property. Contractor requests that indemnifications above be limited to copyright and patent indemnification since other indemnifications become too broad and extends beyond the intent of this Contract. Contractor

requests that the following modifications be made and additional language (as underlined) added to this Section to clarify the remedies Contractor shall provide and claims for which Contractor is not legally liable:

The Contractor shall hold and save harmless the State of Maryland, including but not limited to the Department and its agents, officers, and employees, from liability of any nature or kind arising out of a claim or suit for or on account of the use of any copyrighted or ~~uncopyrighted~~ ~~composition, trademark, service mark, secure process~~ ~~unpatented or patented invention, article or appliance~~ furnished or used in the performance of any Contract resulting from this RFP. The Contractor agrees to assume the defense of any and all such suits and pay the costs and expenses incidental hereto that the Contractor is legally liable to pay, subject to the right of the State to provide additional legal counsel at the State's own expense. If a third party claims that a product infringes that party's patent or copyright, the Contractor will defend the State against that claim at Contractor's expense and will pay all damages, costs and attorney fees that a Court finally awards, provided the State

(i) notifies the Contractor in writing of the claim within a reasonable time after the State's receipt of such claim, with the understanding that the State's failure to give reasonably timely notice shall not relieve Contractor of any obligation hereunder except and to the extent that such failure prejudices Contractors' ability to defend against such claim; and (ii) allows Contractor to control, and cooperates with Contractor in, the defense and any related settlement negotiations.

Contractor requests that indemnifications above be limited to copyright and patent indemnification since other indemnifications become too broad and extends beyond the intent of this Contract. Contractor further requests that the following be added to this Section to clarify the remedies Contractor shall provide and claims for which Contractor is not legally liable.

Remedies

If such a claim is made or appears likely to be made, State agrees to permit Contractor to enable State to continue to use the Product ("infringing item"), or to modify it, or replace it with one that is at least functionally equivalent. If Contractor determines that none of these alternatives is reasonably available, State agrees to return the Product to Contractor on Contractor's written request. Contractor will then give State a credit equal to:

a. _____ for a Product, the amount State paid Contractor for the creation of the Product.

Claims for Which Contractor is Not Responsible

b. _____ Contractor has no obligation regarding any claim based on any of the following:

c. anything provided by State or a third party on State's behalf that is incorporated into a Product or Contractor's compliance with any designs, specifications, or instructions provided by State or a third party on State's behalf;

d. modification of a Product by State or a third party on State's behalf, other than in accordance with its applicable licenses and restrictions;

e. the combination, operation, or use of a Product with any product, hardware device, program, data, apparatus, method, or process that Contractor did not provide as a system, if the infringement would not have occurred were it not for such combination, operation or use;

f. the distribution, operation or use of a Product outside State's Enterprise ; or

g. infringement by a non-Contractor Product or an Other Contractor Program alone.

This Intellectual Property Protection section states Contractor's entire obligation and State's exclusive remedy regarding any third party intellectual property claims.

Response: The State will not consider the modifications or additional language.

39. Question: Attachment A – CATS II Contract, Section 6.6. Contractor's intent is to use work products provided by the State exclusively to facilitate the completion of agreed upon deliverables in each negotiated TORFP. A worldwide, perpetual, non-exclusive license provided by the State to the Contractor may be essential to the Contractor in completing the expectations of the State in a TORFP. Would the State consider the following modifications:

The Contractor shall not acquire any right, title and interest in and to the copyrights for goods, any and all software, technical information, specifications, drawings, records, documentation, data or derivative works thereof, or other work products provided by the State to the Contractor. In a TORFP, the State may, in its sole discretion, elect to grant the Contractor a worldwide, perpetual, non-exclusive license, ~~for which the State may require compensation, perhaps in the form of a royalty, for the Contractor's internal use to non-confidential Contract deliverables first originated and prepared by the Contractor for delivery to the State, but only~~ for use by the Contractor to benefit the State and only as needed by the Contractor to complete deliverables agreed to by the State in a TORFP.

Response: The State will not consider the modifications. It is the intention of the State to have the option to require compensation for use of the referenced items.

40. Question: Attachment A – CATS II Contract, Section 7 Rights to Records. Contractor requests that Sections 6.5, 7.1, 7.2 and 7.4 be governed by our proposed changes and clarifications detailed in Section 2.2.1.2 .

