

Appendix II – Purchase Order Terms and Conditions

Purchase Order Terms and Conditions

Reviewed July 2011

1. **Offer/Acceptance.** If this purchase order (“PO”) refers to your bid or proposal, then this PO is an ACCEPTANCE of your OFFER TO SELL in accordance with the terms and conditions of the Invitation for Bid/Request For Proposal, as stated in your bid. If no bid or proposal is referenced, this PO is an OFFER TO BUY, subject to your acceptance, which must be demonstrated by either your performance of this PO or by a formal acknowledgment in writing. Any COUNTER-OFFER TO SELL is automatically construed as a CANCELLATION of this PO unless a change order is issued accepting a counter-offer. In the event vendor form(s) or part(s) of forms are included in, or as an attachment to, any bid, proposal, offer, acknowledgment, or otherwise, vendor agrees that, in the event of inconsistencies or contradictions, the terms and conditions of the solicitation document and this PO shall supersede and control over those contained in vendor’s form(s) regardless of any statement to the contrary in such form(s). Unless the purchasing agent specifically agrees in writing through overt reference or other express written indication of assent, terms and conditions on vendor forms regarding choice of law, venue, warranty disclaimer or exclusion, indemnification or limitation of liability shall be of no effect.

2. **Safety Information.** All chemicals, equipment and materials proposed and/or used in the performance of this PO must conform to the standards required by the William-Steiger Occupational Safety and Health Act of 1970. Bidders must furnish all Material Safety Data Sheets (MSDS) for any regulated chemicals, equipment or hazardous materials at the time of delivery.

3. **Changes.** Vendor agrees to furnish products and/or services in strict accordance with the specifications, and at the price set forth for each item. Nothing in this PO may be added to, modified, superseded or otherwise altered except in writing signed by an authorized representative of the agency purchasing office and acknowledged by vendor. Each shipment received or service performed shall be only upon the terms contained in this PO, notwithstanding any terms contained in any invoice or other act of vendor other than acknowledgment of a written change order to this PO.

4. **Delivery.** Unless otherwise specified in the solicitation or in this PO, delivery shall be FOB destination. In its acceptance of any quotation offer, the agency is relying on the promised delivery date, installation, or service performance as material and basic to its acceptance. In the event of vendor’s failure to deliver or perform as and when promised, the agency reserves the right to cancel its order, or any part thereof, without prejudice to its other rights, and vendor agrees that the agency may return all or part of any shipment so made, and may charge vendor with any loss or expense sustained as a result of such failure to deliver or perform as promised. Time is of the essence.

5. **Rights in Data, Documents, Computer Software or Other Intellectual Property.** Unless otherwise agreed in writing, any software, research, reports, studies, data, photographs, negatives or other documents, drawings or materials delivered by vendor in the performance of its obligations under this PO shall be the exclusive property of the State. The ownership rights described herein shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use the works.

6. **Quality.** The State will be the sole judge in determining “equals” with regard to quality, price and performance. All products delivered shall be newly manufactured and of the manufacturer’s current model, unless otherwise specified.

7. **Warranties.** All provisions and remedies of the Uniform Commercial Code (“UCC”) relating to both implied and expressed warranties are herewith referred to and made a part hereof and are in addition to any warranties stipulated in the specifications.

8. Inspection and Acceptance. Final acceptance is dependent upon completion of all applicable inspection Rules. Should the products or services fail to meet any inspection requirements, the agency may exercise all of its rights, including those provided in the UCC. The agency reserves the right to inspect services provided under this PO at all reasonable times and places. "Services" as used in this clause includes services performed or tangible material produced or delivered in the performance of services. If any of the services do not conform with PO requirements, the agency may require vendor to perform the services again in conformity with PO requirements, with no additional payment. When defects in the quality or quantity of service cannot be corrected by re-performance, the agency may (i) require vendor to take necessary action to ensure that the future performance conforms to PO requirements and (ii) equitably reduce the payment due vendor to reflect the reduced value of the services performed. These remedies in no way limit the remedies available to the agency in the termination provisions of this PO, or remedies otherwise available at law or in equity.

9. Cash Discount. The cash discount period will start from date of receipt of acceptable invoice, or from date of receipt of acceptable products/services at the specified destination by an authorized agency representative, whichever is later.

10. Taxes. The State agency, as purchaser, is exempt from all federal excise taxes under Chapter 32 of the Internal Revenue Code [No. 84-730123K] and from all State and local government use taxes [CRS 39-26-14(a) and 203, as amended]. Tax exempt numbers for the specific agency may be found elsewhere in this PO. Vendor is hereby notified that when materials are purchased for the benefit of the State, such exemptions apply except that in certain political subdivisions (e.g., City of Denver) vendor may be required to pay sales or use taxes even though the ultimate product or service is provided to the State. These sales or use taxes will not be reimbursed by the State.

