

**Agency Contracts Backgrounder:  
Contract Template**

*January 22, 2025*

This Backgrounder is designed for use by procurement professional on Agency contracts.

This Backgrounder applies to the Agency Contract Template dated January 22, 2025.

The Backgrounder is designed, in part, to leverage the knowledge and experience of Enterprise Services Contracts and Procurement Division team members.

This updated Backgrounder and the Contract Template were developed by the DES team

&

Attorney General’s Office

Please contact DES Contracts & Procurement division with revisions or suggestions for improvement.

This Backgrounder was last revised on January 22, 2025.

Table of Contents

[Before Starting 1](#_Toc178601774)

[Debrief Culture & Strategic Anchors 2](#_Toc178601775)

[Strategic Plan 3](#_Toc178601776)

[Contractual Framework 4](#_Toc178601777)

[Using the Template 6](#_Toc178601778)

[Overview to the Contract Template 8](#_Toc178601779)

[Cover Page 9](#_Toc178601780)

[Caption, Introduction & Footer 10](#_Toc178601781)

[Recitals 12](#_Toc178601782)

[Section 1 – Term 15](#_Toc178601783)

[Section 2 – Scope – Included Goods/Services & Prices 18](#_Toc178601784)

[Section 2.1 Contract Scope 18](#_Toc178601785)

[Section 2.2 State’s Ability to Modify Scope of Contract 21](#_Toc178601786)

[Section 2.3 Economic Adjustment 23](#_Toc178601787)

[Section 2.4 Price Ceiling 30](#_Toc178601788)

[**Section 2.X Product/Manufacturer List Update** 31](#_Toc178601789)

[**Section 3 – Contractor Representations & Warranties** 33](#_Toc178601790)

[Section 4 – Quality; Warranty; Remedies 38](#_Toc178601791)

[Section 5 – Safety; Security; Contractor Requirements While on Purchaser Premises 40](#_Toc178601792)

[Section 6 – Subcontractors 42](#_Toc178601793)

[Section 7 – Delivery & Installation 45](#_Toc178601794)

[Section 8 – Invoicing & Payment 51](#_Toc178601795)

[Section 9 – Contract Management 53](#_Toc178601796)

[Section 10 – Records Retention & Audits 54](#_Toc178601797)

[Section 11 – Insurance 55](#_Toc178601798)

[Section 12 – Claims 56](#_Toc178601799)

[Section 13 – Dispute Resolution 58](#_Toc178601800)

[Section 14 – Termination; Expiration; Suspension; & Remedies 59](#_Toc178601801)

[Section 15 – Public Information & Public Records Disclosure Requests 62](#_Toc178601802)

[Section 16 – General Provisions 63](#_Toc178601803)

[**Force Majeure** 65](#_Toc178601804)

[Attorneys’ Fees 66](#_Toc178601805)

[Signature Block 67](#_Toc178601806)

[*Exhibit A – Included Goods/Services* 68](#_Toc178601807)

[*Exhibit B – Prices for Goods/Services* 69](#_Toc178601808)

[*Exhibit C – Insurance* 70](#_Toc178601809)

[Contractual Risk Management Strategy for Contracts 70](#_Toc178601810)

[Obtaining Insurance Coverage Limits 71](#_Toc178601811)

[Additional Insured Coverage for Contracts 73](#_Toc178601812)

[Certificate of Insurance 73](#_Toc178601813)

[Insurance Coverages for Goods/Services Contracts 74](#_Toc178601814)

[Insurance Coverages for Vehicle Transport/Storage/Repair 84](#_Toc178601815)

[**Additional Provisions** 95](#_Toc178601816)

[Confidential Information; Data Security; Network Access 96](#_Toc178601817)

[Data Security Requirements 98](#_Toc178601818)

[Force Majeure 100](#_Toc178601819)

[Climate Commitment Act (CCA) 101](#_Toc178601820)

[Emergency Support 102](#_Toc178601821)

[Copyright Assignment 103](#_Toc178601822)

[Ownership and Use of Intellectual Property 105](#_Toc178601823)

[Data Ownership, Use, & Recovery 107](#_Toc178601824)

[License for Services 109](#_Toc178601825)

[Delivery of Services (IT) 111](#_Toc178601826)

[Procurement Confidentiality 115](#_Toc178601827)

[Key Personnel 116](#_Toc178601828)

[Prevailing Wage 117](#_Toc178601829)

# Before Starting

The *Agency Contract* template is a tool. This tool is designed to help Agencies deliver government contracting services more cost-effectively and efficiently for our customers. At the same time, this tool is designed to help procurement professional’s relationship with Contractors and accomplish increasing stakeholder expectations for public procurement.

The Agency Contract template is NOT written in stone; Rather, it is a starting point to develop a value-added, customer-focused procurement solution. The Agency Contract, of course, must adhere to the dual purposes that inform competitive procurements in Washington:

1. Attempt to obtain the best deal for Washingtonians; and
2. Conduct the procurement and resulting contract in good faith and in a fair and open manner.

*See, Platt Elec. Supply, Inc. v. City of Seattle, Div. of Purchasing, 16 Wn. App. 265, 555, P.2d 421 (1976).*

Although the template represents the current summation of informed strategic choices (and will be continuously updated to address Legislative enactments and as Enterprise Services develops better or alternative approaches to create value for agencies and optimize vendor relationships), it is the starting point for Agency Contracts.

## Strategic Anchors

If the proposed Agency Contract will be a replacement procurement channel for an expiring Contract, begin by leveraging the Agency’s lessons learned from the prior procurement. For replacement Contracts, the Agency should have valuable instructive data regarding contract management and administration and the lessons learned therefrom.

In addition, for any Contract, it is critical to improve the customer experience. *See, e.g.*, RCW 39.26.125(5). Accordingly, Contracts are an important opportunity for Agencies to create value. This is accomplished, in significant measure, by understanding the customer need in the context of the agency’s procurement authority and designing the Contract to meet those varied needs, within the parameters of procurement authority and procurement integrity obligations.

With the exception of the incumbent Contractor, interested businesses have no idea what the State has been purchasing pursuant to the existing Contract. Similarly, unless the proposed Contract is precise and makes clear exactly what has been competitively procured and, therefore, within the scope of the proposed Contract, neither businesses nor purchasers have certainty that the Contract is a legitimate procurement.

## Strategic Plan

**BEFORE** commencing the procurement or doing ANY work on the planned Contract, begin by initiating, developing, and completing a Strategic Plan for the proposed procurement.

This Strategic Plan should enable you, your team, and agency to:

* + Confirm that the proposed procurement and Contract are a priority for the agency;
  + Develop strategies to meet and exceed customer expectations;
  + Develop strategies to optimize the vendor relationship – e.g., award type and structure, appropriate pricing strategies, term length, volume discounts, rebates, and performance-based contract requirements;
  + Develop strategies to address relevant State Procurement Priorities, including:

## Contractual Framework

**BEFORE** diving into the Contract template, think about the specific procurement at issue and the types of customization that either are required in this particular situation or are necessary to create value and to accomplish the strategic goals pertaining to the procurement.

This is undertaken as part of the procurement strategy. Importantly, however, it means starting with strategic goals; not ‘cutting and pasting’ to the template. The procurement team (i.e., the procurement coordinator and the Agency’s applicable resources – e.g., supervisor, procurement team, legal) instead develops a value-added contractual framework for the specific procurement and then uses the template as a tool to build the Contract.

The resulting Contract is informed and shaped by a variety of factors. For example:

* + *Goods/Services*: Is the planned Contract for a good (e.g., ink toners, vehicles, plumbing supplies), a service (e.g., Lean training, EAP services, HVAC maintenance, process server), or both?
  + *Contractor*: Will the contractor – the State’s counterparty – be providing the good/service (such that the geographic footprint is a critical consideration) or will the contractor drop ship parts to purchasers?
  + *Warranty*: What specific warranty (if any) is the State seeking for the good/service and what, if any, is the remedy for breach of warranty (e.g., repair, replace, refund, or damages)?
  + *Term*: What is the term of the Contract? Does this match the solicitation? Is the contract for a short period of time (e.g., 12-24 months) or is a long-term contract contemplated? Does this appropriately balance risk/return factors such as additional price/performance value in exchange for longer term? Will a longer term reduce the opportunity for a competitive marketplace upon contract expiration? Does the term length adversely impact potential bidders?
  + *Performance-Based Contracts*: What additional opportunities are there to develop and incorporate mutually beneficial performance-based contracting strategies?
  + *Price*: Are prices fixed for the contract term or subject to adjustment (e.g., predefined price increases at designated dates or formulaic adjustments such as inflation adjustment or market segment adjustment)?
  + *Deal Friction Analysis*: What, if any, have been the friction/tension points for customers or suppliers regarding this contract (or commodity) and what are the contractual solutions, if any, to reduce or eliminate these issues? For example, Purchasers getting charged the wrong rate?
  + *Transaction Cost Analysis*: What, if anything, could be done differently in this contract to reduce our transaction and administrative costs but not erode the value proposition – e.g.,
    - Purchase Categories rather than specific products to avoid amendments for specific product changes
    - Structure the Contract to address pricing mechanism to minimize price change amendments
  + *Purchaser*: Does the Program require special contract clauses or consideration (e.g., FTA provisions, school program requirements, federal funding limitations, background checks)?
  + *Unique Provisions*: What, if any, unique provisions must be considered – e.g.,
    - Information Technology (e.g., data security, data breach, patent indemnity, accessibility, SOC audits, etc.)
    - Force Majeure
    - Prevailing Wage
    - Intellectual Property Use/Ownership
  + *Contract Utilization Provisions:* What, precisely, must be included in the specific Contract at issue such that, when completed, the Contract clearly allocates rights/responsibilities and defines how to perform the contract – e.g.,
    - Ordering Goods/Services
    - Delivery
    - Acceptance, Rejection, Remedies
    - Performance Requirements
    - Etc.

# Using the Template

To Do:

* Track Changes.
  + To expedite review by team members, make proposed changes to the Contract template using Microsoft(MS) Word’s track changes (redline/strikethrough) functionality.
  + Track changes enables transparency and allows team members to review the proposed Contract significantly more efficiently. It also enables quick adjustments and easily finalization.
* Formatting.
  + Do not reformat the template.
  + Reformatting the template does not create value.
  + Enterprise Services offers a variety of courses pertaining to MS products, including MS Word.
* Defined Terms. The Contract template and this Backgrounder use certain defined terms that should be used consistently. These include the following:
  + *Bidder*: Any individual or entity who submits bid in response to a *Competitive Solicitation*. *See also*, RCW 39.26.010(1).
  + *Competitive Solicitation*. The Competitive Solicitation document used in Enterprise Services’ competitive procurement process. *See also*, RCW 39.26.010(6).
  + *Contractor*: A/an awarded bidder. *See also*, RCW 39.26.010(7). Upon *Contract* award, do NOT refer to the State’s contractual counterparty as bidder, supplier, vendor, etc.
  + *Goods*: The specified goods that were competitively solicited and included in the *Contract* awarded to *Contractor*. *See also*, RCW 39.26.010(12).
  + *Purchase Order*: The specified tool used by *Eligible Purchasers* to purchase *Goods/Services* from a/an awarded *Contractor* pursuant to an *Enterprise Procurement Solution*.
  + *Services*: The specified services that were competitively solicited and included in the *Contract* awarded to *Contractor*. *See also*, RCW 39.26.010(21).

|  |  |
| --- | --- |
|  | * ***Backgrounder Organization***. This Backgrounder is designed to accompany the Contract template for Internal Contracts and provide a useful resource to develop value added procurement solutions. The Backgrounder is organized to align with the Contract template and, for each section of the Contract, provides three categories of information:   + Action Steps   + Options/Alternatives; and   + Notes * ***Action Steps***. This Backgrounder identifies action steps pertaining to the Contract template for two different points of time:   + **At Bid Posting** (“To Do for Exhibit to the Competitive Solution’) This section focuses on action steps to prepare the Draft Contract that is attached as Exhibit D to the Competitive Solicitation. This stage requires the most effort.   + **At Contract Award** (‘To Do at Contract Award’) This section focuses on action steps to finalize the Contract for award to ASB(s). * ***Options/Alternatives***. When applicable, the Backgrounder identifies options and alternatives to the Contract template provisions as well as sample provisions that the C&P team has developed. * ***Notes***. The Backgrounder also includes important notes that provide additional information, contextual awareness, or other important considerations that pertain to the specific Contract template section. * Keep in mind that the terms and conditions of the Contract are an essential part of the Competitive Solicitation. Accordingly, significant revisions to the Contract that change the Competitive Solicitation are fundamentally incompatible with conducting a high integrity procurement. Accordingly, focused advance planning is essential. |

# Overview to the Contract Template

The Contract template is a starting point to provide agencies with a well-considered beginning point and framework for developing a procurement-specific Contract. Accordingly, the Contract template is designed and structured to enable easy procurement-by-procurement modification for each procurement-specific Contract.

The Contract template is designed with the following parts:

\*Boilerplate provisions (aka standard terms and conditions) are designed, in part, to be reasonable allocation of rights and responsibilities, within the State’s procurement authority and risk management approach, for Contracts for goods/services.

Generally speaking, although every portion of the template needs to be considered, **the majority of the template customization will be in the ‘core section’ depicted above (along with the term) and the Exhibits. In the majority of Contracts, the other portions of the template require substantially less customization.**

# Cover Page

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Replace the first yellow blank with the applicable Contract Number in the space provided. * Replace the second yellow blank with the applicable contract category (e.g., ‘Plumbing Supplies’) in the space provided. * Note: If the Competitive Solicitation is intended to result in Contract awards by Category or Geographic Awards, include the applicable yellow blank(s). If not, delete. * Leave the other two blanks blank (i.e., the space for the awarded Contractor and the space for the effective date of the Contract). These will be filled in at the time of Contract award. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Insert the name of the counterparty (awarded bidder) in the space provided – e.g., Super Contractor, LLC. * Insert the applicable effective date for the Contract in the space provided.   + Ideally, the effective date should be the first day of a month or the next day after the expiration or termination date for a rebid. The date inserted here is the same date that will be inserted in the introductory paragraph (see below). * If applicable, insert the applicable Contract Category(ies) in the space provided. * If applicable, insert the applicable Geographic Region(s) in the space provided. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |
|  | * Depending on the procurement strategy, there may be multiple types of anticipated Contracts – e.g., a Contract for parts and a separate Contract for services. If this is the case, the Contract needs to be adjusted to address this strategy. |

# Caption, Introduction & Footer

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Caption:   + Replace the first yellow blank with the applicable Contract Number in the space provided.   + Replace the second yellow blank with the applicable contract category (e.g., ‘Plumbing Supplies’) in the space provided.     - Note: If the Competitive Solicitation is intended to result in Contract awards by Category or Geographic Awards, include the applicable yellow blank(s). If not, delete. * Introduction Paragraph:   + Do nothing.     - These yellow blanks will be filled in at the time of Contract award. * Footer:   + Replace the first yellow blank with the applicable Contract Number in the space provided in the document footer.   + Replace the second yellow blank with the applicable contract category (e.g., ‘Plumbing Supplies’) in the space provided in the document footer.     - Note: If the contract category is unduly lengthy, use a shorted version so that it fits in the footer. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Caption:   + If applicable, insert the applicable Contract Category(ies) in the space provided   + If applicable, insert the applicable Geographic Region(s) in the space provided. * Introduction Paragraph:   + Replace the first and second yellow blanks with the full name of the counterparty (i.e., the awarded bidder, and now, Contractor) and its state of organization. This needs to be the counterparty’s correct, full, legal name – e.g., ‘Sunshine Parts, LLC, a Delaware limited liability company’   + Replace the third yellow blank with the applicable effective date for the Contract.     - This date must match the effective date on the cover page. See above.     - Ideally, for contract management efficiency, the effective date should be the first day of a month or the next day after the termination date for a rebid. * Footer:   + Do nothing. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * Throughout the Contract, the awarded bidder is defined as ‘Contractor.’ Do not confuse the Contractor, or other individuals by referencing the Contractor by a different term such ‘bidder,’ ‘vendor,’ ‘supplier,’ etc. * If the Contract is awarded by geographic region, category, or other than as a single Contract, the caption will need to be modified to reflect that. |

# Recitals

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Recital B:   + Replace the yellow blank with a contract-specific recital to provide context for the specific Contract.     - Recital B will be different in each Contract. This recital is designed to provide context for the Contract to inform eligible Purchasers as well as other individuals (e.g., court in the event of a contract dispute, etc.).     - *See* samples, below. * Recital C:   + Replace the yellow blanks with the applicable Competitive Solicitation Number and the date of the Competitive Solicitation.   + If the Competitive Solicitation is designed to result in multiple Contract Awards and/or designated awards, revise the recital with a contract-specific recital.     - *See* samples, below. * Recital D:   + Replace the yellow ‘an/the’ text with the correct word (‘an’ or ‘the’). Accordingly, confirm that the Contract will be awarded to the lowest, responsive, responsible bidder and use ‘the.’ If, alternatively, the Competitive Solicitation is designed to result in multiple Contract awards (e.g., separate awards for goods and related services, geographic awards, etc.), use ‘an.’     - *See* samples, below. * Depending on the Procurement Strategy, incorporate contract-specific recitals to improve the value proposition. For example,   + A recital that provides context for critical performance-based goals/requirements   + A recital pertaining to unique statutory requirements that significantly impact the procurement   + Etc.   Such recitals, if any, would be inserted as new lettered recitals after Recital A. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Recital D: Confirm the Contract award is consistent with Recital D and the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Recital B – *Samples*   + Pursuant to Legislative authorization, Enterprise Services has responsibility for the custody and care of the Capitol Campus. *See* RCW 43.19.125. The Capitol Campus includes the Washington State Capitol Campus Childcare Center. The Washington State Capitol Campus Childcare Center (“Capitol Campus Childcare Center”) is a newly constructed, approximately 9,600 square foot state-owned facility designed and equipped specifically for use as a childcare center to accommodate approximately 90 children composed of infants older than six months, toddlers, and preschoolers. *See* *Exhibit D – Site Plan for Capitol Campus Childcare Center (dated July 2, 2020)*..   + Enterprise Services, among other things, is tasked with the care and custody of the Washington State Capitol Campus, including landscape design. Accordingly, Enterprise Services needs to procure bulk bark, sand, soil, and rock for the property entrusted to its care. * Recital C – *Sample for Multiple Contracts*   + On behalf of the State of Washington, [Agency], as part of a competitive governmental procurement, issued Competitive Solicitation No. 07021 dated \_\_\_\_\_\_\_\_\_\_, 2021. The Competitive Solicitation was structured to meet purchaser needs and designed to result in an award of a Contract,   + On behalf of the State of Washington, [Agency], as part of a competitive governmental procurement, issued Competitive Solicitation No. 02619 dated October 15, 2019 regarding Bulk Fresh Fruits and Vegetables. The Competitive Solicitation was structured to meet purchaser needs and designed to result in an award of a Contract, by geographic area, in which the State of Washington was divided into the East Region and the West Region. * Recital D – *Sample for Multiple Contract awards*   + [Agency] evaluated all responses to the Competitive Solicitation and identified Contractor as an apparent successful bidder for the above referenced Contract Category(ies).   + [Agency] evaluated all responses to the Competitive Solicitation and identified Contractor as an apparent successful bidder for the above referenced Geographic Region(s).   + [Agency] evaluated all responses to the Competitive Solicitation and identified Contractor as an apparent successful bidder for the above references Contract Category(ies) and Geographic Region(s). |

|  |  |
| --- | --- |
|  | * Recitals are an opportunity to provide important contextual information regarding a contract. For public procurements, especially Contracts where certain eligible purchasers desire to confirm that the contract was the result of a competitive solicitation, recitals are a simple, efficient tool to do so. * In addition, in the event of a dispute and third-party resolution, recitals can help provide contextual information to an individual decision maker who may be far removed from the contract specifics. Accordingly, when a dispute arises over contractual interpretation and a court or arbitrator is tasked with deciphering an ambiguous provision, the recitals may be brought into play as an aid to interpret the Contract. |