Response: The State will not agree to this request, please see response to Question #35.

41. Question: Attachment A – CATS II Contract, Section 9 Loss of Data. Contractor believes that providing the State with the flexibility of specifying the parties respective responsibilities for backup, recovery, and/or loss of data or records on a individual Task Order Agreement basis provides the State with an opportunity to weigh the advantages and disadvantages of various options based on the task specific needs of the State at the time of request. In consideration of the above, Contractor requests that Section 9 be replaced with the following:

Responsibility with respect to the backup, recovery, and/or loss of data or records shall be mutually agreed upon and delineated in the Statement of Work related to each individual Task Order Agreement issued under this Contract.

Response: The State will revise Section 9 Loss of Data.

42. Question: Attachment A – CATS II Contract, Section 16, Termination for Cause. Contractor believes that providing a thirty (30) day period to cure its failure to fulfill obligations under the Contract is a reasonable risk allocation to both parties and proposes that any damages be subject to the proposed “Limitation of Liability” Section. Would the State consider the following modifications to Section 16?

If the Contractor fails to fulfill its obligations under this Contract properly and on time, or otherwise violates any provision of the Contract, the State may terminate the Contract by written notice to the Contractor . The notice shall specify the acts or omissions relied upon as cause for termination. State shall provide the Contractor with a thirty (30) day period to cure all unfulfilled obligations. All finished or unfinished work provided by the Contractor shall, at the State’s option, become the State’s property subject to the ownership rights proposed in Section 2.2.1.2.above. The State shall pay the Contractor fair and equitable compensation for satisfactory performance prior to receipt of notice of termination, less the amount of damages caused by the Contractor’s breach such damages shall be limited to the proposed changes to Section 27, “Limitation of Liability”. If the damages are more than the compensation payable to the Contractor, the Contractor will remain liable after termination and the State can affirmatively collect damages such damages shall be limited to the proposed changes to Section 27, “Limitation of Liability”. Termination hereunder, including the termination of the rights and

obligations of the parties, shall be governed by the provisions of COMAR 21.07.01.11B.

Response: Attachment A – CATS II Contract, Section 16, Termination for Cause. The clause is mandatory under COMAR and will not be changed.

43. Question: Attachment A – CATS II Contract, Section 16, Termination for Convenience. Providing a thirty day notice to the Contractor assists both the Contractor and State in planning a smooth termination transition and provides for a reasonable time period to plan and manage the termination process. Would the State consider the following modifications to Section 17?

The performance of work under this Contract may be terminated by the State in accordance with this clause in whole, or from time to time in part, whenever the State shall determine that such termination is in the best interest of the State and State shall provide Contractor with thirty (30) days written notice of such termination. The State will pay all reasonable costs associated with this Contract that the Contractor has incurred up to the date of termination, and all reasonable costs associated with termination of the Contract; provided, however, the Contractor shall not be reimbursed for any anticipatory profits that have not been earned up to the date of termination. Termination hereunder, including the determination of the rights and obligations of the parties, shall be governed by the provisions of COMAR 21.07.01.12 (A) (2).

Response: Attachment A – CATS II Contract, Section 17, Termination for Convenience. The clause is mandatory under COMAR and will not be changed.

44. Question: Attachment A – CATS II Contract, Section 18, Delays and Extensions of Time. To reasonably and fairly define the rights and obligations between the parties, Contractor respectfully requests that this Section be modified such that no charges or claims for damages shall be made by the Contractor for any delays or hindrances, in the performance of services under this Contract except in an instance where the State fails to perform in accordance with its responsibilities defined in the Task Order Agreement.

Response: Attachment A – CATS II Contract, Section 18, Delays and Extensions of Time. The clause is mandatory under COMAR and will not be changed.

45. Question: Attachment A – CATS II Contract, Section 19, Suspension of Work. Contractor believes the intent of this Section lends itself to the same notice provision as proposed in Section 17, “Termination for Convenience”. Would the State consider the following modifications to Section 19?

The State unilaterally may order the Contractor in writing by giving thirty (30) days notice to suspend, delay, or interrupt all or any part of its performance for such period of time as the Procurement Officer or Contract Manager may determine to be appropriate for the convenience of the State.

