

SB 78 APPENDIX FOR INFORMATION TECHNOLOGY AGREEMENTS

The terms and conditions (Ts & Cs) in this SB 78 Appendix for Agreements (SB 78 Appendix) have been prepared to comply with Public Contract Code, part 2.5, enacted under Senate Bill 78 (Stats. 2011, ch. 10) and the Judicial Branch Contracting Manual, adopted by the Judicial Council of California and effective October 1, 2011. This SB 78 Appendix may be used by any California trial or appellate court; the Judicial Council of California, Administrative Office of the Courts; or the Habeas Corpus Resource Center (each a “Judicial Branch Entity” or “JBE”) to update terms and conditions of existing forms of agreement (except public works agreements) so the existing forms of agreement come into compliance with the new law and manual. If referenced in a particular agreement, these Ts & Cs are incorporated by reference into the agreement. These Ts & Cs are in addition to all other Ts & Cs in the agreement. If there is any conflict between a provision in this SB 78 Appendix and any other provision of the agreement, the provision contained in this SB 78 Appendix prevails.

1. Contractor Certification Clauses

1.1 Representations and Warranties. Contractor or Contractor’s representative (Contractor) certifies that the following representations and warranties are true:

(A) *Authority.* Contractor is qualified to do business and in good standing in the State of California. Contractor has authority to enter into and perform its obligations under this Agreement, which constitutes a valid and binding obligation of Contractor.

(B) *Not an Expatriate Corporation.* Contractor is not an expatriate corporation or subsidiary of an expatriate corporation within the meaning of Public Contract Code section 10286.1, and is eligible to contract with the JBE.

(C) *Sales and Use Tax Collection.* Contractor collects and remits sales and use taxes as and to the extent required under the Revenue and Taxation Code.

(D) *No Gratuities.* Contractor has not directly or indirectly offered or given any gratuities (in the form of entertainment, gifts, or otherwise), to any member, justice, judicial officer, judge, officer, employee, or agent of a JBE with a view toward securing this Agreement or securing favorable treatment with respect to any determinations concerning its performance under this Agreement.

(E) *No Conflict of Interest.* Contractor has no interest that would constitute a conflict of interest under Public Contract Code sections 10365.5, 10410, or 10411, which, in general, limit entering into (i) follow-on contracts with a consultant who would benefit thereby from the consultant’s advice provided under the first contract, or (ii) contracts with former employees of the JBE; Government Code sections 1090 et seq. or 87100 et seq.; or California Rules of Court, rule 10.103 or 10.104, which restrict employees and former employees from contracting with certain JBEs.

(F) *No Interference with Other Contracts.* To the best of Contractor's knowledge, this Agreement does not create a material conflict of interest or default under any of Contractor's other contracts.

(G) *No Litigation.* No suit, action, arbitration, or legal, administrative, or other proceeding or governmental investigation is pending or, to Contractor's knowledge, threatened against or affecting Contractor or Contractor's business, financial condition, or ability to perform under this Agreement, except any suit, action, arbitration, proceeding, or investigation that individually or in the aggregate with others will not or would not have a material adverse effect on Contractor's business, the validity or enforceability of this Agreement, or Contractor's ability to perform under this Agreement.

(H) *Compliance with Laws Generally.* Contractor complies in all material respects with all laws, rules, and regulations applicable to Contractor's business and services, and pays all undisputed debts when they come due.

(I) *Work Eligibility.* All personnel assigned to perform work under this Agreement are able to work legally in the United States and possess valid proof of work eligibility.

(J) *Union Organizing.* As required under Government Code sections 16645 - 16649, Contractor has not used any funds received from the JBE under this Agreement to assist, promote, or deter union organizing.

(K) *Drug Free Workplace.* Contractor provides a drug-free workplace as required by California Government Code sections 8355 through 8357.

(L) *No Harassment.* Contractor does not engage in unlawful harassment, including sexual harassment, with respect to any persons with whom Contractor may interact in the performance of this Agreement, and Contractor takes all reasonable steps to prevent harassment from occurring.