# Section 1 – Term

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * If the Contract will NOT be a performance-based contract, replace the existing provision with a revised provision that is consistent with the procurement strategy for the Competitive Solicitation.   + *See* samples, below. * Otherwise, confirm the Contract term length performance-based contract strategy (or replace existing provision with alternative approach).   + Notes:     - The template is designed for a performance-based contract that both (a) reduces the State’s transactional risk and (b) incentivizes the Contractor to perform the Contract and earn the full Contract term.     - The template simply takes the term and splits it into two (or three parts) and conditions the Contractor’s right to such second (or second and third portions of the term) on Contractor’s performance – i.e., whether the Contractor achieved the specified performance metrics set forth in the Contract.     - The provision requires specified dates to make that determination so that, if the Contractor failed to perform, agencies has time to conduct a new Competitive Solicitation.   + Replace the first yellow blank with the applicable number of months for the intended initial phase of the Contract term (e.g., ‘thirty-six (36)’).   + Replace the fourth yellow blank with the applicable date for evaluating Contractor’s performance against the performance metrics.   + Replace the fifth yellow blank with the applicable number of months for the intended subsequent ‘earned’ phase of the Contract term (e.g., ‘thirty-six (36)’).   + Replace the yellow blanks in the Contractor Performance Requirement Summary Table with appropriate, contract-specific performance metrics and performance requirements for the Contract.   + Relevant performance metrics and performance requirements should be developed as part of the procurement strategy utilizing, among other things, customer input and concerns, industry practices, etc. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Replace the second and third yellow blanks with the commencement date and ending date for the Contract term. * Confirm/revise performance metrics and performance requirements for the specific Contract. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Fixed Term; No Performance-Based Requirements”   + **Term**. The term of this Contract is \_\_\_\_\_\_\_\_\_\_\_ (\_\_) months, commencing \_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_ and ending \_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_. * Term with Non-Performance-Based Extension:   + **Term**. The term of this Contract is \_\_\_\_\_\_\_\_\_\_\_ (\_\_) months, commencing \_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_ and ending \_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_; *Provided*, however, that if Contractor is not in default, [Agency] may extend the term of the Contract, by written amendment, for up to \_\_\_\_\_\_\_\_\_\_\_ (\_\_) additional months. |

|  |  |
| --- | --- |
|  | * There is one “term.” There can be multiple phases or parts; but there is a single term to a contract. * The Contract term must have a clear, definite ending date. The ending date needs to be consistent with the Competitive Solicitation to, at a minimum, ensure procurement integrity and provide open, fair, transparent, competitive procurements. Any person should be able to determine the exact term of the Contract by reading only the Contract (and appropriate amendments thereto). * The Customer agency understands the reality of government procurement – i.e., that to have an open, competitive, fair marketplace, Contracts must be for a defined period of time and not be extended inconsistently with the underlying Competitive Solicitation. * If using a contract term with a performance-based extension, make sure that the date to be inserted for making the extension decision is sufficiently in advance (e.g., 6 months) such that, if a Contract is needed and Contractor has not satisfied the performance requirements (or does not wish to extend the term), the agency has sufficient time to develop and implement an alternative procurement solution. |

# Section 2 – Scope – Included Goods/Services & Prices

Although the entire Contract must be carefully developed and worded to implement the Competitive Solicitation and Procurement Strategy, Section 3 obviously is critically important to be clear and accurate for the Agency to know, with certainty, what is able to be purchased through the resulting Contract and also to provide a fair, open, transparent, and competitive procurement opportunity for all bidders.

## Section 2.1 Contract Scope

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Scope. The Template addresses Goods and/or Services. If ONLY Goods or ONLY Services will be included, the template must be revised*. See* Options, below. * Exhibits. The Contract will need two (2) critical exhibits to enable the Contract parties to efficiently and cost-effectively utilize the Contract consistent with an open, fair, transparent, and competitive procurement:   + *Exhibit A – Included Goods/Services*. This Exhibit sets the minimum specifications for goods and in part the service expectations for Contractor’s performing on the contract. This Contract exhibit must clearly and definitively specify the goods/services included in the Contract. This has limits. The Contract is the result of a competitive solicitation for definite Goods and/or Services for which the marketplace had an opportunity to compete. Governmental convenience is insufficient justification to add to the scope of the Contract. If the underlying Competitive Solicitation does not include the Goods/Services, later revising or amending the Contract is not a substitute for fair, open, competitive procurement. Accordingly, it is critical to plan ahead to structure the Competitive Solicitation and resulting Contract to meet purchaser needs and maintain a vibrant, open, trusted, fair marketplace. This can be a placeholder that depends on the results of the Competitive Solicitation (e.g., for a category-based procurement, which category the awarded Contractor wins) to be finalized at award.   The language to be inserted here is based on the Specification and Scope of Work templates. Exhibit A may require additions at contract award if the solicitation allowed for bidder to submit alternative equivalents, alternative specifications, or descriptions of how they met standards. These additions would be rare and focused on when the goods/services are highly customized to the purchasers needs. In most case the goods/services and relevant minimums are known at time of drafting and consist of a combination of:   * + A narrative description of the Goods/Services   + A specific list of Goods/Services   + A specific list of Goods/Services with a narrative that includes substantially similar replacements, newer models, etc.   + A defined, specific catalog   + Etc.   The resulting Exhibit A, consistent with the Competitive Solicitation, may specify certain terms and conditions (not otherwise included in the Contract) for the included Goods/Services. For example:   * + - Specified minimum requirements.     - New/OEM     - Current model   + *Exhibit B – Prices*. This also is a placeholder that depends on the results of the Competitive Solicitation. Until the Competitive Solicitation is completed, the agency does not know the prices for the Goods/Services that are included in the Contract.     - Note: If the State intends to have certain terms and conditions impacting price (beyond those terms and conditions expressly set forth in the Contract), one option is to state those terms and conditions in this exhibit. For example, the terms and conditions relevant to:       * A volume order discount       * Minimum order requirements (for free delivery)     - Prompt payment discount |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Confirm Goods/Services or ONLY Goods or ONLY Services (e.g., Competitive Solicitation allowed bidders to compete for goods and, separately, for installation). * Confirm and insert the relevant exhibits. * *Exhibit A – Included Goods/Services*. This will be produced as a result of the Competitive Solicitation drafting. Update this exhibit as needed if there were changes in the solicitation or include portions of a bid response if the bidder responses were intended to become part of the Contract. * *Exhibit B – Prices*. This also will be produced as a result of the Competitive Solicitation. It could take a variety of forms:   + A price list   + A percentage discount from a specified price list or catalog   + Volume-based price discounts   + Etc. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * If limiting the catalog of items offered by the Contractor, include the following after Contract Scope.   + Catalog Scope. Under this Contract, Contractor is authorized to sell only those Goods and/or Services as stated herein. Contractor must not inform Purchaser hereunder that the Contract authorizes Contractor to sell any other materials, supplies, services and/or equipment. Further, Contractor may not infringe on other established Contracts. * Contractor’s Sales Authority – Services Only [To be used when the Contract is for services only with no equipment or parts sales (e.g., Managed Print Services)]   + Contractor’s Sales Authority – Services Only. Contractor is authorized to provide only those Services set forth in the Contract. Contractor must not represent to Purchaser hereunder that the Contract authorizes Contractor to sell any materials, supplies, equipment, or services beyond those Services specified in the Contract. |

|  |  |
| --- | --- |
|  | * Often times, pricing will be subject to deal-specific terms and conditions. Those terms and conditions, however, often impact other aspects of the Contract. Accordingly, it is important to have a contextual negotiation strategy. |

## Section 2.2 State’s Ability to Modify Scope of Contract

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Nothing. Leave as is. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as is. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * Section 2.2 is designed to provide the Agency with some reasonable flexibility to adjust the scope of the included Goods/Services that are available to purchase pursuant to a competitively solicited and awarded enterprise procurement solution.   + Note: Any Contract modification requires mutual agreement with the Awarded Contractor.   + If the Contract scope is modified, ALL warded Contractors should be afforded the same Contract modification. * Section 2.2 is **NOT** a substitute for competition. Two reasons.   + First, stakeholders expect Washington State procurements to be open, fair, transparent, and competitive and not simply an ‘open purchase order’ for the incumbent vendor to **grow the contract without competition**. This disadvantages, in particular, small businesses that lack the scale of large firms to offer expansive product catalogs.   + Second, the procurement code commands competitive procurements. *See* RCW 39.26.120(1) (“Insofar as practicable, all purchases of or contracts for goods and services must be based on a competitive solicitation process.”). This requirement extends to “contract amendments that substantially change the scope of work of the original contract or substantially increase the value of the original contract.” *See* RCW 39.26.120(2). |

## Section 2.3 Economic Adjustment

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * First, as an operational and strategic matter, determine the planned pricing structure for the term of the Contract, for the Goods/Services (e.g., firm and fixed prices, designated price adjustments, indexed price adjustments (e.g., PPI), industry indices, etc). *See* Notes, below.   + There is a difference between ‘economic adjustment’ and ‘price adjustment.’ Price adjustments present a much larger potential procurement integrity risk and economic adjustments (e.g., bidder provides low pricing to win Contract and then demands price adjustments as a condition to continued performance).   + Economic Adjustment: This process is designed to enable the State and bidders to hedge the macroeconomic risk associated with inflationary pressures. In short, rather than risk that bidders may overcompensate for inflation concerns, the State requests that bidders provide current prices for Goods/Services (e.g., for the first 12 months of the Contract term) and then the prices are adjusted periodically at specified times based on a prescribed formula (e.g., PPI). This approach is NOT focused on an individual Contractor; rather, it is focused on marketplace conditions.   + Price Adjustment. This process is designed to adjust Contract prices for reasons other than inflationary impacts. Price adjustments may be scheduled, temporary price adjustments, or responsive to Contractor conditions. * Section 2.3: If the template economic adjustment provision (an inflation adjustment) will NOT be used (e.g., prices are fixed, percentage off catalog, percentage over stated list, etc.), delete Section 2.3 and revise as appropriate.   + *See* samples, below. * If an economic adjustment provision will be used, adjust the template provision to designate the appropriate methodology. * Section 2.3: If an economic adjustment provision is not included, delete the parenthetical reference in Section 2.3. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Economic Adjustment Alternative PPI-based price adjustment:   + Economic Adjustment. Contractor may request price adjustments to the prices set forth in *Exhibit B – Prices for Goods/Services* between [start date of request = default this request period to be 2 months and 3 months before effective date] and [end date of request = give enough time to process requests between this date and the effective date, default one month] annually. Contracts that do not request an adjustment during this time waive their price adjustment for that contract year, future adjustments will not include adjustment for the non-requested year. The prices shall be adjusted as set forth below, based upon the percent changes (whether up or down) in the United States Department of Labor, Bureau of Labor and Statistics (BLS) indices described below, for the most recent year. All calculations for the index shall be based upon the latest version of data published as of [same date as the start date of request] each year. If an index is recoded (i.e., the recoded index is a direct substitute for the prior index according to the BLS), this Contract will use the recoded index, as applicable.  If an index becomes unavailable, [Agency] shall substitute a proxy index.  If there is not a direct substitute, the next higher aggregate index available shall be used. Prices will be adjusted on [effective date of price change] of each year through [Agency] updating *Exhibit B – Prices for Goods/Services* through this process without a contract amendment.  The economic adjustment shall be calculated as follows:   New Price = Old Price x (Current Period Index/Base Period Index).  Note: Adjust the first two highlights if using a timeline that is not an annual adjustment (every 6 months, 2 years, etc.).   * Economic Adjustment.  Beginning twelve (12) months after the effective date of this Contract and annually thereafter, the prices set forth in Exhibit B – Prices for Goods/Services shall be adjusted as set forth below, based upon the percent changes (whether up or down) in the United States Department of Labor, Bureau of Labor and Statistics (BLS) indices described below, for the most recent year. All calculations for the index shall be based upon the latest version of data published as of [date 3 months before the date new prices will be effective] each year.  If an index is recoded (i.e., the recoded index is a direct substitute for the prior index according to the BLS), this Contract will use the recoded index, as applicable.  If an index becomes unavailable, [Agency] shall substitute a proxy index.  If there is not a direct substitute, the next higher aggregate index available shall be used.  Prices will be adjusted on [date new prices will be effective] of each year through [Agency] updating Exhibit B – Prices for Goods/Services through this process without a contract amendment and posting the new prices on the public facing webpage.  The economic adjustment shall be calculated as follows:   BLS Index: [index number and title]  New Price = Old Price x (Current Period Index/Base Period Index).   * Price Adjustment If the Agency intends to use Price Adjustment instead of Economic Adjustment, delete Section 3.3 (Economic Adjustment) and replace with the following as Section 3.3 (Price Adjustment). If, however, the Agency intends to use Price Adjustment in addition to Economic Adjustment, retain Section 3.3 (Economic Adjustment) and add the following as new Section 3.4 (Price Adjustment) (and revise the contract numbering):   + Price Adjustments. The Contract prices are the maximum prices the Contractor may charge.  Pricing shall remain firm and fixed for one (1) year from the Contract’s effective date. Contractor, however, may propose price adjustments on a semi-annual basis by written notice to the Contract Administrator. Price adjustments are to be on a pass-through basis only and must not produce a higher profit margin for Contractor than that established by the original Contract pricing. Such price adjustment requests must include supporting documentation such as price increases at the manufacturer's level and/or other documentation of cost increases. Consideration of price increases will be at the sole discretion of the Contract Administrator. If a price adjustment is approved in part or in full, the resulting new Contract pricing will be implemented through a Contract Amendment.  Contractor may not make Contract performance or extensions contingent on price adjustments. * Temporary Price Adjustment. If the Agency intends to use Temporary Price Adjustment (e.g., to provide a predetermined approach to address unexpected macroeconomic conditions that create unforeseen costs that are beyond the economic price adjustment provision) add the following as new section and revise the contract numbering accordingly:   + Temporary Price Adjustment. Notwithstanding any provision to the contrary, [Agency]may review, evaluate, and, as appropriate in its sole determination, implement temporary price adjustments (increase) to some or all Contract prices for Goods and/or Services impacted by unexpected macroeconomic conditions that create unforeseen costs that are beyond the Contract’s applicable economic price adjustment provision, if any; *Provided*, however, that:     - Contractor must request such temporary price adjustment in writing and set forth the unexpected macroeconomic conditions that create unforeseen costs that are adversely impacting Contractor’s specific Goods and/or Services;     - The unforeseen costs must be beyond the Contractor’s reasonable control, and must be impacting the broader industry/market segment (if the unforeseen costs are impacting only Contractor and not its competitors, there will be no temporary price adjustment);     - The unforeseen costs must not be part of any other economic or price adjustment allowed or provided by the Contract and, if granted by [Agency], the impact of any temporary price adjustment will be considered by [Agency] and factored into any other economic or price adjustments allowed or provided by the Contract;     - Contractor must propose to [Agency] a reasonable, temporary price adjustment that, based on a material input percentage basis (or similar appropriate metric) for the Goods and/or Services equitably aligns Contract prices for impacted Goods and/or Services with the Contract’s allocation of risk/return (e.g., Contractor’s margin) as of the effective date of the Contract;     - Contractor must document and certify to [Agency] that Contractor already has implemented equivalent or greater price adjustments for Contractor’s Goods and/or Services to other non-affiliated customers outside of the Contract based on the unforeseen costs identified to [Agency];     - Contractor, acting in good faith, also must evaluate and, as appropriate, propose temporary price adjustments downward if Contractor experiences unforeseen decreased costs pertaining to the Goods and/or Services;     - [Agency], acting in good faith, shall have sole discretion to approve the scope, amount, and duration of any temporary price adjustment increase;     - [Agency] and Contractor, acting in good faith, shall collaborate to design and implement the scope, amount, and duration of any temporary price adjustment decrease;     - Any temporary price adjustment shall be temporary and shall include a time period not to exceed 180 days; Provided, however, that, if unexpected macroeconomic conditions warrant, Contractor may request a subsequent temporary price adjustment in the same manner as any initial temporary price adjustment request); and     - Unless and until [Agency] approves a temporary price adjustment in writing and administratively posts the approval and adjusted Contract prices to [Agency]’s contract portal, Contractor shall not adjust Contract prices. |

|  |  |
| --- | --- |
|  | * Based on the specific contract, it is critical to plan ahead and develop a pricing mechanism (including, when applicable, economic adjustment and/or price adjustment) – for the term of the Contract – that is clear, transparent, and enables Eligible Purchasers to procure needed goods/services cost-effectively and efficiently. * Economic Adjustment. There are lots of potential options to enable economic adjustment over the term of the Contract, , including:   + Fixed pricing   + Inflation index adjustment (e.g., CPI, PPI)   + Market index adjustment (e.g., if available, use market specific cost/pricing indes)   + Inflation index adjustment, but subject to a specified maximum annual cap and/or specified minimum increase   + Specified scheduled fixed adjustment (e.g., specified percentage price increase such as 2% a year regardless of actual inflation)   + Lessor/greater of inflation index adjustment or specified scheduled fixed adjustment   + Scheduled performance-based adjustment * Price Adjustment   + If there is a likelihood of significant economic fluctuations during the Contract term that would otherwise need to be hedged through initial payment of above-market prices, an equitable price adjustment clause should be included as part of the Competitive Solicitation (in the attached Contract).   + On the other hand, it is profoundly uncompetitive and unfair to non-awarded bidders to modify contract pricing after a Competitive Solicitation is bid, evaluated, and awarded and may raise procurement integrity issues.   + Similarly, certain pricing mechanisms should not be subject to price adjustment. For example, if the Contract pricing is based on percentage off a catalog, there should be no price adjustment. Instead, the catalog prices adjust (the discount is fixed or volume based), but must be generally used for all similar purchasers. The catalog pricing should reflect current market. * Factors. For both economic adjustment and price adjustment, there is no single ‘one size fits all’ solution. Rather, the appropriate provision(s) will depend upon a variety of factors including:   + Term length   + Specific good/service   + Market tension   + Market volatility   + Purchase volume   + Contract –specific issues   + Etc.   The key is to identify – on the front end and as part of the procurement strategy – a price structure and, if appropriate, adjustment mechanism that creates value – i.e., that results in a shared and sensible allocation of risk/return for the particular good/service at issue.   * If a price adjustment clause is desired, the clause should be developed based on objective, fixed criteria and NOT subject to negotiations. Typically, such price adjustments will occur periodically (e.g., annually) for transactions thereafter. * If using an inflation adjustment, consider historical context and prices for the relevant Goods/Services. For example:   + Some goods have common price swings (e.g., copper, building products, computer chips, etc.). Accordingly, in designating relevant benchmark prices, it is important not to tie the benchmark to a price dip. In addition, it may be prudent to average prices over a period of time to reduce price volatility risk to both parties. * Finally, if Contracts prices are adjusted after Contract award, ALL awarded Contractors should have the same Contract terms and conditions. In short, changing the Contract economics – after Contract award – for certain but not all awarded Contractors raises obvious procurement integrity issues. |