11. Prompt Payment. State law and regulations provide that vendors will be paid within 45 days after receipt of products or services and a correct notice of amount due, unless otherwise agreed to by contract or special conditions of the PO. A State liability not paid within 45 days is considered delinquent and, unless otherwise agreed to, interest on the unpaid balance shall be paid beginning with the 46th day at the rate of 1% per month until paid in full. A liability shall not arise if a good faith dispute exists as to the agency's obligation to pay all or a portion of the liability. Vendors shall invoice the agency separately for interest on delinquent amounts due. The billing shall reference the delinquent payment, the number of days interest to be paid and the applicable interest rate. [CRS 24-30-202(24), as amended.]

12. Vendor Offset. CRS 24-30-202 (1) and 24-30-202.4. *[Not Applicable to Intergovernmental Contracts]* The State Controller may withhold payment of certain debts owed to State agencies under the State's vendor offset intercept system for: (a) unpaid child support debts or child support arrearages; (b) unpaid balances of tax, accrued interest, or other charges specified in Article 21, Title 39, CRS; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State or its agencies, as a result of final agency determination or reduced to judgment, as certified by the State Controller.

13. Assignment and Successors; Antitrust Claims. Vendor shall not assign rights or delegate duties under this PO, or subcontract any part of the performance required under this PO, without the express, written consent of the State, which shall not be unreasonably withheld. This PO shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. Assignment of accounts receivable may be made only with written notice furnished to the purchasing agency or institution.

14. Indemnification. In the event any article sold or delivered under this PO is covered by any patent, copyright, trademark, or application therefor, vendor will indemnify and hold harmless the State from any and all loss, liability, cost, expenses and legal fees incurred on account of any claims, legal actions or judgments arising out of manufacture, sale or use of such article in violation, infringement or the like of rights under such patent, copyright, trademark or application. If this PO is for services, to the extent authorized by law, vendor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees and related expenses, incurred as a result of any act or omission by vendor, or its employees, agents, subcontractors or assignees, arising out of or in connection with performance of services ordered by this PO.

15. INDEPENDENT CONTRACTOR. VENDOR SHALL PERFORM ITS DUTIES HEREUNDER AS AN INDEPENDENT CONTRACTOR AND NOT AS AN EMPLOYEE. NEITHER VENDOR NOR ANY AGENT OR EMPLOYEE OF VENDOR SHALL BE OR SHALL BE DEEMED TO BE AN AGENT OR EMPLOYEE OF THE STATE. VENDOR SHALL PAY WHEN DUE ALL REQUIRED EMPLOYMENT TAXES AND INCOME TAX WITHHOLDING INCLUDING ALL FEDERAL AND STATE INCOME TAX AND LOCAL HEAD TAX ON ANY MONIES PAID PURSUANT TO THIS PO. VENDOR ACKNOWLEDGES THAT VENDOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS VENDOR OR THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. VENDOR SHALL HAVE NO AUTHORIZATION EXPRESS OR IMPLIED TO BIND THE STATE TO ANY AGREEMENT, LIABILITY, OR UNDERSTANDING, EXCEPT AS EXPRESSLY SET FORTH HEREIN. VENDOR SHALL PROVIDE AND KEEP IN FORCE, AND SHOW PROOF OF UPON REQUEST, WORKERS' COMPENSATION AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR ITS ACTS AND THOSE OF ITS EMPLOYEES, AND AGENTS.

16. Communication. All communications, including reports, notices, and advice of any nature, concerning administration of this PO, prepared by vendor for the agency's use, must be furnished solely to the purchasing agent within the agency purchasing office.

17. Compliance with Laws. Vendor agrees to comply with all applicable federal and State laws, regulations and policies, as amended, including those regarding unfair labor practices, anti-kick-back and collusion.

18. Americans with Disabilities Act (ADA) Requirements. If this solicitation contemplates the provision of services to the public, vendor shall, in addition to any other requirements under Title 11 of the ADA, comply with the Title 11 requirements of the ADA regarding the accessibility of State services and programs, as an explicit requirement. Vendor assures that, at all times during the performance of any resulting PO, no qualified individual with a disability shall, by reason of that disability, be excluded from participation in, or be denied benefits of, services, programs, or activities performed by vendor for the benefit of the State.

19. Insurance. Vendor shall obtain, and maintain at all times during the term of this PO, insurance as specified in the solicitation or order, and shall provide proof of such coverage.