(M) *Non-discrimination.* Contractor complies with the federal Americans with Disabilities Act (42 U.S.C. 12101 et seq.), and California's Fair Employment and Housing Act (Government Code section 12990 et seq.) and associated regulations (Code of Regulations, title 2, section 7285 et seq.). Contractor does not unlawfully discriminate against any employee or applicant for employment because of age (40 and over), ancestry, color, creed, disability (mental or physical) including HIV and AIDS, marital or domestic partner status, medical condition (including cancer and genetic characteristics), national origin, race, religion, request for family and medical care leave, sex (including gender and gender identity), and sexual orientation. Contractor has notified in writing each labor organization with which Contractor has a collective bargaining or other agreement of Contractor's obligations of non-discrimination.

(N) *Special Provisions regarding Domestic Partners, Spouses, and Gender Discrimination.* If this Agreement provides for total compensation of more than \$100,000, Contractor is in compliance with Public Contract Code section 10295.3, which, subject to specified exceptions, generally prohibits discrimination in the provision of benefits between employees with spouses and employees with domestic partners, or discrimination between

employees with spouses or domestic partners of a different sex and employees with spouses or domestic partners of the same sex, or discrimination between same-sex and different-sex domestic partners of employees or between same-sex and different-sex spouses of employees.

(O) Special Provisions regarding Compliance with National Labor Relations Board Orders. If this Agreement provides for making any purchase of goods or services from a private entity, except for a purchase of goods by credit card for an amount less than \$2,500 from any one Contractor (but not to exceed in the aggregate \$7,500 per year from the Contractor), no more than one, final unappealable finding of contempt of court by a federal court has been issued against Contractor within the immediately preceding two-year period because of Contractor's failure to comply with an order of a federal court requiring Contractor to comply with an order of the National Labor Relations Board. Contractor swears under penalty of perjury that this representation is true.

(P) Special Provisions regarding Compliance with the Sweatfree Code of Conduct. If this Agreement provides for furnishing equipment, materials, or supplies, or for the laundering of apparel, garments or corresponding accessories:

- No apparel, garments or corresponding accessories, equipment, materials, or supplies furnished to the JBE under this Agreement have been laundered or produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor, or with the benefit of sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor. Contractor further declares under penalty of perjury that it adheres to the Sweatfree Code of Conduct as set forth on the California Department of Industrial Relations website located at www.dir.ca.gov, and Public Contract Code section 6108.
- Contractor cooperates fully in providing reasonable access to Contractor's records, documents, agents, and employees, and premises if reasonably required by authorized officials of the Department of Industrial Relations, or the Department of Justice to determine Contractor's compliance with the requirements under this section and shall provide the same rights of access to the JBE.

(Q) Special Provisions regarding Compliance with the Child Support Compliance Act. If this Agreement provides for compensation of \$100,000 or more:

- Contractor recognizes the importance of child and family support obligations and fully complies with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Family Code section 5200 et seq.; and

- Contractor provides the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.

(R) *Special Provisions regarding Discharge Violations.* If this Agreement provides for the purchase or supplies, goods, or services in exchange for compensation of \$25,000 or more, Contractor is not in violation of any order or resolution not subject to review and promulgated by the State Air Resources Board or an air pollution control district; subject to any cease and desist order not subject to review issued under Water Code section 13301 for violation of waste discharge requirements or discharge prohibitions; a party that has been finally determined to be in violation of provisions of federal law relating to air or water pollution.

(S) *Special Provisions regarding the Electronic Waste Recycling Act.* If this Agreement provides for the purchase or lease of covered electronic devices under Public Resources Code section 42460 et seq., Contractor complies with the requirements of the Electronic Waste Recycling Act of 2003, and Contractor maintains documentation and provides reasonable access to its records and documents that evidence compliance.

(T) *Special Provisions regarding the Use of Postconsumer Material.* If this Agreement provides for the purchase and sale of goods specified in Public Contract Code section 12207 (for example, certain paper products, office supplies, mulch, glass products, lubricating oils, plastic products, paint, antifreeze, tires and tire-derived products, and metal products), and the percentage of Contractor's postconsumer material in these goods cannot be verified by reference to a written advertisement, including, for example, a product label, a catalog, or a manufacturer or Contractor website:

- Contractor has delivered a declaration to the JBE specifying the minimum, if not exact, percentage of post consumer material as defined in the Public Contract Code section 12200 in goods offered or sold to the JBE, regardless of whether the goods meet the requirements of Public Contract Code section 12209.1;
- Under penalty of perjury, the declaration is true and correct and will remain so until Contractor delivers any amendment of the current declaration to the JBE, in which case the current declaration as amended will be true and correct; and
- If Contractor sells under this Agreement any printer or duplication cartridges that comply with Public Contract Code section 12209, Contractor has so specified in the declaration required under this section.