## Section 2.4 Price Ceiling

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Confirm strategic approach. * If the Contract will NOT include an economic adjustment provision or a price adjustment provision, delete the parenthetical at the end of the provision. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * If the Contract will NOT include an economic adjustment provision or a price adjustment provision, delete the parenthetical. |

|  |  |
| --- | --- |
|  | * The Contract is a procurement solution. Contractors are authorized, for example, to provide volume discounts to Purchasers who utilize the Contract. |

## **Section 2.X Product/Manufacturer List Update**

|  |  |
| --- | --- |
| **To Do for Exhibit to the Competitive Solicitation**: | |
|  | * Confirm strategic approach. |

|  |  |
| --- | --- |
| **To Do at Contract Award**: | |
|  | * Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

**Options/Alternatives**:

|  |  |
| --- | --- |
|  | * Product/Manufacturer List Updates. Contractor may request, [if this is date limited that goes here: once per year, annually, quarterly, monthly, etc.], to alter goods on Exhibit B - Prices for Goods/Services for any product updates or changes, if such changes fall within the scope of the contract. All Product List Update requests will be reviewed by [Agency] and must be approved by [Agency] before changes can take effect. For clarity, these updates will be made without a formal amendment to the contract and mutually agreeable changes will be effective on the date of the updated Exhibit B - Prices for Goods/Services. [Agency] may request additional information prior to approval and Contractor shall submit the requested information in a timely manner.   + Discontinued Items. Contractor shall use commercially reasonable efforts to notify [Agency], as soon as practicable, regarding any products that are no longer available or discontinued and provide a substitute of a like item, comparable size, quantity, quality, and case count or content at the contracted rate through a product list update.   + Manufacturer Change. Contractor shall use commercially reasonable efforts to notify [Agency], as soon as practicable, regarding any manufacturer products price changes to Exhibit B prices for goods/services. Contractor shall supply supporting documentation from the manufacturer for any updates to Exhibit B prices for goods/services through the manufacture list update. |

|  |  |
| --- | --- |
|  | * Discontinued Items and/or Manufacturer Change would be added to the Contract when the contract is list based, where the price is set by a manufacturer and not the Contractors who are reselling the products. |

## **Section 3 – Contractor Representations & Warranties**

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * *Note*: These are the ‘operational’ Contractor representations and warranties. They are an integral part of the procurement process to implement state procurement priorities, ensure that the State is doing business with responsible and qualified Contractors, and enable effective contract management.   + The warranty and remedies applicable to the Goods/Services/IT are set forth in Section 5 of the Contract. * Delete any of the following specific representations and warranties that are NOT part of the procurement strategy for the Competitive Solicitation (i.e., the Competitive Solicitation will not evaluate bids based such state procurement priority):   + Executive Order 18-03   + Washington Small Business   + Certified Veteran-Owned Business   + Placeholder for ADDITIONAL contract-specific representations and warranties (*Note*: If added, consider whether revisions to *Exhibit A – Bidder’s Certification* are necessary)   + Statutory Preference for PCB-Free Products and Products-In-Packaging * Review the existing representations and warranties and determine whether additional procurement-specific representations and warranties are appropriate (and whether modifications should be made to *Exhibit A – Bidder’s Certification*). If so, add the additional representations and warranties at the end of Section 4. For example:   + 3.20: Placeholder for ADDITIONAL contract-specific representations and warranties   + *See* samples, below. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Delete any of the following specific representations and warranties *if* the awarded bidder did NOT certify compliance with them in its *Exhibit A – Bidder’s Certification* and did not receive an evaluative benefit:   + EO 18-03   + Washington Small Business   + Certified Veteran-Owned Business   + Statutory Preference for PCB-Free Products and Products-In-Packaging   + Other contract-specific state procurement priorities (if included in the draft Contract that was distributed as part of the Competitive Solicitation) if not applicable to the awarded Contractor * Ensure that a representation/warranty is included for each state procurement priority that was an evaluative factor and that was a basis for contract award to the awarded bidder (e.g., Washington Small Business). |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Nonmercury-Added Products – RCW 70A.230.060   + Statutory Preference For Nonmercury-Added Products. Contractor represents and warrants that Contractor provides goods that have the least amount of mercury added to the product necessary for the required performance for products for the Statutory Preference for Nonmercury Added Products.   + Statutory Preference for Nonmercury-Added Products. Contractor represents and warrants that Contractor provides goods that do not contain mercury added to the product necessary for the required performance for products for the Statutory Preference for Nonmercury Added Products. * Electronic Products Meeting Environmental Performance Standards – RCW 39.26.265   + Statutory Preference for Electronic Products meeting Environmental Performance Standards. Contractor represents and warrants that Contractor provides goods that have achieved Electronic Product Environmental Assessment Tool (EPEAT) Silver or Gold registration for the Statutory Preference for Electronic Products Meeting Environmental Performance Standards.   + Statutory Preference for Electronic Products meeting Environmental Performance Standards. Contractor represents and warrants that Contractor provides goods that contain the least hazardous materials for the Statutory Preference for Electronic Products Meeting Environmental Performance Standards. * Products Containing Hydrofluorocarbons- RCW 39.26.310   + Statutory Preference for Products Containing Hydrofluorocarbons. Contractor represents and warrants that Contractor provides goods that [not containing HFCs/contain a low amount of global warming potential refrigerants/that are not designed to function only in conjunction with HFCs/are not manufactured using HFCs/are manufactured with a low amount of global warming potential refrigerants] for the Statutory Preference for Electronic Products Meeting Environmental Performance Standards. * Accessibility – WaTech Requirements   + Accessibility. Contractor represents and warrants that Contractor shall exercise commercially reasonable efforts to comply with the Washington Technology Solutions (WaTech) Standard USER-01-01-S – Minimum Accessibility Standard located at [https://watech.wa.gov/policy/minimum-accessibility-standard](https://watech.wa.gov/policies/minimum-accessibility-standard). Contractor regularly shall review Contractor’s systems and, at the commencement of this Contract and annually thereafter, certify to [Agency], as applicable, that Contractor’s Services meet WaTech Standard USER-01-01-S. * Accessibility – Deliverables   + Accessibility – Deliverables. Contractor represents and warrants that Contractor shall eservices commercially reasonable efforts to provide accessible deliverables. * Federal Requirements *Note*: The Contract Template has a boilerplate provision regarding federal requirements (see Section 16), but, depending on the specific procurement, a Contractor representation and warranty may be useful for certain Eligible Purchasers. note: This version requires a Bidder Certification.   + Federal Requirements. Contractor represents and warrants, as previously certified in Contractor’s *Bidder’s Certification* – Federal Requirements, that Contractor complies with the Federal Requirements to enable Eligible Purchasers to purchase Contractor’s Goods/Services incompliance with applicable Federal Requirements. Such Federal Requirements are set forth in *Exhibit \*\* – Federal Requirements*. * Federal Requirements – Buy America   + Buy America. Contractor represents and warrants, as previously certified in Contractor’s *Bidder’s Certification* – Buy America, that Contractor complies with the Buy America Requirements – i.e., 49 U.S.C. § 5323(j) and the applicable regulations, 49 C.F.R. part 6612 – for the procurement of steel, iron, or manufactured products. * Diversity, Equity, & Inclusion   + Diversity, Equity, & Inclusion. Contractor represents and warrants, as previously certified in Contractor’s Bidder’s Certification, that Contractor shall follow the Washington State Enterprise Leadership Competencies and, if utilizing subcontractors, shall ensure that such subcontractors also follow the Washington State Enterprise Leadership Competencies. * Authorized Dealer   + Authorized Dealer. Contractor represents and warrants that Contractor is an authorized service provider or product reseller for the goods and/or services and that it shall maintain its authorized service provider or product reseller status for the Term of this Contract. Upon request by [Agency], Contractor shall provide evidence of its status as an authorized service provider or product reseller. * Vehicle Title & Registration   + Vehicle Title & Registration. Contractor represents and warrants that, upon delivery, Contractor shall convey to Purchaser vehicle title free and clear of all liens, pledges, mortgages, encumbrances, or other security interests. All materials, equipment, supplies and/or services shall be free of all liens, claims, or encumbrances of any kind, and if [Agency] requests, a formal release of same shall be delivered to the respective requestor. All necessary paperwork to register the unit with the Washington State Department of Licensing as a motor vehicle will be furnished at the time of delivery. This includes a “manufacturer’s statement of origin” (MSO) and Washington State title application. * **Contractor Representations and Warranties**. Contractor makes each of the following representations and warranties as of the effective date of this Contract and at the time any Services are performed pursuant to this Contract. If, at the time of any such Services, Contractor cannot make such representations and warranties, Contractor shall not perform such Services and shall, within three (3) business days notify [Agency], in writing, of such breach |

|  |  |
| --- | --- |
|  | * The Contract must include a representation/warranty for each state procurement priority that was an evaluative factor and that was a basis for contract award to the bidder. This enables Agencies to have an effective tool to manage the Contract to ensure the State receives the benefit of its bargain. – e.g., State may terminate Contract for Contractor breach of its representation and warranty. * Agencies MUST include the representation/warranty for wage violations. This is required by the Legislature and cannot be removed. * Consider including ‘Authorized Dealer’ requirement if the agency is awarding a Contract based on a specific manufacturer. Distributor franchises may be either exclusive, where there will be no other distributor franchised in the territory; or nonexclusive, where the new distributor might be one of several distributors franchised in the territory. |

# Section 4 – Quality; Warranty; Remedies

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Note: Section 4 are the warranties and remedies for Goods, Services, & IT. Depending on the specific Competitive Solicitation, Section 5 can be narrowed, for example only to goods if no services or IT are involved. For many Competitive Solicitations, however, it will be appropriate and advisable to include Goods, Services, and IT. * Review the warranty time periods to determine whether the time period is appropriate or should be revised or deleted. The Template includes the following:   + 4.1: Goods – Longer of 12 months from start of use of Goods or 18 months from delivery of Goods.   + 4.3: Services – 12 months from date Services are completed.   + 4.5: IT – 12 months after the date IT Goods are delivered or IT Services are complete, as applicable.   + Revise/delete provisions in Section 4 that are NOT relevant to the specific procurement.  *See* samples, below. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Confirm warranty period (revise if awarded bidder provided longer period(s)). |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * \_\_\_\_\_\_\_. |

|  |  |
| --- | --- |
|  | * The language in Section 4 frequently requires adjustment to align with the specific procurement. For example, if the Contract is ONLY for Goods, there is no need to address Services. * The scope and duration of the warranties and scope of the remedies are designed to be common, commercially reasonable contract terms. * It is important, when applicable, to establish minimum warranty periods and specify appropriate remedies if the Goods/Services do not meet the warranty requirements. |

# Section 5 – Safety; Security; Contractor Requirements While on Purchaser Premises

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Review the Procurement Strategy and customer expectations to determine what Contract-specific provisions should be included for the specific procurement. **This section, depending on the specific procurement, may require substantial modification align with the planned procurement.** * Revise/delete provisions in Section 5 that are NOT relevant to the specific procurement. * Add Contract specific provisions as appropriate. Potential provisions could include:   + Equipment and PPE   + Hazardous materials   + Background checks (e.g., for deliveries to Washington State Ferries, Department of Corrections, etc.)   + Specialized training (e.g., Prison Rape Elimination Act training for Department of Corrections).   + Identification badges.   + Prohibited substances.   + Prohibited personnel (e.g., Schools and sexual predators). |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Equipment & PPE.   + Equipment & PPE. Contractor is solely responsible for providing appropriate personal protective equipment (“PPE”) and equipment for use by Contractor, its agents, employees, or subcontractors in performing this Contract. If while performing Services Contractor uses vehicles, rigging, blocking, scaffolding, or other equipment (“Equipment”) or PPE owned by Purchaser or a third party, then before using such Equipment or PPE, Contractor shall determine, at its sole discretion and risk of loss, the adequacy of the Equipment or PPE to perform the required task and educate itself and Contractor personnel regarding the appropriate and safe usage of the Equipment and PPE. * Hazardous Materials.   + Hazardous Materials. If Contractor uses chemicals or any potentially hazardous materials in the performance of Services, Contractor assumes responsibility for any loss, release, or environmental incident arising out of Contractor’s unloading, discharge, storage, handling, or disposal of any chemical or container holding potentially hazardous materials, including the use of potentially hazardous material alone or in combination with other substances, and for Contractor’s noncompliance with any related laws or regulations. * Facility Inspections.   + Facility Inspections. Contractor shall provide right of access to its facilities to [Agency] and/or to any other authorized agent or official of the state of Washington or the federal government, at all reasonable times, in order to monitor and evaluate performance, compliance, and/or quality assurance under this Contract. |

|  |  |
| --- | --- |
|  | * This section can be utilized to address common customer (Purchaser) issues or concerns. This section likely may require procurement specific adjustment. |

# Section 6 – Subcontractors

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * *Note*: The template is designed to enable the Contractor to utilize subcontractors; *Provided*, however, that the Contractor is responsible for the subcontractors. * If the Competitive Solicitation and resulting Contract are designed NOT to allow Contractor to use subcontractors (i.e., it is critical that the Contractor not use subcontractors to perform the Contract), do the following   + Delete subsections 6.1 – 6.3 in their entirety.   + Insert provision prohibiting subcontractors. *See* options, below. * If the Competitive Solicitation and resulting Contract are designed to require agency’s prior approval to allow Contractor to use subcontractors, do the following   + Delete subsection 6.1 and replace it with the optional subsection 6.1. *See* options, below. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * If the Contractor has submitted a Subcontractor Inclusion Plan, insert the following as 6.5.   + Subcontractor Inclusion Plans Subject to the terms and conditions set forth in this Contract, Contractor, in performing this Contract may utilize any of the Subcontractors Listed on Contractor’s Subcontractor Inclusion Plan attached as Exhibit D - Contractor’s Subcontractor Inclusion Plan.     - Add the submitted plan as Exhibit D to the Contract. * Nothing. Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Preclude Subcontractors: If the Competitive Solicitation and resulting Contract are designed to preclude subcontractors, use the following:   + **6. Subcontractors**. Notwithstanding any provision to the contrary, Contractor shall not utilize subcontractors to perform this Contract. * Condition Subcontractor Utilization on agency’s Prior Approval: If the Competitive Solicitation and resulting Contract are designed to condition Contractor’s utilization of subcontractors on agency’s prior authorization, use the following:   + 6.1 Contractor Responsibility. Notwithstanding any provision to the contrary, Contractor shall not utilize subcontractors to perform this Contract unless such subcontractor is approved in advance by [Agency], in writing; *Provided*, however, that [Agency] shall have sole discretion whether to approve any subcontractor. If [Agency] authorizes Contractor to utilize subcontractors to perform this Contract, Contractor shall: (a) incorporate Contractor’s responsibilities under this Contract into its subcontracts; (b) be fully responsible for the performance of any such subcontractors (regardless of tier) and ensure that subcontractors comply with each and every Contractor obligation set forth in this Contract; (c) be the sole point of contact for [Agency] regarding all contractual matters; and (d) defend, indemnify, and hold [Agency] harmless in case of negligence, other tortious fault, or intentional misconduct by any such subcontractors (regardless of tier). |

|  |  |
| --- | --- |
|  | * Washington’s Procurement Code for Goods/Services requires fair, open, transparent, and competitive solicitations and contract awards. The Contractor is awarded the Contract; not the subcontractor. Accordingly, if the Contractor utilizes subcontractors, it is important that the Contract terms and conditions are not nullified by such structuring and that such structuring does not result in procurement integrity issues. * For Goods/Services contracts, it is not uncommon for Contractors to utilize subcontractors to perform some or all of the contract. It also is not uncommon for purchasers to require that the Contractor be fully responsible for its subcontractors. Several reasons:   + Contractors should not be able to eliminate their contractual representations and warranties (and other contractual obligations) simply by utilizing a subcontractor (including a wholly owned subsidiary).   + The Contractor has the business option to utilize subcontractors. If the Contractor is not accountable for the subcontractors, the Contractor has substantially less incentive to utilize high quality (and potentially costly) subcontractors.   + If the Contractor’s contract requirements do not apply to the subcontractor, the State can end up doing business with firms that are debarred, delinquent on paying their taxes, and have no insurance. This would undermine the Procurement Code’s requirement that goods/services contracts be awarded to responsible bidders.   + Absent highly unusual circumstances, Contractors can add subcontractors to their insurance coverage as Named Insureds or Additional Insureds. If Contractor desires not to do so, the Contractor simply has to ensure that its subcontractors comply with the insurance requirements that are applicable to the Contractor. But, this obligation and contract administration task should not be pushed onto agencies by the Contractor. |