20. Termination For Default/Cause. a. Except as otherwise agreed, the UCC shall govern in the case of goods. In the case of services, if vendor refuses or fails to timely perform any of the provisions of this PO, with such diligence as will ensure its completion within the time specified in this PO, the purchasing agent may notify vendor in writing of non-performance, and if not promptly corrected within the time specified, such agent may terminate vendor's right to proceed with the PO or such part thereof as to which there has been delay or a failure to properly perform. Vendor shall continue performance of the PO to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services elsewhere. Payment for completed services performed and accepted shall be at the PO price.

b. In the case of remedies exercised under this paragraph for services, or analogous remedies exercised under the UCC for in goods, the purchasing agency may withhold amounts due to vendor as the purchasing agent deems necessary to reimburse the purchasing agency for the excess costs incurred in curing, completing or procuring similar goods and services.

c. In the case of either goods or services, vendor shall not be in default by reason of any failure in performance of this PO in accordance with its terms, if such failure arises out of acts of God; acts of the public enemy; acts of the State or any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

d. If after rejection, revocation, or other termination of vendor's right to proceed under the provisions of the UCC or this clause, it is determined for any reason that vendor was not in default under the provisions of this clause, or that the delay was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience clause.

21. Termination For Convenience. a. If not accepted by written acknowledgment, this PO may be canceled by written or oral notice to vendor prior to shipment of goods or beginning of performance of services.

b. Unless otherwise agreed in writing, in addition to the rights and remedies governing goods in the UCC, the purchasing agent may, when the interests of the purchasing agency so require, terminate this PO in whole or in part for the convenience of the agency or institution. The purchasing agent shall give written notice of the termination to vendor specifying the part of the PO terminated and when termination becomes effective. Upon receipt of notice of termination, vendor shall incur no further obligations except to the extent necessary to mitigate costs of performance. In the case of services or specially manufactured goods, the State shall pay reasonable settlement expenses, the PO price or rate for supplies and services delivered and accepted, the reasonable costs of performance on unaccepted supplies and services, and a reasonable profit for that unaccepted work, in accordance with the cost principles promulgated in accordance with CRS 24-107-101, as amended. In the case of existing goods, the State shall pay reasonable settlement expenses, the PO price for goods delivered and accepted, reasonable costs incurred in preparation for delivery of the undelivered goods, and a reasonable profit for that preparatory work. The amount of the termination liability under this paragraph shall not exceed the amount of the PO price plus a reasonable cost for settlement expenses. Vendor agrees to submit a termination proposal as well as reasonable supporting documentation, cost and pricing data, and a certification as required CRS 24-106-101, as amended, upon request of the purchasing agent.

22. Purchase Order Approval. This PO shall not be valid unless it is executed by the purchasing agent for the purchasing State agency or institution. The State shall have no responsibility or liability for products or services delivered or performed prior to proper execution hereof.

23. Fund Availability; Federal Funds Contingency. Financial obligations of the State payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted and otherwise made available. If this PO is funded in whole or in part with federal funds, this PO is subject to and contingent upon the continuing availability of federal funds for the purposes hereof. If this PO contemplates the purchase of goods to be delivered in a single installment, the State represents that it has set aside sufficient funds to make payment under this PO in accordance with its terms.

24. Choice of Law. This PO is made in, and the laws of the State of Colorado shall govern, in connection with the formation, performance and the legal enforcement of, this PO. Unless otherwise specified in the solicitation or this order, venue for any judicial action arising out of or in connection with this PO shall be in Denver, Colorado. Vendor shall exhaust administrative remedies in CRS 24-109-106, as amended, prior to commencing any judicial action against the State.

25. Uniform Commercial Code. All references in this PO to the UCC shall mean the UCC as adopted by the State of Colorado at Title 4, Colorado Revised Statutes, as amended.

26. Non-discrimination. Vendor agrees to comply with the letter and spirit of all applicable State and federal laws respecting discrimination and unfair employment practices.

27. PUBLIC CONTRACTS FOR SERVICES. CRS §8-17.5-101. [*Not Applicable to agreements relating to the offer, issuance, or sale of securities, investment advisory services or fund management services, sponsored projects, intergovernmental agreements, or information technology services or products and services*]

Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this contract, through participation in the E-Verify Program or the Department program established pursuant to CRS §8-17.5-102(5)(c), Contractor shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. Contractor (a) shall not use E-Verify Program or Department program Rules to undertake pre-employment screening of job applicants while this contract is being performed, (b) shall notify the subcontractor and the contracting State agency within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this contract, (c) shall terminate the subcontract if a subcontractor does not stop employing or contracting

with the illegal alien within three days of receiving the notice, and (d) shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to CRS §8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the Department program, Contractor shall deliver to the contracting State agency, institution of higher education or political subdivision a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and comply with all of the other requirements of the Department program. If Contractor fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., the contracting State agency, institution of higher education or political subdivision may terminate this contract for breach and, if so terminated, Contractor shall be liable for damages.

28. PUBLIC CONTRACTS WITH NATURAL PERSONS. CRS 24-76.5-101. Contractor, if a natural person eighteen (18) years of age or older, hereby swears or affirms under penalty of perjury that he or she (i) is a citizen or otherwise lawfully present in the United States pursuant to federal law, (ii) shall comply with the provisions of CRS 24-76.5-101 et seq., and (iii) shall produce one form of identification required by CRS 24-76.5-103 prior to the effective date of this contract.

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