1.2. Covenant as to Representations and Warranties. Contractor shall cause its representations and warranties above to remain true during the term of this Agreement, and Contractor shall promptly notify the JBE if any representation and warranty becomes untrue.

2. Special Provisions for Agreements Providing for the Sale of Recyclable Goods

If this Agreement provides for the sale of goods, regardless of whether the goods are specified in PCC 12207, the JBE shall purchase and Contractor shall sell under this Agreement only recycled products if fitness and quality are equal to non-recycled products and recycled products are available to the JBE at the same or lesser total cost as non-recycled products. In addition, if this Agreement provides for the purchase and sale of goods specified in Public Contract Code section 12207 (for example, certain paper products, office supplies, mulch, glass products, lubricating oils, plastic products, paint, antifreeze, tires and tire-derived products, and metal products), with respect to these goods, Contractor shall use recycled products in the performance of this Agreement to the maximum extent doing so is economically feasible.

3. Special Provisions for Document Printing Agreements

If this Agreement is for printing documents, Contractor shall use only recycled paper, unless the proposed printing job cannot be done on recycled paper. Upon completion of performance of the Services under this Agreement, Contractor shall certify in writing under penalty of perjury the minimum percentage of post-consumer and secondary materials provided or used in the performance of the Services.

4. Special Provisions for Parts-cleaning Agreements

If this Agreement involves parts cleaning, Contractor shall use recycled solvents. Contractor shall certify in writing under penalty of perjury, upon completion of performance of this Agreement, the minimum percentage of post-consumer and secondary materials provided or used in the Services.

5. Special Provisions for Agreements Providing for Progress Payments

If this Agreement provides for the making of progress payments to Contractor (e.g., in connection with the purchase and sale of any customizable goods), the JBE shall make the progress payments in arrears not more frequently than monthly and only following successful completion of any clearly identifiable project milestones set forth in this Agreement and that Contractor has successfully achieved on the date indicated. The JBE shall withhold an amount of not less than 10 percent from each installment payment pending final completion of all work.

6. Special Provisions for Federally-funded Agreements

If this Agreement is funded in whole or in part by the federal government, then:

- It is mutually understood between the parties that this Agreement may have been written for the mutual benefit of both parties before ascertaining the availability of congressional appropriation of funds, to avoid program and fiscal delays that would occur if this Agreement were executed after that determination was made;

- This Agreement is valid and enforceable only if sufficient funds are made available to the JBE by the United State Government for the fiscal year in which they are due and consistent with any stated programmatic purpose. In addition, this Agreement is subject to any additional restrictions, limitations, or conditions enacted by the Congress or to any statute enacted by the Congress that may affect the provisions, terms, or funding of this Agreement in any manner;
- The parties mutually agree that if the Congress does not appropriate sufficient funds for any program under which this Agreement is intended to be paid, this Agreement shall be deemed amended without any further action of the parties to reflect any reduction in funds.
- The parties may invalidate this Agreement under the termination for convenience or cancellation clause (providing for no more than 30 days' notice of termination or cancellation), or amend this Agreement to reflect any reduction in funds.
- Exemptions from the above requirements may be granted if the JBE can certify in writing that federal funds are available for the term of this Agreement.

7. Special Provisions regarding DVBE Participation Certification

If Contractor made a commitment to achieve disabled veterans business enterprise participation, Contractor shall within 60 days of receiving final payment under this Agreement (or within such other time period as may be specified elsewhere in this Agreement) certify in a report to the JBE: (i) the total amount the prime Contractor received under the Agreement; (ii) the name and address of any disabled veterans business enterprises (DVBE) that participated in the performance of this Agreement; (iii) the amount each DVBE received from the Contractor; (iv) that all payments under this Agreement have been made to the DVBE; and (v) the actual percentage of DVBE participation that was achieved. A person or entity that knowingly provides false information shall be subject to a civil penalty for each violation.

8. Special Provisions for Agreements for Equipment, Materials, or Supplies; Loss Leader Prohibition

If this Agreement involves the furnishing of equipment, materials, or supplies, Contractor shall not sell or use any article or product as a "loss leader" as defined in Business and Professions Code section 17030.