# Section 7 – Delivery & Installation

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Review the Procurement Strategy and customer expectations to determine what contract-specific provisions should be included for the specific procurement. **This section usually will require substantial modification to conform to the specific Contract.**   + *Note*: The substantive content of this section depends on the particular Competitive Solicitation and resulting Contract. For example, the appropriate terms and conditions for a Contract for culverts will be different than the appropriate terms and conditions for a Contract for cloud services. * Consider appropriate contractual provisions to address:   + Unique nature of the specific Goods/Services   + Delivery requirements   + Storage requirements   + Installation   + Testing   + Inventory levels   + Response time   + Confidentiality requirements   + Data Security   + Intellectual Property rights   + Data Ownership   + Performance/Service Level Agreement * Section 7.3: If it is important for Purchaser to test the Goods/Services, at Contractor’s expense, delete the provision and replace with optional provision that allows for testing at Contractor’s expense.   + *See* sample, below. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Purchaser Testing at Contractor’s Expense.   + Receipt and Inspection of Goods and/or Services. Goods and/or Services purchased under this Contract are subject to Purchaser’s reasonable inspection, testing, and approval at Purchaser’s destination. Purchaser reserves the right to reject and refuse acceptance of Goods and/or Services that are not in accordance with this Contract and Purchase Order. Purchaser may charge Contractor for the cost of inspecting rejected goods. If there are any apparent defects in the Goods and/or Services at the time of delivery, Purchaser promptly will notify Contractor. At Purchaser’s option, and without limiting any other rights, Purchaser may require Contractor to repair or replace, at Contractor’s expense, any or all of the damaged Goods and/or Services or, at Purchaser’s option, Purchaser may note any such damage on the receiving report, decline acceptance, and deduct the cost of rejected Goods and/or Services from final payment. Payment for any Goods and/or Services under such Purchase Order shall not be deemed acceptance. * Delivery of Goods & Completion of Services.   + Delivery of Goods & Completion of Services. Failure to deliver Goods or complete Services by the date(s) stated in the Contract is a breach of this Contract. Contractor shall deliver the Goods to the delivery point set out in the Purchase Order (“Delivery Point”) and complete the Services on or before the date(s) set out in the Purchase Order. Contractor shall notify Purchaser within seventy-two (72) hours prior to the estimated delivery so that Purchaser may coordinate necessary resources to receive Goods. Contractor promptly shall notify Purchaser in writing of any anticipated or actual delay in delivery of Goods or completion of Services, the reasons for the delay, and the actions being taken by Contractor to overcome or minimize the delay. * Title and Risk of Loss; Shipping.   + Title and Risk of Loss; Shipping. Title and risk of loss and responsibility for damage to the Goods or deliverables under any Services will pass from Contractor to Purchaser upon delivery to the Delivery Point pursuant to the delivery terms specified in the Purchase Order. Contractor shall appropriately pack, mark and ship Goods in accordance with Purchaser's instructions and in accordance with all applicable laws. * Inspection.   + Inspection. Purchaser will have 120 days from the date of delivery of Goods or completion of Services to inspect the Goods and Services. If Goods or Services do not conform to the specifications, or are otherwise defective, Purchaser may, at its election either notify Contractor and offer Contractor a reasonable opportunity to remedy or return Goods to Contractor at Contractor’s expense and receive either replacement Goods or a refund of the amounts paid for Goods, or receive a refund for or re-performance of Services. If Purchaser returns Goods, it does not waive any other remedies that may be available under this Contract, at law or at equity. Purchaser’s review of drawings and/or specifications does not constitute approval and does not relieve Contractor of responsibility for compliance with all specifications and with all applicable laws, codes, and regulations. Purchaser’s inspection or failure to inspect, payment for, or acceptance of Goods and Services will not impair Purchaser’s right to reject nonconforming Goods or Services or to pursue any other remedies available under this Contract, including its warranty rights. Final acceptance of Goods or Services occurs when they have been shown to meet the specifications. * Changes.   + Changes. Purchaser may request changes in specifications or drawings or increase or decrease the quantity of Goods or the scope of Services. If any requested changes require changes to design or fabrication methods, or alters the quantity to be delivered or delivery schedule, then Contractor will provide Purchaser with a written proposal within five (5) business days of Purchaser’s request that includes any changes in costs, dates, or other terms. If accepted by Purchaser, the proposal, together with any changes in terms will be memorialized in an amendment to the Purchase Order, signed by both parties. * No Effect of Click-Through Terms and Conditions   + No Effect of Click-Through Terms and Conditions. Where an Authorized User is required to “click through” or otherwise accept or made subject to any online terms and conditions in using the Services, such terms and conditions are not binding and shall have no force or effect as to the Services or this Contract. * State’s Right to Terminate for Deficiencies   + State’s Right to Terminate for Deficiencies. The State reserves the right, at its sole election, to immediately terminate this Contract or a Statement of Work without limitation and without liability if the State determines that Contractor fails or has failed to meet its obligations under this Section. * Order Cancellation.   + Order Cancellation. Purchaser may cancel or change orders for standard contract items without penalty within five (5) working days from purchase order receipt. * Installation.   + Installation. Installation shall be performed by Contractor in a professional manner in accordance with industry standard best practices. The premises shall be left in a neat, clean, and undamaged condition. Purchaser reserves the right to require Contractor to repair any damage caused during installation or provide full compensation as determined by Purchaser. * Confidentiality; Safeguarding of Information.   + Confidentiality; Safeguarding of Information. Contractor shall not use or disclose any information concerning [Agency/the State of Washington], or information which may be classified as confidential, for any purpose not directly connected with the administration of this Contract, except with prior written consent of [Agency], or as may be required by law. * Treatment of Assets. Include this provision if agency will be delivering/entrusting any of their property to the Contractors. For example, if equipment has to be sent out for repair or testing:   + Treatment of Assets. Title to all property furnished by [Agency] shall remain with [Agency] , as applicable. Any property of [Agency] a furnished to Contractor shall, unless otherwise provided herein or approved by [Agency], be used only for the performance of this Contract. Contractor shall be responsible for damages as a result of any loss or damage to property of [Agency] which results from the negligence of Contractor or which results from the failure on the part of Contractor to maintain, administer and protect that property in a reasonable manner and to the extent practicable in all instances. If any [Agency] property is lost, destroyed, or damaged, Contractor immediately shall notify [Agency] and shall take all reasonable steps to protect the property from further damage. Contractor shall surrender to [Agency] all property of [Agency] prior to settlement upon completion, termination, or cancellation of this Contract. Title to all property furnished by Contractor, the cost for which the Contractor is entitled to be reimbursed as a direct item of cost under this Contract, shall pass to and vest in the Purchaser upon delivery of such property by Contractor and acceptance by the purchaser. Title to other property, the cost of which is reimbursable to Contractor under this Contract, shall pass to and vest in the Purchaser upon (i) issuance for use of such property in the performance of this Contract, or (ii) commencement of use of such property in the performance of this Contract, or (iii) reimbursement of the cost thereof by the Purchaser in whole or in part, whichever first occurs. All reference to Contractor under this clause shall also include Contractor's employees, agents or subcontractors.   + All delivery costs shall be itemized and invoiced as a separate line item. Contractor shall use commercially reasonable efforts to minimize delivery costs for Purchasers. * Fulfilling Purchases. Include this provision when establishing expectations for when a Contractor is fulfilling purchases:   + Item Availability. Contractor shall use commercially reasonable efforts to ensure distribution centers must be sufficiently stocked to meet Purchaser requirements. Items ordered must be readily available for fulfillment on Purchase Orders. Contractors who have items repeatedly unavailable (more than XX times within a rolling 12-month period) may be considered in default.   + Product Substitution. In the event Contractor is unable to fulfill a product ordered, a replacement product of an equivalent product, meeting or exceeding outlined specifications, at the contracted price may be substituted, if agreed to by Purchaser. Product substitutions must be a like item of comparable size, quantity, quality, and case count or content. All product substitutions must be agreed to by Purchaser and in writing prior to order fulfillment and documented in Purchaser’s ordering paperwork. |

|  |  |
| --- | --- |
|  | * This section frequently requires substantial effort to identify and incorporate contract-specific requirements. These requirements should be incorporated into the logic of the Contract Template. They should NOT be cut and pasted into additional exhibits. * *See* samples, Additional Provisions (at the end of this Backgrounder). |

# Section 8 – Invoicing & Payment

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Section 8.1: Replace the yellow blank with the applicable Contract Number for the procurement. * Section 8.4: Determine whether the specific procurement requires an adjustment to the ‘advance payments prohibited’ provision. If so, see options/alternatives, below. * Determine whether to seek a prompt payment discount as a state procurement priority (to be evaluated and scored in the solicitation). * If payment will be sent electronically, insert a generic billing address. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed for the Contract exhibit attached to the Competitive Solicitation. * If bidder offered a prompt payment discount, include a prompt payment discount provision as new Section 8.7 or incorporate into *Exhibit B - Prices*. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Section 8.4 – Advance Payments (exception for maintenance payments):   + Advance Payments Prohibited. Except as authorized by law, Contractor shall not request or receive advance payment for any Goods or Services furnished by Contractor pursuant to this Contract; *Provided*, however, that the parties agree that maintenance payments, if any, may be made on a quarterly basis at the beginning of each quarter. * Prompt Payment Discount:   + Prompt Payment Discount. [insert contract-specific provision] |

|  |  |
| --- | --- |
|  | * If the Contract requires maintenance/lease payments in advance, replace Section 8.4 in the template with the optional provision above. * This is an accounting issue. The State of Washington generally prohibits advance payments to contractors before goods/services are received. Contractors, similarly, often have their own policies/requirements that prohibit their extension of credit (in the form of goods/services) to customers. This can create unnecessary tensions and costs. Historically, the State and OFM have made numerous exceptions to the broad prohibition on ‘advance payments.’ To manage risk, however, it typically is appropriate to structure the payments commensurate with goods/service levels, risk, etc. * Similarly, the prohibition on advance payments typically does not extend to subscription agreements. |

# Section 9 – Contract Management

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Section 9.1: Replace the yellow blanks with the applicable contact information for the agency in the spaces provided. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Section 9.1: Replace the blank spaces with the applicable contact information for the awarded Contractor in the spaces provided. * Section 9.3: Replace the blank spaces with the applicable contact information for the awarded Contractor in the spaces provided. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * Effective contract management requires that the Contract include agreed contact information such that the parties have an agreed communication channel to address, for example, contract disputes. |

# Section 10 – Records Retention & Audits

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Nothing. Leave as is. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as is. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * Under Washington law, written contracts need to be retained for six (6) years after contract expiration or earlier termination. * Bidders commonly wish to have a shorter records retention period. The State, however, must retain records consistent with state law. * Bidders commonly wish to delete the audit provision. The State, however, must retain the right to audit the Contract and the Contractor’s performance. |

# Section 11 – Insurance

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Consistent with the Procurement Strategy for this procurement, Exhibit C will need to be developed to include any additional appropriate insurance coverages. *See* notes for *Exhibit C – Insurance Requirements*. * The text for Section 11 should remain unchanged. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed (*Exhibit C – Insurance Requirements*) for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * See notes pertaining to *Exhibit C – Insurance Requirements*. |

# Section 12 – Claims

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Section 12.2: If broader (or narrower) Contractor indemnification is appropriate, delete and replace with optional provision. *See* optional provisions, below. The Contract template requires Contractor negligence to invoke the indemnity obligation. * Section 12.3: If inapplicable to the specific Contract, delete. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed for the Contract Exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Broader liability for Contractor   + 12.2 Third-Party Claims; General Indemnity. To the fullest extent permitted by law, Contractor shall defend, indemnify, and hold [Agency] and their employees and agents harmless from and against all claims, demands, judgments, assessments, damages, penalties, fines, costs, liabilities, or losses including, without limitation, sums paid in settlement of claims, attorneys’ fees, consultant fees, and expert fees (collectively “Claims”) arising from any act or omission of Contractor or its successors, agents, and subcontractors under this Contract, except claims caused solely by [Agency] negligence. Contractor shall take all steps needed to keep Purchaser’s property free of liens arising from Contractor’s activities, and promptly obtain or bond the release of any such liens that may be filed. * Narrower liability for Contractor (includes proportionate exclusion)   + 12.2 Third-Party Claims; General Indemnity. To the fullest extent permitted by law, Contractor shall defend, indemnify, and hold [Agency] and their employees and agents harmless from and against all claims, demands, judgments, assessments, damages, penalties, fines, costs, liabilities, or losses including, without limitation, sums paid in settlement of claims, attorneys’ fees, consultant fees, and expert fees (collectively “Claims”) to the extent arising out of Contractor’s or its successors’, agents’, or subcontractors’ negligence, other tortious fault, or intentional misconduct under this Contract. The parties agree that if there are any limitations of Contractor’s liability, including a limitation of liability clause for anyone for whom the Contractor is responsible, such limitations of liability shall not apply to injuries to persons, including death, or to damages to property. Contractor shall take all steps needed to keep Purchaser’s property free of liens arising from Contractor’s activities, and promptly obtain or bond the release of any such liens that may be filed. |

|  |  |
| --- | --- |
|  | * Third-Party Claims; Indemnity   + Absent exceptionally unusual circumstances, agency Contracts must include a contractual provision expressly requiring the Contractor to defend and indemnify the State.   + This provision, in combination with the required insurance and the additional insured requirement, combine to limit the State’s liability to third-party claims arising out of the Contractor’s performance of the Contract. All parts must be included.   + Washington – unlike most states – expansively waived its sovereign immunity. Accordingly, the State – uniquely – is at risk to third party claims. Accordingly, it is imperative that the Contract appropriately manage this risk.   + **Agencies have no authority to agree to mutual indemnification**. Unlike certain other Washington State agencies, the State Legislature has not provided Agencies with any authority to indemnify any other party for third party claims. |

# Section 13 – Dispute Resolution

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Confirm that the time frame set forth in the dispute resolution provision is appropriate for the specific Contract. * If the unique circumstances of a particular procurement warrant either no contractual dispute resolution process or a different approach, modify. Otherwise, leave as is. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Delete existing provision. Then, if there is a contract dispute that the parties cannot resolve, either may resort to judicial resolution. |

|  |  |
| --- | --- |
|  | * A contract functions, in part, to plan ahead and to specify how to resolve disputes, if any. Very, very few commercial contract disputes are litigated. Nonetheless, contractual disputes can impose costs. Experienced commercial counterparties will want a fair, efficient, and cost-effective dispute resolution process. Accordingly, the contract should contemplate cost-effective and efficient dispute resolution strategies, which may vary depending upon specific circumstances. |

# Section 14 – Termination; Expiration; Suspension; & Remedies

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Determine whether a termination for Conflict of Interest provision is appropriate. *See* sample provisions, below. * Depending on the specific Contract, adjust Section 14.9 (limitation in damages). *See* sample provisions, below. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as developed for the Contract exhibit attached to the Competitive Solicitation. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * This is rare for Contracts. The easiest remedy for Contracts is to simply stop using the Contract. * Termination for Conflict of Interest. If desired for the specific Contract, add:   + Termination for Conflict of Interest. [Agency] may terminate this Contract by written notice to Contractor if it is determined, after due notice and examination, that any party to this Contract has violated RCW chap. 42.52 (Ethics in Public Service), or any other laws regarding ethics in public acquisitions and procurement and performance of contracts. In the event this Contract is so terminated, [Agency] shall be entitled to pursue the same remedies against Contractor as it could pursue in the event that Contractor breaches this Contract. * Limitation on Damages: Lost Profits Delete Section 14.9 and replace with the following:   + 14.9 Limitation on Damages. Notwithstanding any provision to the contrary, the parties agree that in no event shall any party be liable to the other for exemplary or punitive damages or for lost profits; *Provided*, however, that nothing contained in this Section will in any way exclude or limit: (a) a party’s liability for all damages arising out of that party’s intentional acts or omissions; (b) the operation of any Goods or Services warranty provided in this Contract; or (c) damages subject to the Intellectual Property Indemnity section of this Contract. Any limitation of either party’s obligations under this Contract, by delivery slips or other documentation is void. * Limitation on Damages: Incidental Damages; Consequential Damages; & Lost Profits Delete Section 14.9 and replace with the following:   + 14.9 Limitation on Damages. Notwithstanding any provision to the contrary, the parties agree that in no event shall any party be liable to the other for incidental, consequential, or punitive damages, including loss of profits or loss of revenue; *Provided*, however, that nothing contained in this Section will in any way exclude or limit: (a) a party’s liability for all damages arising out of that party’s intentional acts or omissions; (b) the operation of any Goods or Services warranty provided in this Contract; or (c) damages subject to the Intellectual Property Indemnity section of this Contract. Any limitation of either party’s obligations under this Contract, by delivery slips or other documentation is void. |
|  | * This portion of the Contract creates friction with inexperienced or aggressive Contractors who may be unfamiliar with certain nuances of state procurement. In particular, such Contractors may demand that the Contract be modified to provide for:   + Expansive limitations on damages – e.g.     - Damage caps – e.g., total liability is contract price or some multiple or purchase price     - Damage exclusions – e.g., incidental, indirect, lost profits     - Limiting damages to Contractor’s insurance coverage * Generally speaking, such revisions are inappropriate for Contracts. Fundamentally, contracting with the State is different than contracting with a commercial firm (or even the federal government). For Contracts, the concept of mutual s fundamentally at odds with the objective of a Contract. That said, the State simply must have the ability to terminate for convenience (even though that practice is nearly universally unheard of in commercial contracts). It’s just a fact of life for doing business with the State. * Similarly, Contractors – in commercial contracts – have legitimate reason to worry about damage expose for lost profits and sophisticated parties with equal bargaining power contract to address such concern. The State, however, does not make a profit and such provisions are not necessary. More worrisome, however, is that Contractors often include expansive damage exclusions that are inappropriate for the particular Contract. |

# Section 15 – Public Information & Public Records Disclosure Requests

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Nothing. Leave as is. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as is. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * Contractors often do not like broad scope of Washington’s Public Records Act. That, however, is not something that agencies can change. * It is important that, when contracting with state agencies, Contractors understand their obligations pertaining to public records disclosure requests. |

# Section 16 – General Provisions

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Nothing. Leave as is. These are ‘boilerplate’ provisions that, in collaboration with the Attorney General’s Office, have been developed over a number of years. These provisions have been designed to be a fair and reasonable allocation of rights and responsibilities between the State and the awarded Contractor in the unique context of public procurement in Washington State. The provisions are common solutions to common problems. Accordingly, absent extremely unusual circumstances, these provisions should not be revised. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Nothing. Leave as is. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * This Backgrounder includes options that, depending on the circumstances, may be appropriate. See below – e.g.   + Force Majeure   + Attorneys’ Fees * Federal Restrictions on Lobbying   + Federal Restrictions on Lobbying. Contractor certifies that, under the requirements of Lobbying Disclosure Act, 2 U.S.C., Section 1601 et seq., no Federal appropriated funds have been paid or will be paid, by or on behalf of the Contractor, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. * FTA – Lobbying Certification.  Bidder certifies, to the best its knowledge and belief, that:   No federal appropriated funds have been paid or will be paid, by or on behalf of the bidder, to any person for influencing or attempting to influence an officer or employee of a federal department or agency, a member of the U.S. Congress, an officer or employee of the U.S. Congress, or an employee of a member of the U.S. Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification thereof.  If any funds other than federal appropriated funds have been paid or will be paid to any person for making lobbying contacts to an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this federal Contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form LLL, “Disclosure Form to Report Lobbying,” in accordance with its instruction, as amended by “Government-wide Guidance for New Restrictions on Lobbying,” 61 Fed. Reg. 1413 (1/19/96).  Bidder shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.  This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into.  Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 USC § 1352 (as amended by the Lobbying Disclosure Act of 1995).  Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure. |

|  |  |
| --- | --- |
|  | * These provisions require case-by-case review and customization. |

## **Force Majeure**

Contractors frequently desire to include a very expansive force majeure provision in the Contract. Although such a provision may be appropriate in certain circumstances, great care must be taken to draft an appropriate force majeure provision for a specific Contract.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Force Majeure (Decide if Force Majeure is relevant for your contract. Delete 16.12 if this provision is not needed. ): |

|  |  |
| --- | --- |
|  | * Do not use a bidder’s ‘standard force majeure provision.’ * The State of Washington – as the purchaser – should rarely (ideally, never) include force majeure language in a Contract UNLESS the provision very tightly controls what constitutes an allowable force majeure event, limits when and how a force majeure event can operate, and allows the state to terminate the Contract regardless of the force majeure event within a specified time frame as – presumably – the State needs the goods/services that were contracted for and will need to switch to a different vendor who can in fact provide the goods/services. |

## Attorneys’ Fees

Contractual parties are free to allocate attorneys’ fees by contract. Accordingly, to discourage contractual parties from forcing their counterparties to resolve disputes through litigation (at their own costs), parties commonly require that, in the event a dispute must be litigated, the prevailing party is entitled to recover their attorneys’ fees (which can exceed the amount of the dispute at issue) from the losing contractual party. The goal there is to provide economic pressure on parties to resolve disputes without litigation and not to take unreasonable positions.

