

STATE CONTROLLER POLICY

VENDOR AGREEMENTS

1) Definitions

- a. **Vendor Agreement.** Agreements (in any form, including on-line agreements) provided by vendors containing contractual provisions relating to the goods and/or services they provide.
- b. **Impermissible Provisions.** The following are impermissible provisions and shall be stricken from the vendor agreement unless approved in advance as set forth below:
 - i. **Price Increase.** All provisions putting the State at risk for payment of more than the agreed price for the goods or services or other vendor performance. However, vendor agreements may specify reasonable cancellation provisions or other commercially reasonable terms, including but not limited to liquidated damages, rights, or obligations because of breach or termination (unless terminated for cause) of the agreement.
 - ii. **State's Indemnity – Hold Harmless.** Any provision the effect of which is to require the State to indemnify or hold harmless the vendor from or against third party claims regardless of how it is phrased; e.g., stating "the State shall be responsible for" in place of the "the State shall indemnify", does not change the meaning. Also, adding the phrase "to the extent provided by law" does not make an indemnity permissible.
 - iii. **Choice of Law.** Provisions providing for choice of law of or venue in any state other than the State of Colorado. If the vendor insists on alternative locations, the State Agency or Institution of Higher Education (IHE) shall obtain approval from the Office of the State Controller or the Attorney General or designated reviewing Assistant or Special Assistant Attorney General or Chancellor before agreeing to such provision.
- c. **Conflicting Provisions.** Provisions that conflict with the general provisions included in the State's model contracts, standard provisions included in the State's purchase order (see Fiscal Rule 2-2 Appendix) and Special Provisions in Fiscal Rule 3-1. The following provides additional clarification:
 - i. **Limitation of Vendor's Liability - Bodily Injury and Property Damage.** Vendor agreements involving tangible risk from the nature of the agreement shall not limit the vendor liability for claims or damages, including consequential damages, arising out of bodily injury (including death) and damage to tangible property.
 - ii. **Limitation of Vendor's Liability - Other Types of Transactions.** Agencies IHEs may propose commercially reasonable limitations of liability and/or remedies provisions, or the exclusion of consequential damages, with approval of the State Controller.

2) Policy-Vendor Agreement-Used Alone. Agency and IHE chief fiscal officers or procurement directors may authorize execution of vendor agreements up to \$5,000 for the purchase of goods or services if all of the following conditions are met:

- a. A State contract or purchase order is not required by Fiscal Rule;
- b. All requirements of the Fiscal Rules and this policy have been met;
- c. All impermissible terms and conditions have been deleted or nullified by specific reference;
- d. All provisions in the vendor agreement have been reviewed and authorized, and the agreement signed, by the Agency or IHE's chief financial officer (or an authorized agency or IHE official, purchasing agent or State Controller contract signatory);
- e. All charges and incidentals have been stated in the vendor agreement;
- f. All amendments, changes, and deletions have been made and approved in writing by an authorized state official; and
- g. The vendor agreement is complete and contains all attachments and schedules relevant to such agreement

3) Policy-Vendor Agreement-Used in Lieu of State Contracts or Purchase Orders. Vendor agreements may be used in lieu of a required State contract or purchase order only with prior written

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approval of the State Controller and when all requirements of the Fiscal Rules and this Policy have been met.

- 4) Policy-Vendor Agreement-Used with State Contracts or Purchase Orders.** If a State contract or purchase order is required, Agencies or IHEs may use a vendor agreement in conjunction with State contracts or purchase orders only as follows:
- a. State Purchase Order and Vendor Agreement.** If purchase order are required by Fiscal Rule, vendor agreements may be attached as an exhibit to and incorporated in the purchase order if:
 - i. All requirements of the Fiscal Rules and this Policy have been met;
 - ii. All impermissible provisions have been deleted or nullified by specific reference;
 - iii. The integration clause in the vendor agreement is stricken; and
 - iv. Any conflict between the purchase order terms and conditions and the provisions of the vendor agreement that would create a risk to the State have been resolved in favor of the purchase order terms and conditions.
 - b. State Contract and Vendor Agreement.** If State contracts are required by Fiscal Rule, vendor agreements may be attached as an exhibit and incorporated in the State contract or the provisions of the vendor agreement may be set forth in the body of the contract, provided that all the following conditions are met:
 - i. All requirements of the Fiscal Rules and this Policy have been met;
 - ii. If the vendor agreement is attached as an exhibit to the State contract, any conflict between the provisions of the vendor agreement and the provisions of the State contract have been resolved in favor of the State contract; and
 - iii. If the provisions of the vendor agreement are set forth in the body of the contract, all impermissible and conflicting terms and conditions of the vendor agreement have been deleted or nullified by specific reference from the contract.

David J. McDermott, CPA
State Controller