Response: Attachment A – CATS II Contract, Section 19, Suspension of Work. The clause is mandatory under COMAR and will not be changed.

46. Question: Attachment A – CATS II Contract, Section 23, Retention of Records. Contractor cannot permit third party audit firms to conduct audits of Contractor records as it applies to this Contract. Contractor must protect the confidential Client information it possesses as well as protect a any early release of its financial records (e.g. Contractor’s own cost and profit information), which could affect the prices it sets for its goods and services in the marketplace as well as Contractor’s overall stock price. Allowing a third party to audit financial information will be inappropriately disclosed. Would the State consider the following modifications to Section 23?

The Contractor shall retain and maintain all records and documents in any way relating to this Contract for three years after final payment by the State under this Contract or any applicable statute of limitations, whichever is longer, and shall make them available for inspection and audit by ~~authorized representatives of the State~~, including by way of example only, the Procurement Officer or the Procurement Officer’s designee, and the Contract Manager or the Contract Manager’s designee, at all reasonable times. All records related in any way to the Contract are to be retained for the entire time provided under this section. The Contractor shall, upon request by the State, surrender all and every copy of documents needed by the State, including, but not limited to itemized billing documentation containing the dates, hours spent and work performed by the Contractor and its subcontractors under the Contract. The Contractor agrees to cooperate fully in any audit conducted by or on behalf of the State, including, by way of example only, making records and employees available as, where, and to the extent requested by the State and by assisting the auditors in reconciling any audit variances. Contractor shall not be compensated for providing any such cooperation and assistance. This section shall survive expiration of this Contract.

Response: Attachment A – CATS II Contract, Section 23, Retention of Records. The clause is mandatory under COMAR and will not be changed.

47. Question: Attachment A – CATS II Contract, Section 25, Subcontracting; Assignment. The Contractor believes that it is reasonable that any proposed changes agreed to between Contractor and State should also apply to Subcontractors. Would the State consider the following modifications?

The Contractor may not subcontract any portion of the services provided under this Contract without obtaining the prior written approval of the Procurement Officer, nor may the Contractor assign this Contract or any of its rights or obligations hereunder, without the prior written approval of the Procurement Officer, any such approvals to be in the State's sole and absolute subjective discretion; provided however, a Contractor may assign monies receivable under a TO Agreement after due notice to the State. Any such subcontract or assignment shall include the terms of sections 9, and 11 through 24 subject to the proposed changes made by Contractor contained herein of this Contract and any other terms and conditions that the State deems necessary to protect its interests. The State shall not be responsible for the fulfillment of the Contractor's obligations to the subcontractors.

Response: As stated on RFP Section 1.20, Offeror Responsibilities, any selected Offeror shall be responsible for all products and services required by the RFP. The State will not consider the modifications.

48. Question: Attachment A – CATS II Contract, Section 26, Indemnification. Would the State consider replacing the entire Section 26 as follows:

Contractor will defend, indemnify, and hold harmless the State, its officers, employees, agents, and representatives from and against any and all claims, actions, suits, or liabilities for bodily injury (including death) or damage to real or tangible personal property arising out of, or caused by, the acts or omissions of Contractor and/or its agents, servants, employees, or subcontractors in the performance of (or failure to perform) provided that the State promptly notifies Contractor in writing of any claims of which it has knowledge; allows Contractor, to control the litigation or other proceeding; and cooperates with Contractor, at Contractor's expense in the defense and any related settlement negotiations.

The State agrees that this Contract will not create any right or cause of action for any third party, nor will Contractor will be responsible for any third party claims against the State except as described in section 6.3 above (copyright and patent infringement) or as permitted by the Limitation of Liability section below for bodily injury (including death) or damage to real or tangible personal property for which Contractor is legally liable.

The law has firmly established the limitations of actions for damages, adequately balancing the needs of both parties by setting the appropriate burden of proof, legal standard and scope of liability, among other things. An indemnification clause disrupts the equitable balance struck by years of legal principles and shifts risk to the Contractor. Broad indemnification clauses would require the Contractor to step up to damages regardless of whether it was negligent, and regardless of whether it was the legal cause of the damages.

Response: The State will not consider the proposed replacement.