The Contract template, however, makes clear that, in the event of litigation, each party bears its own attorneys’ fees.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * If the American rule is more appropriate, simply delete the existing provision (section 16.19) in its entirety and replace with the following:   + 16.19 Attorneys’ Fees. Should any legal action or proceeding be commenced by either party in order to enforce this Contract or any provision hereof, or in connection with any alleged dispute, breach, default, or misrepresentation in connection with any provision herein contained, the prevailing party shall be entitled to recover reasonable attorneys’ fees and costs incurred in connection with such action or proceeding, including costs of pursuing or defending any legal action, including, without limitation, any appeal, discovery, or negotiation and preparation of settlement arrangements, in addition to such other relief as may be granted. |

|  |  |
| --- | --- |
|  | * The ‘American rule,’ regarding attorneys’ fees is that, absent a statute or contractual provision to the contrary, each party bears their own court costs and attorneys’ fees. * In the event of litigation, the State – even when entitled to attorneys’ fees, often does not obtain attorneys’ fees against the other party. Accordingly, the template is a strategic decision not to expose the state to potential claims for attorneys’ fees. |

# Signature Block

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Insert name and title of signing authority for the agency/program. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Insert the full legal name and entity type of the Contractor. * Insert the name and title of signing authority for Contractor. * Confirm or revise the name and title of signing authority for the agency/program. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * It is important to correctly and properly identify the Contractor. The Contractor should be the same as set forth in the beginning paragraph of the Contract. |

# *Exhibit A – Included Goods/Services*

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Insert applicable content based on the Specification/Scope of Work templates. * For the rare solicitations that are necessarily complex in terms of how the good/service is delivered and where the end good/service is highly customizable such that there is no single standard to base the good/service on, there may be parts of Exhibit A that are left blank and will be completed based on the Bidders’ responses for how their goods/services meet the purchasing need. This is for solicitations like software develop or customized product manufacturing (for products where each product is custom designed for the individual purchaser, i.e. buses rather than mass manufactured cars). * Confirm that the Exhibit is consistent with the Procurement Strategy for this procurement. * Strategic Tasks:   + Provide a narrative description of the good/service being solicited.   + Be certain to include item specifications, applicable quality standards (e.g., USDA approved, ASTM, etc.).   + Include “minimum requirements,” “mandatory requirements,” “tasks and responsibilities,” etc.   + Do not include a specific business’s products (i.e., the incumbent Contractor’s). That gives the incumbent business an advantage over other potential bidders and is not consistent with open, fair, competitive procurement.   + Consistent with the strategic plan for the procurement, draft specific performance requirements (e.g., product specifications and/or statement of work for the procurement-specific goods/services). These performance requirements should, at a minimum, be designed to:     - Improve the customer experience – e.g., procure the goods/services that state agencies and other eligible purchasers need to perform their mission;     - Promote competition – e.g., not exclude or favor certain market participants. * Exhibit Tasks:   + If the Contract will be awarded geographically (e.g., region, county, etc.), address any specifications that apply to regions/counties.   + If the Contract will be awarded categorically (e.g., by ‘contract category’), address any specifications that apply to individual categories separately.   + Insert applicable content. This MUST be thought out as part of the strategic assessment that is conducted BEFORE the Competitive Solicitation and Contract are developed. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Confirm the content is appropriate. * For the rare solicitations where Bidder indicates how their proposal meets relevant standards, insert applicable content. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * **Equal or Alternative Goods and/or Services**. If accepting equal or alternate to what is specified in solicitation:   + Bidders may bid a product or service that is an equal to what is specified in the solicitation. An “equal” for purposes of this solicitation is “an offer of materials, supplies, services and/or equipment that meets or exceeds the quality, performance, and use of the performance requirements identified in a solicitation.” Bidders may suggest equal alternatives by providing a detailed description, supporting documentation, and any associated exceptions to the performance requirements to [Agency] in writing at least five (5) business days before the bid due date. If the proposed alternative is determined by [Agency] to be acceptable, [Agency] will issue a solicitation amendment to notify potential bidders. Otherwise, any bid that does not meet minimum mandatory performance requirements may be deemed non-responsive. * **Multi-Category Procurement**. If the Competitive Solicitation will have multiple categories with significant amount of scope of work/specifications for each category with limited overlap, increase clarity for bidders (and subsequent ease of use for purchasers) by structuring Exhibit A to have multiple sections. The following is an example:   + *Exhibit A – \*\*\* Parts Specification and Services Scope of Work*: These exhibits outline the required performance requirements for the goods and servicesthat are the subject of this Competitive Solicitation.     - Parts Specifications * Services Scope of Work |

|  |  |
| --- | --- |
|  | * Insert only the included goods/services and/or categories. * Do NOT include a ‘laundry list’ of contract terms for the good/service in this section. The contract terms (e.g., delivery, shipping, invoice, defects, liability, etc.) belong in the relevant Contract section, often . Accordingly, modify the Contract template, as appropriate to develop a single contractual document for the purchase/sale of the goods/services. |

# *Exhibit B – Prices for Goods/Services*

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Leave placeholder to insert applicable content at Contract award. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Insert applicable content. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * N/A |

# *Exhibit C – Insurance*

## Contractual Risk Management Strategy for Contracts

Contractual insurance coverage is both a critical risk mitigation strategy and a potential obstacle for some potential vendors to do business with the State of Washington. Accordingly, it is imperative to think about appropriate insurance coverages prior to issuing the Competitive Solicitation (and attached Contract). It also is critical to ensure that the appropriate contractual language is utilized.

The appropriate insurance coverages will depend, among other things, on the particular contract, whether the Contractor will be on-site, the type of activity involved, and the agency’s risk management strategy. It requires thought at the front end. Specifying unnecessary insurance coverage creates unnecessary transaction costs and raises real barriers to transactions, both for state agencies and for potential vendors

Generally speaking, all Contracts will require the Contractor to have Commercial General Liability (CGL) Insurance. In addition, depending on the specific Contract, additional coverages may be appropriate. The insurance requirements must be developed as part of the Procurement Strategy and in consultation with the Procurement Strategy Team and legal.

Insurance requirements, if any, must be expressly spelled out in the Contract. This provides clear direction to the Contractor. In addition, sometimes additional insured endorsements only will provide additional insured coverage “as required by contract.” Accordingly, it is imperative that the coverage, terms, limits, conditions, etc. clearly and expressly are set forth in the Contract.

A Contractor’s failure to obtain or maintain required coverage, including the failure to obtain any specified additional insurance coverage, will support a breach of contract claim. *See* *U.S. Oil & Refining Co. v. Lee & Eastes Tank Lines*, 104 Wn. App. 823 (2001).

## Obtaining Insurance Coverage Limits

How Contractors obtain insurance coverage limits is substantially less important than whether they obtain the requisite insurance coverage. Accordingly, structuring the procurement and resulting Contract to enable Contractors – especially small businesses – to reach the performance requirement (i.e., the minimum insurance coverage) is a strategic decision. Accordingly, absent unusual circumstances, rather than requiring a Contractor only to have a CGL policy with a minimum $4,000,000 limit, it is appropriate to allow Contractors to provide the requisite $4,000,000 insurance coverage through a combination of the CGL policy and an excess liability insurance policy and/or an umbrella insurance policy.

Umbrella and excess liability insurance often are mentioned interchangeably. They are not the same. There is a difference between the policy forms.

Excess Policies

Excess liability policies provide coverage above the limits of the underlying coverage. A pure excess liability policy is NOT broader than the primary insurance. It does NOT extend coverage to any exposures that are not covered by the primary insurance. The excess policy, however, may be narrower because it may include additional exclusions.

Contractors may have multiple excess or umbrella insurance layers.

Umbrella Policies

Umbrella liability is a form of excess liability insurance. It is intended to serve three purposes:

* Provide increased amounts of coverage pertaining to certain primary insurance policies (e.g., CGL, Auto);
* Replace primary coverage if the aggregate limit is exhausted; and
* Broadens coverage for some risks not covered by the primary insurance.

Umbrella liability is broader than a straight excess liability policy because it extends or expands liability protection by covering some losses that would be excluded under the underlying insurance. For example, an umbrella policy could extend coverage territory to include worldwide coverage territory, which is often broader coverage territory than underlying policies cover.

When additional coverage is provided by the umbrella policy, it is usually subject to the insured’s assumption of a self‐insured retention, or retained limit.

Coverage

In the event of a claim or lawsuit, the primary coverage is … primary. The excess and/or umbrella coverage kicks in, if applicable, only after the primary coverage is exhausted up to its limit of insurance for a covered loss above a specified amount (e.g., above the primary coverage). See chart below:

Accordingly, Contractors – to manage their potential risk (and to provide risk management to the State through the additional insured requirement) – may obtain and ‘stack’ appropriate insurance coverages. There are limits, however – e.g., umbrella insurance is NOT available for every type of insurance coverage. For example

## Additional Insured Coverage for Contracts

A critical element of the State’s risk management strategy is that the Contract require the Contractor to designate the State as an additional insured on the applicable required insurance coverages. This is a coverage endorsement.

Agencies should expressly require that the State be included on the Contractor policies as an additional insured on ‘occurrence-based’ liability policies (CGL, Commercial Auto, Pollution Liability). This provides defense and indemnity for the State under the Contractor’s liability policy for third-party claims arising out of the Contractor’s performance of the Contract.

The additional insured endorsement, which is added to the policy, extends coverage to the State under the policy (subject to the terms and conditions set forth in the additional insured endorsement and the policy).

An additional insured endorsement can be obtained for most liability policies. The State, however, cannot be named as an additional insured on certain insurance coverages either because of the nature of the coverage or the insurance industry’s willingness to provide such coverage – e.g.,:

* Professional liability
* Pollution liability
* Workers compensation
* Personal automobile liability
* Cyber risk liability

The Contract must specifically require that additional insured coverage be primary and non-contributory – meaning that the additional insured coverage will be the first in line to provide coverage in the event of a loss. The CGL policy will grant this coverage provided that the Contract requires it.

If the additional insured coverage form (i.e., the Certificate of Insurance form) states ‘coverage is provided as required by written contract,’ that is known as ‘blanket coverage.’ Blanket coverage is good. It incorporates, by reference, the Contract’s additional insured coverage requirements.

## Certificate of Insurance

A ‘Certificate of Insurance’ or ‘Certificate of Liability Insurance’ typically is on an ACORD Form. This form identifies:

* The types of insurance coverage provided;
* The limits of insurance under each policy;
* The insurer(s) providing the coverage;
* The policy period; and
* Any special terms (which will be located in the Description section)

Requiring, obtaining, and reviewing the certificate of insurance is a basic, fundamental obligation of contract administration and management.

## Insurance Coverages for Goods/Services Contracts

The following table provides a high-level overview of common potential insurance coverages for goods and services Contracts. There are a wide variety of other potential insurance coverages beyond the scope of typical goods/services Contracts or that are highly specific and not generally applicable to routine goods/services Contracts (e.g., insurance for drones, aviation, art, marine vessels, maritime employer’s liability, boiler & machinery, garage keepers, medical malpractice, D&O), etc.).

Remember, the agency authority under RCW 39.26 is limited to goods/services. The Agency is unlikely to have authority to develop and execute Contracts for public works, real property construction, etc. which involves other insurance issues and are general authorized to be developed by divisions of the Department of Enterprise Services.

| **Insurance Coverages for Goods/Services Contracts** | | |
| --- | --- | --- |
| Insurance Coverage | Coverage | When to Include |
| Commercial General Liability Insurance (CGL)  aka General Liability Insurance | Coverage protects against financial loss (legal defense and damages) for liability for personal injury, property damage, products and completed operations, and personal & advertising injury arising from the Contractor’s non-professional negligent acts  Excludes coverage for risks that are insured by separate policies e.g.,   * Professional liability (need separate professional liability policy) * Environmental liability (need separate environmental or pollution liability policy) * Workers compensation claims (covered by workers compensation insurance) * Property damage during the course of construction (need bond or builder’s risk coverage) * Motorized vehicles (autos, commercial vehicle and trucks, watercraft, aircraft) (need specific policies)   *Note*: Policies also may include a provision covering ‘contractual liability.’ This is important coverage – i.e., if a Contractor’s professional liability insurance does not cover liability assumed under a contract (i.e., indemnification obligation), this coverage would be critical. Typically provided as an additional coverage. | Always  This is the most important insurance coverage. Must always be required.  The amount of coverage will depend on the specific Contract. |
|  | | |
| Commercial Automobile Liability Insurance  aka Business Auto Liability Insurance | Covers bodily injury and property damage resulting from vehicles used for business purposes. Includes owned, rented, and leased vehicles.  ‘Symbol 1’ Commercial Automobile Insurance protects against liability claims arising from the use of ‘any automobile,’ either owned, hired, or non-owned (i.e., employee vehicles). | Contract specific  Include when Contractor’s activities involve use of vehicles – e.g., delivering goods/services, transporting clients, visiting State of Washington sites. |
|  |  |  |
|  | | |
| Workers’ Compensation Insurance | Covers employee injuries or illness relating to their jobs, including medical costs and wages during the time the employee is unable to work due to the injury or illness.  An employer's responsibility for injuries to its employees usually is handled through workers’ compensation coverage. This coverage is designed to provide injured employees with a schedule of benefits in exchange for their giving up the right to sue the employer. These benefits are paid without regard to fault.  Importantly, workers’ compensation does NOT cover the employer’s negligence – i.e., if the employer fails to provide a safe working environment.  *Note*: Workers’ Compensation Insurance is NOT the same thing as Employers’ Liability Insurance (aka Stop Gap). | Do NOT add. This obligation is addressed in the Contract as standard contract language. *See*, Contract template at Section 11.2.  Washington is one of four states (OH, ND, WA, and WY) where workers’ compensation is provided by a state fund rather than by private insurance. The state fund is the exclusive source of workers compensation insurance in these states. These states are known as ‘monopolistic state funds.’  Problematically, these ‘monopolistic state funds’ do NOT include employer’s liability insurance (hence the term ‘gap’).  In Washington, all employers must provide this insurance or be registered as a Self-Insured entity with the State of Washington.  *Note*: This is not required for sole proprietors or companies that have no employees, typically professional partnerships that use contracted administrative support.  If a sole proprietor at any time adds employees to their business, they must acquire workers compensation insurance for their business. |
| Employers’ Liability Insurance  aka Stop Gap | An employer's responsibility for injuries to his or her employees is usually handled through workers’ compensation coverage; this coverage is designed to provide injured employees with a schedule of benefits in exchange for their giving up the right to sue the employer. There are instances, however, when an employer can be sued for injuries to employees, regardless of the existence of workers’ compensation.  Stop gap coverage provides a form of employers’ liability insurance for employers who do not have the coverage because they operate in a so-called monopolistic state. Such coverage addresses liability regarding (each of which are specifically excluded from CGL coverage):   * Third party action-over claims; * Consequential injury (loss of consortium, loss of services, etc.) to an injured employee’s family members; * Dual capacity claims; * Intentional tort claims; and * Claims for injury or disease not covered by workers compensation laws.   *Note*: One common way to arrange stop gap coverage is to add it as an endorsement to a CGL policy. | Contract specific  *Note*: Employers’ Liability Insurance (aka stop gap) is NOT a substitute for workers’ compensation insurance. These are two different things.  Because the State of Washington is one of four monopolistic workers’ compensation states, Contractors must obtain stop gap insurance coverage from the private insurance marketplace. |
|  | | |
| Umbrella Liability Insurance  aka Commercial Umbrella Liability Insurance | Umbrella liability insurance is separate insurance over and above certain, stated, ‘primary’ or ‘underlying’ policies. This is designed to add to or extend the liability coverage over designated insurance coverage limits (i.e., raise the designated insurance coverage limits), including:   * Commercial General Liability Insurance * Commercial Automobile Liability Insurance * Employers’ Liability Insurance * Professional Liability Insurance   *Note*: The umbrella policy language must clearly list what types of insurance it covers.  For example, if procurement requires that the contractor have $4 million in CGL coverage, this could be accomplished by a CGL policy with $4 million limit or, alternatively, a CGL policy with a $2 million limit and an Umbrella policy (tied to the CGL) with a $2 million limit. | Contract specific  Include, if needed, to reach required coverage limits.  Must have the applicable underlying insurance coverage. |
| Excess Liability Insurance | Excess Liability insurance is a type of policy that provides limits that exceed the underlying liability policy. It is no broader concerning the incidents covered by the primary insurance, meaning it will not expand the stated coverage but will provide higher limits on top of the original policy. The primary purpose of Excess Liability insurance is to close coverage gaps and to offer an added layer of protection in case the underlying insurance is exhausted of all possible resources. | Contract specific  Include, if needed, to reach required coverage limits.  Must have the applicable underlying insurance coverage. |
|  | | |
| Professional Liability Insurance  aka Errors & Omissions Insurance  aka Malpractice Insurance | Covers professional judgment errors (i.e., negligence, errors, and/or omissions) that lead to damages. Usually a ‘claims made’ policy.  Professional Services examples:   * Engineers * Consultants * Counselors * Brokers * Medical professionals * Accountants * Investigators * Attorneys * Architects   *Note*: All CGL policies exclude professional liability. | Contract specific  Include if appropriate and address extended reporting. |
| Technology Professional Liability Insurance  aka Technology Errors & Omissions | Covers professional technology judgment errors (i.e., negligence, errors, and/or omissions) that lead to damages  *Note*: Additional coverage for technology that infringes copyright and trade secrets.  *Note*: All CGL policies exclude professional liability. | Contract specific  Include if using technology services or products where the design of the technology may lead to damages of the Purchaser (e.g., the Contractor actively develops technology). The insurance is not necessary if Contractor is simply a reseller, distributor or similar. |
|  | | |
| Cyber Risk Liability Insurance | Liability and property loss for data breaches.  *Note*: This is a larger risk if Contractor has access to Personally Identifiable information (PII), Personal Health Information (PHI), or financial information. Data breaches of PII and PHI will can lead to large settlements and fines. Coverage may be separated by security & privacy liability, regulatory defense & penalties, web site media content liability, cyber extortion loss, first party data loss, and first party network business interruption loss. Also included are legal, forensic, and notification services to assist the state in responding to a data security breach incident.  *Note*: CGL policies exclude cyber risk liability. | Contract specific  Include if Contractor has access to such information and/or Contractor processes or stores such information. |
| Crime Insurance/Employee Dishonesty | Coverage provided to an employer for loss arising from the dishonest acts of employer’s employees. Dishonest acts include theft, computer fraud, and misappropriation of employer’s property, including cash and other negotiable instruments. | Contract specific  High crime risks and exposures when a Contractor is vulnerable to business crimes, particularly businesses that deal in cash or large volumes of online payments. |
|  | | |
| Contractor’s Pollution Liability & Asbestos Liability Insurance | Pollution clean-up and claims for injuries, illness, or death from pollution.  Pollution insurance policies can cover general pollution or specifically include the site or source of pollution based on the nature of the work. When known specify coverage for specific sites or sources of pollution including pollution of soil, groundwater, and property; air-borne contaminates; and waste products. Pollution includes unsafe chemicals in manufacturing, industrial repair, and transportation. This is a claims made policy.  *Note*: All CGL policies exclude pollution liability. | Contract specific |
| Transportation Pollution Liability Coverage |  | Contract specific |
| Marine Protection & Indemnity Insurance | Covers vessel liability as well as liability to crew and passengers. | Contract specific |
| Environmental Liability Insurance |  | Contract specific |
|  | | |
| Property Insurance | Covers damage to buildings and contents – e.g., fire, theft. | Contract specific  Include if Contractor is building, renovating, or improving Purchaser’s premises with a high risk of damaging property.  *Note*: Rare to include, except in construction or leases with tenant improvements to a purchaser site. This includes damage to adjacent property. |
| Building & Personal Property Insurance  aka BPP | Covers buildings and contents. | Contract specific |
| Builders Risk Insurance | Coverage for fire and related peril damage typically to new buildings or other structures under construction.  Coverage also can apply to temporary or permanent buildings, machinery, tools, and supplies used in conjunction with a construction project.  Note: Limit is the project cost. | Contract specific  Include when Contractor is constructing a new building. |
| Installation Floater Insurance | Coverage for materials, tools, and equipment for building projects. Coverage applies in transit, on site, and while partially installed. Coverage also applies to testing (e.g., HCAV systems). | Contract specific  Typically included for remodeling and/or minor building addition contracts. |

