

The following are “Prohibited Provisions” that must not be included in any Hardware/Software Licensing Agreements as they violate State of Tennessee Law. Please modify your standard terms and conditions accordingly.

### **Unacceptable Provisions**

- a) Disclaimer of vendor’s liability for incidental, exemplary, or consequential damages;
- b) Disclaimer by vendor of express or implied warranties of merchantability and fitness for a particular purpose;
- c) Limitation on dollar amount of damages recoverable by state from vendor;
- d) Limitation on time permitted Institution for bringing legal action against vendor.
- e) Requirement of payment by Institution in advance of delivery or prior to acceptance of products and services;
- f) Requirement that Institution pay taxes of any kind;
- g) Passing of risk of loss or title to Institution before delivery and/or installation of products;
- h) Right of Vendor to enter Institution’s premises without notice to remove equipment or product upon alleged default by Institution;
- i) Assessment of penalties or liquidated damages against Institution;
- j) Award of Attorney’s fees to Vendor in the event of legal action against Institution;
- k) Governing Law other than Tennessee;
- l) Arbitration clause designating third party to settle legal disputes;
- m) Consent to jurisdiction in courts outside Tennessee;
- n) Indemnification or holding harmless of vendor by Institution;
- o) Payment of travel/per diem expenses in excess of maximum limitations set forth in Tennessee Board of Regents (TBR) policy.

### **Essential Contents of the Agreement**

The following provisions should be considered as essential terms and conditions of your proposal.

- A. Non-discrimination. The parties agree to comply with Title VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Executive Order 11,246, American Disabilities Act of 1990 and the related regulations to each. Each party assures that it will not discriminate against any individual including, but not limited to, employees or applicants for employment and/or students, because of race, religion, creed, color, sex, age, disability, veteran status or national origin.

The parties also agree to take affirmative action to ensure that applicants are employed and that employees are treated during the employment without regard to their race, religion, creed, color, sex, disability, veteran status or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection available to employees and applicants for employment.

- B. Indemnification. The State of Tennessee, its officers, agents, and employees shall be held harmless from liability from any claims, damages and actions of any nature arising from the use of any materials furnished by the vendor, provided that such liability is not attributable to negligence on the part of the using agency or failure of the suing agency to use the materials in the manner outlined by the vendor in descriptive literature or specifications submitted with the vendor’s bid.

- C. Copyright and Patent Liability.

- 1) The vendor shall, at his own expense, be entitled to and shall have the duty to defend any suit which may be brought against the State of Tennessee to the extent that it is based on a claim that the products or services furnished infringe a United States copyright or patent. The vendor shall further indemnify the State against any award of damages and costs made against the State by final judgment of a court of last resort in any such suit. The Licensee or State Board of Regents shall provide vendor immediate notice in writing of the Institution of such claim and full right and opportunity to conduct the defense

thereof, together with all available information and reasonable cooperation, assistance and authority to enable vendor to do so. No cost or expenses shall be incurred for the account of the vendor without written consent. The Attorney General for the State of Tennessee reserves the right to participate in the defense of any such action. Vendor shall not be liable for any award of judgment against the Licensee or State of Tennessee reached by compromise or settlement unless the vendor accepts the compromise or settlement. Vendor shall have the right to enter into negotiations for and the right to effect settlement or compromise of any such action, but no such settlement or compromise shall be binding upon the State of Tennessee or using Institution unless approved by the State and the Licensee.

- 2) If, in the vendor's opinion, the products or services furnished under said contract are likely to, or do become, the subject of a claim of infringement of a United States copyright or patent, then without diminishing the vendor's obligation to satisfy the final award, the vendor may at its option and expense:
  - a) Procure for the using Institution, TBR, and/or the State of Tennessee the right to continue using the products and services.
  - b) Replace or modify the alleged infringing products or services with other equally suitable products or services that are satisfactory to the using Institution and TBR so that they become noninfringing.
  - c) Remove the products or discontinue the services and cancel any future charges pertaining thereto.

Provided however, that the vendor will not exercise option [2.c] until the vendor, using Institution and the TBR have determined that options [2.a] and [2.b] are impractical.

- 3) Vendor however, shall have no liability to the State or using Institution if any such copyright or patent infringement or claim thereof is based upon or arises out of:
  - a) The use of the products or services in combination with apparatus or devices not supplied or approved by the Vendor.
  - b) The use of the products or services in a manner for which the products or services were neither designed nor contemplated.
  - c) The claimed infringement of any copyright or patent in which the Licensee or State of Tennessee has any direct or indirect interest by license or otherwise.

D. Shipment. Shipment by F.O.B. destination terms is preferred; however, if vendor ships F.O.B. shipping point, the agreement should specify that freight is to be prepaid and that risk of loss will remain on seller until goods are physically delivered to the Institution.

E. Cancellation. Vendor may request cancellation of a purchase order or contract and the State may grant relief only if the vendor is prevented from performance by an act of war, order of legal authority, Act of God, or other unavoidable causes not attributed to the fault or negligence of the contractor.

F. Payment. Payment for any item delivered may be withheld by the Institution until all requirements of the contract have been complied with in full.

G. Default. In case of any default of the vendor, the Institution may procure the product or services from other sources and hold the Vendor responsible for any damages incurred including, but not limited to, excess cost or handling charges.

H. Audit Records. The Institution shall have the right to audit the books and records of any vendor of products or services for any contract other than a firm fixed-price contract. Such books or records shall be maintained by the contractor or subcontractor for a period of three (3) years from the date of the final payment under the contract.

I. Conflict of Interest. The Vendor warrants that no part of the total contract amount provided herein shall be paid directly or indirectly to any officer or employee of the State of Tennessee as wages, compensation, or gifts in exchange for acting as officer, agent, employee, subcontractor or consultant to the Vendor in connection with any work contemplated or performed relative to this contract.