49. Question: Attachment A – CATS II Contract, Section 27, Limitation of Liability. Liability caps are a commercially accepted practice in the IT industry. They are also endorsed by the National Association of State Chief Information Officers (NASCIO). Information technology companies must have an outside limit to their financial exposure under a contract as part of a prudent risk management. Otherwise, they cannot effectively balance the risks and rewards of a particular engagement.

Direct damages are intended to provide compensation to allow the customer to obtain products or services with the quality and functions specified in the contract as a substitute for the products or services that the vendor was supposed to provide but did not deliver as contracted. A direct damages cap which is equal to the charges paid to the contractor should be more than sufficient to cover the charges for substitute products or services.

Consequential damages are inherently speculative, because it is almost impossible to demonstrate what would have happened if a particular event had not occurred. Such damages bear no direct relationship to the value or charges for the product or service that caused the claim. A failure of a very small server could be disastrous if it is running a critical application but the failure of a multi-million dollar mainframe could be inconsequential if it was in a non-production environment. Vendors need to manage risk as a function of revenue, which is impossible with consequential losses. Customers, on the other hand, can control and accommodate for consequential damages. Decisions such as the extent of redundancy, data backup and recovery, storage, business recovery plans are the customer's decisions and can dramatically reduce the risk of a consequential loss. Customers make those decisions and the risk allocation for consequential loss should be a factor that they – not their vendors – have to consider.

When sophisticated IT contractors cannot effectively balance the risks of pursuing a contract because of large liability amounts, they often choose not to compete for the contract. Further, unrealistic Limitation of Liability clauses can result in higher prices to customers as contractors build risk into their pricing cases.

Would the State consider the following modifications?

For breach of this Contract, negligence, misrepresentation or any other contract or tort claim, Contractor shall be liable as follows:

- A. For infringement of patents, trademarks, trade secrets and copyrights as provided in Section 6 ("Patents, Copyrights, Intellectual Property") of this Contract;
- B. Without limitation for damages for bodily injury (including death) and damage to real property and tangible personal property;
- C. For all other claims, damages, loss, costs, expenses, suits or actions in any way related to this Contract, regardless of the form, of any actual direct damages, Contractor's liability per claim shall not exceed ~~five (5) times~~ the total amount of the TORFP (or charges paid to the Contractor for said TORFP if TORFP is not completed) out of which the claim arises; provided however, the State may, in its sole discretion, decrease the ceiling established hereunder in any TORFP issued pursuant to this RFP. Third party claims arising under Section 26 ("Indemnification") of this Contract are included in this limitation of liability only if the State is immune from liability. Contractor's liability for third party claims arising under Section 26 of this Contract shall be unlimited if the State is not immune from liability for claims arising under Section 26.

D. Items for Which Contractor Is Not Liable

Except as expressly required by law without the possibility of contractual waiver, under no circumstances is Contractor, its subcontractors, or Program developers liable for any of the following even if informed of their possibility:

- a. loss of, or damage to, data;
- b. special, incidental, exemplary, or indirect damages or for any economic consequential damages; or
- c. lost profits, business, revenue, goodwill, or anticipated savings.

Response: The State will not consider the modifications.

50. Question: Attachment A – CATS II Contract, Section 30, Nonvisual Accessibility Warranty. Contractor requests that Section 30 above be modified such that it is applicable only when clearly delineated as a requirement in a TORFP.

Response: The State will not consider the modification.

51. Question: Attachment A – CATS II Contract, Section 2.1, the order of precedence is laid out such that the CATS II base agreement takes precedence over any other document, terms or conditions. In the Pre-proposal Conference it was stressed that, to apply lessons learned in CATS I, it was intended that there would be flexibility built in on the task order level to alter certain terms, e.g. Intellectual Property Rights, and

Limitation of Liability. Doesn't the Order of Precedence need to be revised to reflect the general rules of contract construction, that the specific (in this case the Task Order Agreement) has precedence over the general (the base CATS II Contract) if the process is to meet the stated intent of CATS II?

Response: No, the Order of Precedence does not need to be revised. The RFP allows for flexibility for Intellectual Property Rights and Limitation of Liability at the TORFP/RFR level. Please see Attachment A, CATS Contract, Sections 6 and 27.