## Insurance Coverages for Vehicle Transport/Storage/Repair

This Contracts & Procurement Backgrounder provides a high-level overview of unique insurance coverage considerations for state goods/services contracts involving vehicle transport, storage, and repair.

Insurance Coverage Requirements: Goods/Services Contracts

Appropriate insurance coverages for state contracts depends on the goods/services at issue and the state’s risk management strategy. Proper contractual insurance coverage requirements and related contractual provisions enable contracts and procurement professionals to steward state resources and:

* Ensure contracts are awarded to responsible bidders – i.e., bidders who invest in insurance to reduce existential risks (e.g., a lawsuit or business calamity that otherwise would bankrupt the business and preclude its ability to perform the Contract);
* Manage certain risks pertaining to the Contractor’s acts and omissions; and
* Provide insurance coverage, through specified carriers, that provide a source of funds to fund the Contractor’s indemnity obligation (which otherwise may be worthless).

Insurance Coverage Requirements: Goods/Services Contracts for Vehicle Transport, Storage, Repair

Contracts that provide vehicle storage, transport, or repair/maintenance services to the State may require specialized liability insurance when the contractor transports and/or stores or repairs the vehicle at their shop/garage or lot. Such contracts could include:

* Auto repair
* Auto body
* Tire installation/repair
* Commercial parking lots
* Towing services
* Windshield repair & installation

There are two types of liability insurance that, depending on the circumstances, should be required:

* Garage Liability Insurance; and
* Garage Keeper’s Liability Insurance.

Garage Liability Insurance

Garage liability insurance is equivalent to a general liability policy (i.e., CGL) for garage operations. Garage liability insurance also includes automobile liability coverage under the same policy.

Garage liability insurance provides coverage for losses occurring on the garage premises or due to the operations of the business (e.g., garage, repair shop, service station, towing, etc.).

* Covers damages resulting from shop operations.
* Coverage is designed to protect garage owner against liability for injury or damage occurring in garage operations (e.g., customer slip and fall; shop owner drives into a customer vehicle on premises).

Garage liability insurance, however, generally excludes damage to cars being repaired, stored, or transported by the contractor. Accordingly, if the Contractor is repairing, storing, or transporting vehicles, garage keeper’s liability insurance also should be required.

Garage Keeper’s Liability Insurance

Garage Keepers liability insurance provides protection to the Contractor for loss or damage to vehicles belonging to others that are in the Contractor’s care, custody, or control.

* Cover’s damage to customer’s vehicle.
* Coverage is designed to protect garage owners and parking lot owners against liability for physical damage to third party (customer) vehicles in their care, custody, or control.

If the garage/parking lot owner also will be towing vehicles to/from such location, the insurance coverage should include ‘on-hook’ coverage for damages/injuries while towing a vehicle.

Exhibit C Insurance Requirements

Depending on the goods/services contract at issue, the required insurance coverages set forth in *Exhibit C – Insurance Requirements* should be adjusted. Generally speaking, the following adjustments to Section 1 should occur:

* ***Delete*** the requirement for commercial general liability (CGL) insurance.
  + Note: CGL coverage typically excludes coverage for garage liability and garage keeper’s liability. Accordingly, for such businesses, CGL coverage is not appropriate.
* ***Add*** garage liability insurance.
  + Note: The Contractor’s COI may identify this insurance coverage as ‘general liability.’
  + Note: The garage liability insurance *may* include commercial automobile liability coverage (by endorsement). If so, no need to include commercial automobile liability insurance. If not, then do include commercial automobile liability insurance.
  + Note: Agency should be listed as Additional Insureds for this coverage.

Garage Liability Insurance. Garage liability coverage (and, if necessary, commercial umbrella liability insurance) covering bodily injury, property damage, premises, and operational liability for garage operations, covered vehicles, and operations necessary and incidental to the garage business on an ‘occurrence form’ in the amount of not less than $1,000,000 per occurrence and $2,000,000 general aggregate. This coverage shall include blanket contractual liability coverage. This coverage shall include a cross-liability clause or separation of insured condition.

* ***Add*** garage keeper’s liability insurance.
  + Note: The coverage amount here is substantially less than for garage liability insurance as the risks are substantially different.
  + Depending on the Contract (e.g., volume; value issue), use one of the following options:

Garage Keeper’s Liability Insurance. Symbol 30’ garage keeper’s liability coverage (and, if necessary, commercial umbrella liability insurance) including coverage for customer/purchaser's vehicles that are in the care, custody, and control of the named insured. The combined single limit per occurrence shall not be less than $100,000.

Garage Keeper’s Liability Insurance. Garage keeper’s liability coverage with $250 comprehensive deductible and $500 collision deductible. Coverage is to be provided on a direct primary coverage basis.

* ***Add*** ‘on-hook’ insurance coverage provision ***IF*** the Contractor also will be providing towing services.
  + This insurance coverage is for damages/injuries while towing a vehicle.
  + Replace above coverage requirements with the following, as appropriate (using the first option as preferred, because of coverage limits):

Garage Liability & Towing Insurance. Garage liability coverage (and, if necessary, commercial umbrella liability insurance) covering bodily injury, property damage, premises, and operational liability for garage operations, covered vehicles, and operations necessary and incidental to the garage business on an ‘occurrence form’ in the amount of not less than $1,000,000 per occurrence and $2,000,000 general aggregate. The policy shall be endorsed to include coverage for towing or on hook coverage. This coverage shall include blanket contractual liability coverage. This coverage shall include a cross-liability clause or separation of insured condition.

Garage Keeper’s Liability & Towing Insurance. Symbol 30’ garage keeper’s liability coverage (and, if necessary, commercial umbrella liability insurance) including coverage for customer/purchaser's vehicles that are in the care, custody, and control of the named insured. The policy shall be endorsed to include coverage for towing or on hook coverage. The combined single limit per occurrence shall not be less than $100,000.

|  |  |
| --- | --- |
| To Do for Exhibit to the Competitive Solicitation: | |
|  | * Determine appropriate insurance coverages (including amounts). *Note*: The insurance requirements for each Contract should be addressed as part of the Strategic Assessment that occurs BEFORE the Competitive Solicitation & Contract are developed. * Section 1: Replace the yellow space with any applicable, relevant, procurement-specific insurance coverages and requirements (e.g., Commercial Automobile Liability, Professional Liability, Cyber, etc.). * Section 4: Replace the yellow blanks with the appropriate Contract Number, Contract Category, point of contact, and email address. |

|  |  |
| --- | --- |
| To Do at Contract Award: | |
|  | * Confirm insurance coverage(s). * Prior to signing the Contract, collect and file Contractor’s Certificate of Insurance and policy endorsements.   + Insurance Certificates and policy endorsements are required annually.   + These MUST be obtained and retained as part of the State’s records for the Contract. |

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Commercial General Liability Insurance   + Commercial General Liability Insurance. Commercial General Liability Insurance written under ISO Form CG 0001 with minimum limits of $5,000,000 per occurrence and in the aggregate for each one-year policy period. This coverage may be any combination of primary, umbrella, or excess liability coverage affording total liability limits of not less than $5,000,000 per occurrence and in the aggregate. The Commercial General Liability Insurance policy shall include coverage for: (a) blanket contractual liability; (b) premises operations; and (c) products and completed operations for a period of five (5) years following acceptance of the work / expiration or termination of the Contract. * Commercial Automobile Liability Insurance   + Commercial Automobile Liability Insurance. (if Contractor is using a Contractor owned, leased, or operated vehicle to access Purchaser premises). Commercial automobile liability insurance covering the ownership, maintenance, and/or use of all owned/leased, non-owned, and hired vehicles used in the performance of the Contract, with limits of not less than $1,000,000 per accident, combined single limit for bodily injury and property damage liability. Coverage shall be provided on Insurance Services Office (ISO) form number CA 0001 or an equivalent. The required limits can be satisfied by any combination of primary, umbrella, or excess policy.   + Commercial Automobile Liability Insurance. ‘Symbol 1’ commercial automobile liability coverage (and, if necessary, commercial umbrella liability insurance) including coverage for all owned, hired, and non-owned vehicles. The combined single limit per accident shall not be less than $1,000,000. * Commercial Automobile Liability Insurance – with In Transit Pollution Risk   + Commercial Automobile Liability Insurance. Commercial automobile liability insurance covering the ownership, maintenance, and/or use of all owned/leased, non-owned, and hired vehicles used in the performance of the Contract, with limits of not less than $5,000,000 per accident, with a combined single limit for bodily injury and property damage liability. Coverage shall be provided on Insurance Services Office (ISO) form number CA 0001 or an equivalent. If pollutants are to be transported, MCS 90 and CA 9948 (in transit pollution risks coverage) endorsements are required unless in-transit pollution risk is covered under a pollution liability insurance policy. The required limits can be satisfied by any combination of primary, umbrella, or excess policy. * Business Transportation Liability Insurance   + Business transportation liability insurance. This insurance shall apply to all owned, non-owned and hired vehicles. Limits of liability shall not be less than $1,000,000 combined single limit per accident. Coverage shall be provided on Insurance Services Office (ISO) form number CA 0001 or an equivalent. * Commercial Umbrella Liability Insurance   + Commercial Umbrella Liability Insurance. Commercial umbrella liability insurance coverage in the sum of $\_\_\_\_\_\_\_\_ shall be provided and shall apply over all liability policies, without exception, including but not limited to Commercial General Liability, Commercial Automobile Liability, Employers Liability, and Professional Liability. * Excess Liability Insurance   + Excess Liability Insurance. Excess liability insurance with limits not less than $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ which shall provide coverage at least as broad as the primary coverages set forth herein, including Commercial General Liability, Commercial Automobile Liability, and \_\_\_\_\_\_\_\_\_\_\_, in excess of the amounts set forth herein. * Professional Liability (Errors & Omissions) Insurance   + Professional Liability (Errors & Omissions) Insurance. Professional liability insurance in the amount of not less than $1,000,000 combined single limit per occurrence or claim, $2,000,000 general annual aggregate for malpractice or errors and omissions coverage against liability for damages because of personal injury, bodily injury, death, or damage to property, including the loss of use thereof, and damages because of negligent acts, errors, and omissions in any way related to this Contract. The policy shall have an extended reporting period of not less than five (5) years after completion. * Technology Errors & Omissions Insurance   + Technology Errors & Omissions Insurance. Technology errors and omissions insurance, on an occurrence form. This coverage shall include Contractual Liability insurance for the indemnity provided under this Contract. Limits are $2,000,000 per claim/annual aggregate.   + Technology Professional Liability (errors & Omissions). Technology professional liability insurance coverage. Coverage shall be sufficiently broad to respond to the duties and obligations as undertaken by Contractor in this Contract and shall include, but not be limited to, claims involving infringement of intellectual property, including, but not limited to, infringement of copyright, trademark, trade dress, invasion of privacy violations, information theft, damage to or destruction of electronic information, release of private information, alteration of electronic information, extortion, and network security. The policy shall provide coverage for breach response costs as well as regulatory fines and penalties as well as credit monitoring expenses with limits sufficient to respond to these obligations. Combined single limit per claim shall not be less than $2,000,000 per occurrence and $4,000,000 general aggregate. * Technology Professional Liability & Cyber Liability Insurance   + Technology Professional Liability & Cyber Liability Insurance. Contractor shall maintain throughout the term of this Contract and for three (3) years thereafter, a policy or policies of Professional Liability or Errors & Omissions Insurance including Information Security and/or Cyber insurance (separately, or as part of a broad E&O policy) in an amount not less than US $XX million per claim, and US $YY in the aggregate covering Contractor, its employees, subcontractors, and agents for claims and losses resulting from wrongful acts committed in the performance of or failure to perform all services or support services agree to be provided under the Statement of Work (SOW) in this Contract, including but not limited to claims, demands, regulatory investigations, fines or penalties, or any other payments the Contractor shall become legally or contractually obligated to pay for any of the following, including infringement of intellectual property (except for patent infringement), breaches to and failures in electronic and physical security, breach of confidentiality and invasion of or breach of privacy. Contractor shall require and secure evidence of same insurance for its subcontractors and independent contractors hired or retained to perform or support work to be performed under this SOW or shall provide coverage on their behalf. State Agency reserves its right to review and accept evidence of such insurance for Contractor and its subcontractors. No policy deductible or self-insured retention and no limit of insurance shall serve to limit Contractor’s liability for services rendered or failed to have been rendered as outlined in the SOW, except as otherwise provided in Section \*\*.   + Technology Professional Liability & Cyber Liability Insurance. Contractor agrees to purchase and maintain throughout the term of this Contract a technology/professional liability insurance policy, including coverage for network security/data protection liability insurance (also called “cyber liability”) covering liabilities for financial loss resulting or arising from acts, errors, or omissions, in rendering technology/professional services or in connection with the specific services described in this Contract:     1. Violation or infringement of any right of privacy, including breach of security and breach of security/privacy laws, rules or regulations globally, now or hereinafter constituted or amended;     2. Data theft, damage, unauthorized disclosure, destruction, or corruption, including without limitation, unauthorized access, unauthorized use, identity theft, theft of personally identifiable information or confidential information in whatever form, transmission of a computer virus or other type of malicious code; and participation in a denial of service attack on third party computer systems;     3. Loss or denial of service;     4. No cyber terrorism exclusion;   with a minimum limit of $\_\_\_\_\_\_\_\_\_ each and every claim and in the aggregate. Such coverage must include technology/professional liability including breach of contract, privacy and security liability, privacy regulatory defense and payment of civil fines, payment of credit card provider penalties, and breach response costs (including without limitation, notification costs, forensics, credit protection services, call center services, identity theft protection services, and crisis management/public relations services).  Such insurance must explicitly address all of the foregoing without limitation if caused by an employee of Contractor or an independent contractor working on behalf of Contractor in performing services under this Contract. Policy must provide coverage for wrongful acts, claims, and lawsuits anywhere in the world. Such insurance must include affirmative contractual liability coverage for the data breach indemnity in this Contract for all damages, defense costs, privacy regulatory civil fines and penalties, and reasonable and necessary data breach notification, forensics, credit protection services, public relations/crisis management, and other data breach mitigation services resulting from a breach of confidentiality or breach of security by or on behalf of Contractor.   * Cyber Risk Liability Insurance   + Cyber Risk Liability Insurance. Cyber risk insurance, on a claims made form. The policy shall include coverage for liability as a result of a data security breach or violation of consumer data protection laws arising out of Services provided under this Contract and resulting Purchase Orders - Limits are $1,000,000 per occurrence and $2,000,000 aggregate. The insurance coverage limits set forth herein are the minimum. Contractor’s insurance coverage shall be no less than the minimum amounts specified. Coverage in the amounts of these minimum limits, however, shall not be construed to relieve Contractor from liability in excess of such limits. * Crime Insurance/Employee Dishonesty   + Crime Insurance/Employee Dishonesty. Employee dishonesty and (when applicable) inside/outside money and securities, including computer fraud coverages for State of Washington property in the care, custody, and control of Contractor. Coverage limits shall not be less than \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ per occurrence and $\_\_\_\_\_\_\_ general aggregate. * Property Insurance   + Property Insurance. Contractor shall provide property insurance covering all real property, fixtures, and equipment. Such insurance shall be written on an all risks basis and, at a minimum, cover the perils insured under ISO special causes of loss form CP 10 30, and cover the full replacement cost of the property insured, and include the State of Washington as a loss payee. * Transportation Pollution Liability Coverage   + Transportation Pollution Liability Coverage. Contractor shall provide transportation pollution liability insurance in an amount not less than $10,000,000 per occurrence and $20,000,000 aggregate. * Contractor’s Pollution Liability Insurance   + Contractor’s Pollution Liability Insurance. Pollution liability insurance coverage (to include, without limitation, loading and unloading of all Fuel Products) with a combined single limit per occurrence of not be less than $5,000,000, or the equivalent. Such insurance shall provide coverage for bodily injury, including death; loss or damage to property, including loss of use of damaged property or of property that has not been physically injured; cleanup costs; and costs and expenses incurred in the investigation, defense or settlement of claims. Such coverage shall provide coverage for both on-site and off-site clean-up costs and cover gradual and sudden pollution.   + Contractor’s Pollution Liability & Asbestos Liability Insurance. Contractor shall provide Contractor’s Pollution Legal Liability and/or Asbestos Legal Liability with limits of no less than $1,000,000 per occurrence or claim and $2,000,000 policy aggregate. * Environmental Liability Insurance   + Environmental Liability Insurance. Environmental liability insurance coverage, on an occurrence or claims made basis, with annual limits of not less than $100,000,000 per claim and in the aggregate, including liability arising out of transportation and non-owned disposal sites. The policy shall have a five-year extended reporting period and cover claims made on and prior to the completion and claims made after final acceptance, but within the extended reporting period. The required limits can be satisfied by any combination of primary, umbrella, or excess policy. * Marine Protection & Indemnity Insurance   + Marine Protection & Liability Insurance. Marine Protection and Indemnity Insurance, including Collision, Jones Act, and passenger coverages. Combined single limit per occurrence shall not be less than $1,000,000, or the equivalent. * Certificate of Insurance   + Certificate of Insurance. Prior to execution of the Contract, Contractor shall furnish to [Agency], as evidence of the insurance coverage required by this Contract, a certificate of insurance satisfactory to [Agency] that insurance, in the above-stated kinds and minimum amounts, has been secured. In addition, no less than ten (10) days prior to coverage expiration, Contractor shall furnish to [Agency] an updated or renewed certificate of insurance, satisfactory to [Agency], that insurance, in the above-stated kinds and minimum amounts, has been secured. Failure to maintain or provide proof of insurance, as required, shall constitute a material breach of contract upon which [Agency] may, after giving five (5) business days’ notice to Contractor to correct such breach, immediately terminate the Contract or, at [Agency]’s discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to [Agency] on demand, or at the sole discretion of [Agency], offset against funds due the Contractor by [Agency]. All policies and certificates of insurance shall include the Contract number stated on the cover of this Contract. * Alternative Dispute Resolution   + Alternative Dispute Resolution. With the exception of Commercial Automobile Liability Insurance, no insurance policies required herein shall contain an arbitration or alternative dispute resolution clause applicable to disputes between the insurer and its insureds. Any and all disputes concerning the terms and scope of insurance coverage afforded by the policies required hereunder and/or extra contractual remedies and relief which may be afforded policy holders in connection with coverage disputes, shall be resolved in Washington Superior Court, applying Washington law. |

|  |  |
| --- | --- |
|  | * Generally speaking, with the exception of Section 1 of the Insurance Exhibit and Section 4 (address for certificates of insurance), the rest of the Insurance Exhibit does NOT change. * As part of managing the Contract, Agency must collect and properly file Contractor’s Certificate of Insurance. Insurance Certificates are required annually. These MUST be retained as part of the State’s records for the Contract. If a claim is asserted against the State related to the Contract (during or after expiration or termination of the Contract, but within the applicable statute of limitations), it is critical to be able to determine whether there is insurance coverage for the claim. * *See also*, Training Resources for Contracts/Insurance:   + Insurance Requirements – State Contracts for Goods/Services (September 17, 2020)   + Insurance Requirements – State Contracts for Goods/Services: Exhibit C – Insurance Requirements (February 3, 2021)   + Insurance Requirements – State Contracts for Goods/Services: Additional Insured Status (March 10, 2021)   + Insurance Requirements – State Contracts for Goods/Services: Certificate of Insurance (April 14, 2021)   + Insurance Requirements – State Contracts for Goods/Services: Cyber Liability Insurance (May 19, 2021)   + Insurance Requirements – State Contracts for Goods/Services: Professional Liability Insurance (August 17, 2021)   + Insurance Requirements – State Contract for Goods/Services: Excess & Umbrella (September28, 2021   + Insurance Requirement – State Contracts for Goods/Services: Workers Compensation & Employer’s Liability Insurance (October 12, 2021)   + Insurance Requirements – State Contracts for Goods/Services: Commercial General Liability Insurance (January 26, 2022)   + Insurance Requirements – State Contracts for Goods/Services: Commercial Auto Liability Insurance (April 6, 2022) |

## Additional Provisions

* Confidential Information; Data Security; Network Access
* Data Security Requirements
* Force Majeure
* Climate Commitment Act (CCA)
* Emergency Support
* Copyright Assignment
* Ownership and Use of Intellectual Property
* License for Services (IT)
* Delivery of Services (IT)
* Procurement Confidentiality
* Key Personnel
* Prevailing Wage

## Confidential Information; Data Security; Network Access

Provision:

* Confidential Information; Data Security; Network Access

1. Confidential Information. For purposes of this Contract, “Confidential Information” includes, but is not limited to, information that is deemed confidential under federal or state law, personal information as defined in [RCW 42.56.590](https://app.leg.wa.gov/RCW/default.aspx?cite=42.56.590), as well as any information identified, in writing, by Purchaser as confidential or protected.
2. Protection of Confidential Information. Notwithstanding any provision to the contrary, Contractor’s use of Confidential Information will be in compliance with all applicable state and federal law. At a minimum, Contractor shall maintain records documenting: (i) the Confidential Information received pertaining to this Contract; (ii) the purpose(s) for which the Confidential Information was received; (iii) who received and maintained the Confidential Information; and (iv) final disposition of the Confidential Information. Purchaser reserves the right to monitor, audit, and/or investigate Contractor’s use of Confidential Information used, collected, or acquired by Supplier pursuant to this Contract.
3. Contractor Obligation – Confidential Information. Contractor shall: (i) hold Confidential Information in strictest confidence and not make use of Confidential Information for any purpose other than the performance of this Contract; (ii) release Confidential Information only to authorized employees or agents requiring such information for the purpose of performing this Contract and who have executed an appropriate nondisclosure agreement or data sharing agreement as approved by Purchaser; (iii) implement and maintain physical, electronic, and managerial safeguards to prevent unauthorized access to Confidential Information including, but not limited to, storing Confidential Information on secure servers with access to the data strictly controlled and limited to staff with appropriate training and clearance; and (iv) ensure that all Confidential Information is encrypted in transmission from and to Contractor, at rest in the data base or other data facility maintained or used by Contractor, and when transmitted to authorized recipients.
4. Contractor Obligation – Data Security. If the Contract involves Purchaser’s Data and/or access to Purchaser’s IT network, Contractor, at its expense, will comply with the data security requirements set forth in *Attachment XX – Data Security Requirements*.
5. Contractor Obligation – Expiration or Termination. Upon expiration or termination of this Purchase Order, Contractor, at Purchaser’s direction, timely will: (i) Certify to Purchaser that all Confidential Information has been destroyed; or (ii) return all Confidential Information to Purchaser; or (iii) take whatever other actions Purchaser requires of Contractor to protect such Confidential Information.
6. Network Access. During its performance of this Contract, Contractor may be granted access to Purchaser’s computer and telecommunication networks (“Networks”). As a condition of Network use, Contractor shall: (a) use the Networks in compliance with all applicable laws, rules, and regulations; (b) use software, protocols, and procedures as directed by Purchaser to access and use the Networks; (c) only access Network locations made available to Contractor by Purchaser; (d) not interfere with or disrupt other users of the Networks; (e) assure the transmissions over the Networks by Contractor (i) do not contain any libelous, defamatory, profane, offensive, obscene, pornographic, or unlawful material, and (ii) are not used to perform any illegal activities, including but not limited to, encouraging, selling, or soliciting illegal drugs, gambling, pornography, prostitution, robbery, spreading computer worms or viruses, hacking into computer systems, or trafficking credit card codes; and (f) upon termination or expiration of the Contract, relinquish all IP addresses or address blocks assigned to them on the Networks. Additionally, Contractor shall comply with Purchaser’s IT policies.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  |  |

## Data Security Requirements

Provision:

* Data Security Requirements.

1. Security Compliance. Contractor is responsible for establishing an information security program and maintaining physical, technical, administrative, and organizational safeguards, that comply with: (a) applicable industry standards and guidelines; (b) American Institute of Certified Public Accountants (AICPA) System and Organization Controls (SOC) 1; and (c) Washington Technology Solutions Standards WaTech). See Policy 141.10 – [*Securing Information Technology Assets Standards*](https://watech.wa.gov/sites/default/files/2023-12/141.10_SecuringITAssets_2023_12_Parts_Rescinded.pdf)
2. Annual Security Certifications. Contractor will, at the commencement of this Contract and annually thereafter provide [Agency] the following reports and certifications: (a) AICPA Statement of Standards for Attestation Engagement (SSAE) No. 18 SOC 1 Type II fiscal year cycle audit report; (b) SOC 2 Type I report in accordance with AICPA AT 101; and (c) attestation that Contractor’s Services are in compliance with WaTech Security Policy 141.10 – *Securing Information Technology Assets Standards*. [Agency] may accept, at its sole discretion, alterative reports, audits or reporting formats which [Agency] determines to be equivalent or better to the reports and certifications described herein.
3. Data Breach. Contractor must have an incident response process that follows National Institute of Standards and Technology (NIST) of Standards and Technology (NIST) standards and includes breach detection, breach notification and breach response. Upon discovery or reasonable belief of any access, destruction, loss, theft, use or disclosure of [Agency]’ Data by an unauthorized party (“Data Breach”), Contractor shall notify [Agency] by the fastest means available and also in writing. Contractor shall provide such notification within forty-eight (48) hours after Contractor reasonably believes there has been such a Data Breach. Contractor’s notification shall identify:
   * 1. The nature of the Data Breach;
     2. The Data accessed, used or disclosed;
     3. The person(s) who accessed, used, disclosed and/or received Data (if known);
     4. What Contractor has done or will do to quarantine and mitigate the Data Breach; and
     5. What corrective action Contractor has taken or will take to prevent future Data Breaches.

Contractor shall quarantine the Data Breach, ensure secure access to Data, and restore Services as needed to comply with terms and conditions of this Contract. Contractor shall conduct an investigation of the Data Breach and shall share the report of the investigation with [Agency].

In the event of the Data Breach, Contractor agrees to comply with all applicable state and federal statutory provisions, including but not limited to RCW 19.255.010 and [RCW 42.56.590](https://app.leg.wa.gov/RCW/default.aspx?cite=42.56.590). Where notifications are required to the public or regulators, Contractor shall coordinate and cooperate with [Agency] in the development of a communication plan, and promptly and at no cost, provide advance copies of any notifications for [Agency] review before disseminating. If a Data Breach occurs and is found to be the result of Contractor’s acts, omissions or negligence, Contractor shall assume complete responsibility for notification of affected parties, and be liable for all associated costs incurred by [Agency] in responding to or recovering from the Data Breach.

1. Technical Examination and Audit. Upon advance written request, Contractor agrees that [Agency] or its designated representative shall have reasonable access to Services purchased by [Agency] under this contract, its operational documentation, records and databases, including online inspections. The online inspection shall allow [Agency], its authorized agents, or a mutually acceptable third party hired by [Agency], to test that controls are in place and working as intended. Tests may include, but not be limited to, the following:
   * 1. Operating system/network vulnerability scans;
     2. Web application vulnerability scans;
     3. Database application vulnerability scans; and
     4. Any other scans to be performed by [Agency] or representatives on behalf of [Agency].

Contractor shall allow [Agency] reasonable access to Services security logs, latency statistics, and other related Services security data that affect this Contract and [Agency]’ Data, at no cost to [Agency]. After any significant Data loss, specific to data stored within the Services platform, or as a result of any disaster or catastrophic failure, Contractor will at its expense have an independent, industry-recognized third party perform an information security audit. This does not apply to data loss resulting from interruptions in the Services stemming from [Agency]’ computers, network hardware, internet connectivity, or other elements owned or controlled by [Agency] that are reasonably required to use Services. The audit results shall be shared with [Agency] within seven (7) days of Contractor’s receipt of such results. Upon Contractor receiving the results of the audit, Contractor will provide [Agency] with written evidence of planned remediation within thirty (30) days and promptly modify its security measures in order to meet its obligations under this Contract.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * These provisions are recommended by WaTech. |

## Force Majeure

Provision:

* Force Majeure. Except for the obligation to pay amounts when due under the Contract, neither party will be liable to the other for damages due to a failure to carry out its obligations under this Contract when that failure is in whole or part caused by fire, hurricane, flood, earthquake, lightning, or other natural event or disaster; freight embargo; governmental or administrative prohibition; riot; strike (other than at the affected party’s operations or that of its suppliers); acts of public enemies or terrorists; sabotage; or other events beyond that party’s reasonable control (a “force majeure event”). A party affected by a force majeure event immediately shall notify the other, describing the event and estimating its duration. The parties shall cooperate in good faith to mitigate the effects of the force majeure event; *Provided*, however, that, if Contractor is unable to perform in a timely fashion, Purchaser may purchase replacement Goods or obtain substitute Services from another vendor without penalty, and those replacement Goods and substitute Services shall count towards any volume requirements in this Contract. Alternatively, [Agency] may elect to terminate the Contract . Unless Contractor is excused from performing due to a force majeure event, if Purchaser is required to acquire replacement Goods and substitute Services from another supplier because Contractor is unable to timely perform on the agreed schedule, Contractor shall reimburse Purchaser for all commercially reasonable additional costs and expenses incurred to obtain the replacement Goods and substitute Services.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  |  |

## Climate Commitment Act (CCA)

Provision:

* Climate Commitment Act Branding. This [program/project] received funding from Washington’s Climate Commitment Act (CCA). To strengthen public awareness of how CCA funding is used, Contractor shall use the CCA logo consistent with the CCA branding guidelines in the following circumstances: any [program/project] website or webpage that includes logos from other funding partners, any [program/project] media or public information materials that include logos from other funding partners, and/or any on-site signage. Contract shall use the following funding language on websites and included in announcements, press releases and publications used for media-related activities, publicity and public outreach: “The [program/project] is supported with funding from Washington’s Climate Commitment Act. The CCA supports Washington’s climate action efforts by putting cap-and-invest dollars to work reducing climate pollution, creating jobs, and improving public health. Information about the CCA is available at www.climate.wa.gov.”

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * This language should be used when it is clear that the program/project itself is receiving funding from the Climate Commitment Act. The program staff should have a good understanding of when those funds are used. This language would not be used when the agency receives CCA funds but those funds are not used for the program/project. |

## Emergency Support

Provision:

* Emergency Support. During the term of this Contract, in the event of public emergency (declared by the Governor), Contractor shall provide Goods and Services to Purchaser on a first priority basis.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  |  |

## Copyright Assignment

Provision:

* Copyright. Unless otherwise provided, all materials produced under this contract shall be considered "works for hire" as defined by the U.S. Copyright Act of 1976 and shall be owned by [Agency]. In the event such materials are not considered “works for hire” under the U.S. Copyright laws, Contractor hereby assigns and transfers all right, title, and interest in the materials, including all intellectual property rights, to [Agency] effective from the moment of creation of such materials. Contractor agrees to execute all papers and to perform acts [Agency] may deem necessary to secure for [Agency] or its designee rights herein assigned. For materials that are delivered under the Contract, but that incorporate pre-existing materials not produced under the Contract, Contractor hereby grants to [Agency] a nonexclusive, royalty-free, irrevocable license (with rights to sublicense others) in such materials to translate, reproduce, distribute, prepare derivative works, publicly perform, and publicly display. Contractor warrants and represents that Contractor has all rights and permissions, including intellectual property rights, moral rights and rights of publicity, necessary to grant such a license to [Agency]. Contractor shall exert all reasonable effort to advise [Agency], at the time of delivery of materials furnished under this contract, of all known or potential invasions of privacy contained therein and of any portion of such document which was not produced in the performance of this Contract. [Agency] shall receive prompt written notice of each notice or claim of infringement received by the Contractor with respect to any material delivered under this Contract. [Agency] shall have the right to modify or remove any restrictive markings placed upon the material by Contractor.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Copyright. The copyright in all works of authorship created pursuant to this agreement shall be owned by the State of Washington. All such works or portions of works created by the Contractor are hereby agreed to be "works made for hire" within the meaning of 17 U.S.C. § 201. If, however, the State of Washington is not able to obtain copyright ownership under the statutory provisions for "works made for hire," then Contractor hereby assigns to State of Washington all right, title, and interest in:   1. the copyright to Contractor’s work of authorship ("Work") and contribution to any such Work ("Contribution");   2. any registrations and copyright applications, along with any renewals and extensions thereof, relating to the Contribution or the Work;   3. all works based upon, derived from, or incorporating the Contribution or the Work;   4. all income, royalties, damages, claims and payments now or hereafter due or payable with respect to the Contribution or the Work;   5. all causes of action, either in law or in equity, for past, present, or future infringement of copyright related to the Contribution or the Work, and all rights corresponding to any of the foregoing, throughout the world.   In addition, to the extent any applicable law or treaty prohibits the transfer or assignment of any moral rights or rights of restraint the Contractor has in the Contribution or the Work, Contractor waives those rights as to State of Washington, its successors, licensees, andassigns. |

|  |  |
| --- | --- |
|  | * Prior to executing the Contract, Agency should negotiate for and make clear that Agency is acquiring ownership rights. |

## Ownership and Use of Intellectual Property

Provision:

* Ownership and Use of Intellectual Property.

1. Prior Intellectual Property. Each party’s intellectual property existing prior to the date of the Contract shall remain the exclusive property of that party.
2. Materials. As used herein, “Materials” means all information in any format that includes, but I not limited to, data, reports, documents, pamphlets, advertisements, books, surveys, studies, computer programs, films, tapes, and sound reproductions.
3. Works For Hire. Contractor promptly shall disclose to Purchaser, all developments, including designs, ideas, computer programs, discoveries, inventions, or improvements thereto, whether patentable, copyrightable, or not, made by Contractor in the performance of this Contract. Unless otherwise provided, all Materials produced under this Contract shall be considered "works for hire" as defined by the U.S. Copyright Act and will be owned by Purchaser. Purchaser shall be considered the author of such Materials. If the Materials are not considered “works for hire” under the U.S. Copyright laws, Contractor hereby irrevocably assigns all right, title, and interest in such Materials, including all intellectual property rights, to Purchaser effective from the moment of creation of such Materials.
4. License for Materials that Incorporate Pre-Existing Intellectual Property. For Materials that are delivered under this Contract, but that incorporate pre-existing Materials not produced under this Contract, Contractor grants to Purchaser a nonexclusive, royalty-free, irrevocable license (with rights to sublicense others) in such Materials to translate, reproduce, distribute, prepare derivative works, publicly perform, and publicly display. Contractor warrants and represents that Contractor has all rights and permissions, including intellectual property rights, moral rights, and rights of publicity, necessary to grant such a license to Purchaser.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * Intellectual Property. All intellectual property rights in all works or supplies provided under this Contract which are written or produced on a customized basis, including, without limitation, all future such rights when the said works are created, shall be owned by Purchaser and Contractor shall ensure that it executes all documents necessary to effect such ownership. Where Contractor provides existing intellectual property right protected material to the Purchaser under this Contract it shall disclose this to Purchaser, warrants it has the right to do so and shall fully indemnify and hold harmless against all loss or liability arising from any third party intellectual property rights claims arising both from such existing material and in relation to any such bespoke work. Except as provided above both parties retain ownership of their pre-existing intellectual property right protected material. |

|  |  |
| --- | --- |
|  | * N/A |

## Data Ownership, Use, & Recovery

Provision:

* Data Ownership, Use, Recovery.

1. Data Ownership and Use. [Agency’s] data (“Data”) shall include [Agency]’ data collected, used, processed, stored, or generate as the result of the use of the Services. Data is and shall remain the sole and exclusive property of [Agency]. Contractor is provided a limited, non-exclusive license to access and use Data solely for performing its obligations under the Contract. Contractor shall: (a) keep and maintain Data in strict confidence and as further described in this Contract and applicable law to avoid unauthorized access, use, disclosure, or loss; and, (b) not use, sell, rent, transfer, distribute, or otherwise disclose or make available Data for Contractor’s own purposes or for the benefit of anyone other than [Agency] without [Agency]’ prior written consent.
2. Data Backup. As part of the Services, Contractor is responsible for maintaining a backup of Data and for an orderly and timely recovery of such Data in the event that the Services may be interrupted. Contractor shall maintain a contemporaneous backup of Data that can be recovered within two (2) hours at any point in time.
3. Extraction of Data. Contractor shall, within one (1) business day of [Agency]’ request, provide [Agency], without charge and without any conditions or contingencies whatsoever (including but not limited to the payment of any fees due to Contractor), an extract of the Data in the format specified by [Agency].
4. Disaster Recovery. In the event of disaster or catastrophic failure that results in significant Data loss or extended loss of access to Data, Contractor shall notify [Agency] by the fastest means available and also in writing. Contractor shall provide such notification within twenty-four (24) hours after Contractor reasonably believes there has been such a disaster or catastrophic failure. In the notification, Contactor shall inform [Agency] of: (a) The scale and quantity of the Data loss; (b) What Contractor has done or will do to recover the Data and mitigate any deleterious effect of the Data loss; and (c) What corrective action Contractor has taken or will take to prevent future Data loss. Contractor shall restore continuity of Services to meet the 24 hours Recovery Point Objective (RPO) and 72 hours Recovery Time Objective (RTO). At the commencement of the Contract, Contractor shall provide a copy of its disaster recovery plan and obtain [Agency]’ written approval of the disaster recovery plan. Contractor shall annually demonstrate the completion of disaster recovery testing and present a summary of test findings and any resulting remedial actions.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  |  |

## License for Services

Provision:

* License for Services.

1. Authorized Users. Subject to the terms of this Contract, Contractor grants [Agency] a renewable, irrevocable, nonexclusive, royalty-free, worldwide right for [Agency] and its employees, contractors, agents, or any other individuals or entities authorized by [Agency] (each an “Authorized User”) to access and use the Services. For the purposes of 11 U.S.C. § 365(n), Contractor and [Agency] agree that this Contract constitutes a license grant of intellectual property in software form to [Agency] from Contractor. [Agency] agrees to license an initial number of Authorized Users as described in *Exhibit C – Price*. [Agency] is entitled to increase or decrease the number of Authorized Users on an as-requested basis.
2. Pre-existing Materials. [Agency] acknowledges that, in the course of performing the Services, Contractor may use software and related processes, instructions, methods, and techniques that have been previously developed by Contractor (collectively, the “Pre-existing Materials”) and that the same shall remain the sole and exclusive property of Contractor.
3. Changes in Functionality. During the term of the Contract, Contractor shall not reduce or eliminate functionality in the Services. Where Contractor has reduced or eliminated functionality in the Services, [Agency], at [Agency]’ sole election and in [Agency]’ sole determination, shall: (a) have, in addition to any other rights and remedies under this Contract or at law, the right to immediately terminate this Contract and be entitled to a return of any prepaid fees; or, (b) determine the value of the reduced or eliminated functionality and Contractor immediately will adjust the Services fees accordingly on a prospective basis. If improved features or versions (e.g., patches, bug fixes, updates or releases) are made available to other Services users at no additional cost, Contractor also shall make such improved features or versions available to [Agency] at no additional cost and with the same rights, obligations, and limitations as for the Services.
4. Documentation. Contractor shall provide the documentation for the Services (“Documentation”) that accurately and completely describes the functions and features of the Services, including all subsequent revisions thereto. The Documentation shall be understandable by a typical end user and shall provide Authorized Users with sufficient instructions such that an Authorized User can become self-reliant with respect to access and use of the Services. [Agency] shall have the right to make any number of additional copies of the Documentation at no additional charge.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  |  |

## Delivery of Services (IT)

Provision:

* Delivery of Services.

1. Location of Services. The Services shall be provided solely from within the continental United States and on computing and data storage devices residing therein.
2. Availability Service Level Standard. Services shall be available Sunday through Saturday 6:00 AM to 6:00 PM Pacific Time, with maintenance occurring outside these hours.
   * 1. If Services’ monthly availability averages less than 99.999% for the above time period (excluding agreed-upon maintenance downtime), [Agency] shall be entitled to apply Performance Credit equivalent to ten percent (10%) of Services fees (as calculated on an annual basis) for each one (1) percent under 99.999% availability average.
     2. If Services monthly availability averages less than 99.999% (excluding agreed-upon maintenance downtime), for three (3) or more months in a rolling twelve-month period, [Agency] may terminate the Contract for material breach subject to Section \*\* of this Contract.
3. Failure to Meet Service Level Standards. In the event Contractor does not meet the expected standard of performance for Services measurement (“Service Level Standard”), Contractor shall: (a) owe to [Agency] any applicable portion of the Services fees, in the form of liquidated damages, and not as a penalty, that is due to [Agency] as a result of a Service Level Standard not being achieved (“Performance Credit”); and (b) use its best efforts to ensure that any unmet Service Level Standard is subsequently met and impact and duration of any outage, interruption, or degradation of Services are minimized.
4. Technical Support Service Level Standard.
5. Contractor will provide to [Agency] telephone and email support (“Technical Support”) from 6:00 AM to 6:00 PM PST Monday through Friday. Authorized Users will make Technical Support requests by calling, emailing Contractor’s Technical Support staff or by submitting a request via Contractor’s customer services web portal. The Technical Support staff shall assign to the request the Problem Severity Level indicated by the requestor. Contractor must respond to a Technical Support request made by an Authorized User within the indicated Request Response Time and must resolve a Technical Support request made by an Authorized User within the indicated Request Resolution Time.

| Problem Level | Response & Resolution Time |
| --- | --- |
| Problem Severity Level 1: (a) Services, as a whole, are non-functional or are not accessible; (b) unauthorized exposure or corruption of all or part of [Agency]’ Data. | Request Response: 30 minutes  Request Resolution: 2 hours |
| Problem Severity Level 2: Significant and/or ongoing interruption of an Authorized User’s use of a critical function (as determined by the Authorized User). | Request Response: 1 hour  Request Resolution: 4 hours |
| Problem Severity Level 3: (a) minor and/or limited interruption of an Authorized User’s use of non-critical function (as determined by the Authorized User) of the Service; or (b) problems which are not included in Problem Severity Level 1 or 2. | Request Response: 8 hours  Request Resolution: 24 hours |
| Problem Severity Level 4: (a) general questions pertaining to the Service; or  (b) problems which are not included in Problem Severity Level 1, 2 or 3. | Request Response: 8 hours  Request Resolution: 48 hours |

1. If a Problem Severity Level 1 or 2 request cannot be corrected to the reasonable satisfaction of the requestor within the Request Resolution Time after the requestor makes the initial request for Technical Support, Contractor will: (a) immediately escalate the request to Contractor’s management; (b) take and continue to take the actions which will most expeditiously resolve the request; (c) provide a hourly report to the requestor of the steps taken and to be taken to resolve the request, the progress to correct, and the estimated time of correction until the request is resolved; and (d) provide increasing levels of technical expertise and Contractor management involvement in finding a solution to the request until it has been resolved. If percentage of requests that meet the Request Resolution Time Service Level Standard is less than 99.0% of total number of requests, [Agency] shall be entitled to apply Performance Credit equivalent to five percent (5%) of Services fees (as calculated on a quarterly basis for the reporting quarter) for each full one (1) percent under 99.0% standard.
2. If a Problem Severity Level 3 or 4 request cannot be corrected to the reasonable satisfaction of the requestor within the Request Resolution Time after the requestor makes the initial request for Technical Support, at the sole election of the requestor: (a) Contractor will work continuously to resolve the request; or (b) requestor and Contractor will mutually agree upon a schedule within which to resolve the request. If percentage of requests that meet the Request Resolution Time Service Level Standard is less than 99.0% of total number of requests, [Agency] shall be entitled to apply Performance Credit equivalent to one percent (1%) of Services fees (as calculated on a quarterly basis for the reporting quarter) for each full one (1) percent under 99.0% standard.
3. Service Level Standards Reporting and Audit. On an annual basis, at least thirty days prior to the Contract anniversary dates, Contractor shall provide reports to [Agency] describing the performance of the Services and of the Contractor as compared to the Service Level Standards as set forth herein. The reports shall be in a form agreed-to by [Agency], and contain no less than the following information: (a) actual performance compared to the Service Level Standards; (b) time, severity level, description, response and resolution time for each incident logged during the year; (c) the cause or basis for not meeting the Service Level Standard; (d) specific remedial actions Contractor has undertaken or will undertake to ensure that the Service Level Standard will be achieved; and (e) any Performance Credit due to [Agency]. Where Contractor fails to provide a report for a service level in the applicable timeframe, the Service Level shall be deemed to be completely failed for the purposes of calculating Performance Credits.
4. Maintenance. Contractor shall provide bug fixes, corrections, modifications, enhancements, upgrades and new releases to the Services to ensure: (a) the functionality of the Services available to Authorized Users is in accordance with this Contact, the Documentation and *Exhibit B-1 – Requirements* and *Exhibit B-2 – Implementation Statement of Work*; and (b) the Services comply with the most current industry, security and accessibility standards.
   * 1. Required Notice of Maintenance. Unless otherwise agreed to by [Agency] on a case-by-case basis, Contractor shall provide no less than thirty (30) calendar days’ prior written notice to [Agency] of all non-emergency maintenance to be performed on the Services, such written notice shall include a detailed description of maintenance to be performed and impact of the maintenance to [Agency]. For emergency maintenance, Contractor shall provide as much prior notice to [Agency] as commercially practicable and shall provide a detailed description of all maintenance performed and impact to [Agency] no greater than one (1) calendar day following the implementation of emergency maintenance.
     2. Acceptance of Non-Emergency Maintenance. Unless as otherwise agreed to by [Agency] on a case-by-case basis, for non-emergency maintenance, [Agency] shall have a ten (10) business day period to test any maintenance changes prior to Contractor introducing such maintenance changes into production (the “Maintenance Acceptance Period”). In the event that [Agency] rejects, for good cause, any maintenance changes during the Maintenance Acceptance Period, Contractor shall not introduce such rejected maintenance changes into production.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  |  |

## Procurement Confidentiality

Provision:

* Procurement Confidentiality. Contractor understands and acknowledges that the Services provided to [Agency] by Contractor are used as part of a competitive procurement system for public works procurements. Accordingly, because such procurements are competitive it is critical that Contractor establish and maintain security measures, including physical, technical, administrative, and organizational safeguards, designed to: (i) ensure the security and confidentiality of the procurement information; (ii) protect against any anticipated threats or hazards to the security or integrity of the information; (iii) protect against unauthorized disclosure, access to, or use of the information; and (iv) ensure that all employees, agents, and subcontractors of Contractor, if any, comply with all of the foregoing.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  |  |

## Key Personnel

Provision:

* **Contractor’s Key Personnel Changes**.  Key Personnel as set forth in *Exhibit A – Included Goods/Services* must not be changed during the term of this Contract.  If Key Personnel become unavailable to perform the Services due to termination of employment or unpaid or paid leave of absence, Contractor must notify [Agency] as soon as practicable, but no later than five (5) business days after Key Personnel becomes unavailable. Key Personnel may be replaced with written approval from [Agency].  Replacement Key Personnel must have equal or greater qualifications and capabilities as specified in *Exhibit A – Included Goods/Services* and the *Competitive Solicitation*.  [Agency] reserves the right, in its sole judgement, to approve or reject such proposed replacement staff.
* Key Personnel. If at Contract award or any time thereafter, any named individual specifically identified in the bid or Contract no longer is available, [Agency] reserves the right to approve or reject any personnel substitutions by Contractor.

Options/Alternatives:

|  |  |
| --- | --- |
|  | * N/A |

|  |  |
| --- | --- |
|  | * To be placed in Section 2 of the Contract. * Certain experienced, professional and/or technical personnel are essential for successful accomplishment of the work under the contract. This clause is meant to prevent ‘bait and switch’ issue – where the vendor wins the award based on certain “Key Personnel” whose resumes were submitted for evaluation of the proposal, but after the award the vendor assigns different individuals to perform contract work. |

## Prevailing Wage

Provision:

* Prevailing Wages. This Contract is subject to Washington’s Prevailing Wage on Public Works Act (RCW 39.12). Accordingly, for work pursuant to this Contract, Contractor (including any subcontractors), unless exempt, shall pay all workers employed in the performance of any part of the work in accordance with RCW 39.12 and the rules promulgated by the Washington State Department of Labor and Industries.

1. Wage Rates. Contractor, and any subcontractor or other person doing any portion of the work covered by this Contract, shall not pay any laborer, worker, or mechanic less than the applicable and most current prevailing hourly wage rates and fringe benefits for said worker’s classification to all laborers workers or mechanics who perform any work pursuant to any resulting contract, in conformance with the scope or work description of the Industrial Statistician of the Washington State Department of Labor and Industries. Contractor shall have sole responsibility to ascertain the applicable prevailing rate of wage for such classification, as set forth by the State of Washington for the County in which the work is performed. The applicable prevailing wage rates are set forth on the [website](http://www.lni.wa.gov/TradesLicensing/PrevWage/WageRates/default.asp) for the Washington State Department of Labor and Industries. Prevailing wage rates are updated twice a year, on the first business day in February and August, and take effect thirty (30) days after publication.
2. Statement of Intent to Pay Prevailing Wages. Before commencing any work under this Contract, Contractor (and all subcontractors) shall file with the Washington State Department of Labor and Industries, for approval, a statement, under oath, certifying its Intent to Pay Prevailing Wages. Contractor also shall provide a copy of the Intent to Pay Prevailing Wages to [Agency].
3. Invoices & Contract Payments. Contractor understands and agrees that each invoice for payment submitted to [Agency] shall state that prevailing wages have been paid in accordance with the pre-filed Statement(s) of Intent, as approved. Copies of the Intent to Pay Prevailing Wages shall be posted on the work site with the address and telephone number of the Industrial Statistician of the Washington State Department of Labor and Industries where a complaint or inquiry regarding prevailing wages may be made.
4. Affidavit of Wages Paid. Upon completion of the work under this Contract, Contractor (and each subcontractor) shall file with the Washington State Department of Labor and Industries the approved Affidavit of Wages Paid. [Agency] shall condition final payment to Contractor on the submittal of such Affidavit of Wages Paid.
5. Labor & Industries Fees. Contractor shall pay to the Washington State Department of Labor and Industries any applicable fees for the Statement of Intent and/or Affidavit of Wages Paid that are to be submitted to the Washington State Department of Labor and Industries for certification.
6. Payroll Records. Contractor shall retain payroll records pertaining to work performed for this Contract for three (3) years following expiration or termination of this Contract and, upon request, provide certified copies of such payroll records to [Agency].

Options/Alternatives:

|  |  |
| --- | --- |
|  | * None |

|  |  |
| --- | --- |
|  | * Agencies must comply with the Washington State Department of Labor & Industries’ Prevailing Wage requirements – see.   + <http://www.lni.wa.gov/TradesLicensing/PrevWage/default.asp>.   + RCW 39.12   + WAC 296-127 * Combined Intent/Affidavit Forms   + Agencies contracting for small public works projects may use a combined intent/affidavit statement at their discretion. These combined forms are only available for public works projects under $2,500 including tax and limited public works projects under $35,000 including tax.   + The combined form may only be used if one payment will be made under the contract and if there are no subcontractors. If the project involves subcontractors or multiple payments, separate statements and affidavits must be filed.   + ***Important***: By using the combined form, the agency assumes liability for any unpaid wages on the project. * Prevailing Wages will impact goods and services contracts that pertain to public works – e.g.,:   + Janitorial Services   + Cubicle installation   + Marble restoration in Capitol Building   + IT Cabling contract in state-owned buildings |

⬩ ⬩ ⬩ End of Backgrounder ⬩ ⬩ ⬩