9. Special Provisions Applicable to Competitively Bid Agreements; Antitrust Claims

If goods or services under this Agreement were obtained by means of a competitive bid, JBE and Contractor shall comply with the requirements of Government Code sections 4552-4554, which concern the assignment of claims and reimbursement of specified costs regarding the Clayton Act (15 U.S.C., sec. 15) and the Cartwright Act (Business and Professions Code, section 16700 et seq.).

10. Special Provisions regarding Ownership of Results

10.1. Special Provisions Applicable to Agreements funded with Grant Funds. If this Agreement provides compensation to Contractor under a project funded through a grant, title to all expendable and non-expendable personal property with a value of \$500 or more purchased with grant funds shall vest automatically and without further action of the parties with the JBE or grantor of funds, effective at the conclusion of the project. Contractor must await specific written instructions from the project manager regarding any transfer of title or disposition. If Contractor provides written certification to the JBE that the property will continue to be used for grant-related purposes and the JBE approves such certification in writing, the JBE may permit title to all such property to remain with Contractor in accordance with the JBE's written instructions.

10.2. Special Provisions Applicable to Certain Agreements for the Purchase of Equipment. Title to equipment purchased or built with JBE funds (as compared to grant funds) vests in the JBE immediately upon payment of the purchase price. Even if the JBE owns the equipment, before delivery of the equipment to the JBE, Contractor is responsible for loss or damage to the equipment to the extent it results from a negligent act or omission of Contractor or its directors, officers, employees, or agents, and Contractor shall make all necessary or appropriate repairs and adjustments. At the JBE's election, the JBE may deduct from any amount payable to Contractor the cost of repair or replacement of damaged, lost, or stolen equipment.

11. Special Provisions for Rental Agreements

If this Agreement provides for rental of personal property, the JBE shall have no responsibility for loss or damage to the rented equipment arising from causes beyond the JBE's control. The JBE is responsible for repairs and liability for damage or loss only to the extent they become necessary and result from a negligent act or omission of the JBE or any judicial branch personnel. Contractor shall keep the equipment in good working order and make all necessary or appropriate repairs and adjustments without qualification.

12. Special Provisions Applicable to Consulting Services Agreements.

12.1. Agreements of \$1,000 or more. If this Agreement provides for the payment of \$1,000 or more for consulting services, as directed by the JBE, Contractor must deliver detailed performance criteria, a schedule for performance, and progress reports to the JBE to allow the JBE to determine whether Contractor is on the right track and the project is on schedule, to provide communication of interim findings, and to afford opportunities for airing difficulties or special problems encountered so that remedies can be developed quickly.

12.2. Agreements of \$5,000 or more. If this Agreement provides for the payment of \$5,000 or more for consulting services:

- Contractor shall assign to this project only persons who have sufficient training, education, and experience to successfully perform Contractor's duties. If the JBE is dissatisfied with any of Contractor's personnel, for any reason or no reason, Contractor shall replace them with qualified personnel.
- Contractor shall endeavor to minimize turnover of personnel Contractor has assigned to this project. Any additional personnel are subject to approval by the JBE.
- Contractor shall cooperate with the JBE if the JBE wishes to perform any background checks on Contractor's personnel by obtaining, at no additional cost, all releases, waivers, and permissions the JBE may require. Contractor shall not assign personnel who refuse to undergo a background check. Contractor shall provide prompt notice to the JBE of (i) any person who refuses to undergo a background check, and (ii) the results of any background check requested by the JBE and performed by Contractor.
- As directed by the JBE, Contractor shall deliver resumes of each Contractor participant who will exercise a major administrative role or major policy or consultative role.

13. Special Provisions for Agreements for Certain Services with Compensation over \$200,000

If this is an Agreement for services, other than consulting services, with total compensation over \$200,000, Contractor shall give priority consideration in filling vacancies in positions funded by this Agreement to qualified recipients of aid under Welfare and Institutions Code section 11200 in accordance with Public Contract Code section 10353.

14. Special Provisions for Agreements Providing for Reimbursement of Costs; Union Activities Certification Requirement

If this Agreement provides for the reimbursement of costs to Contractor, as required under Government Code section 16645.1, Contractor shall include with any request for cost reimbursement from the JBE's funds a certification that the Contractor is not seeking reimbursement for costs incurred to assist, promote, or deter union organizing.

15. Special Provisions for Commercial Office Moving Services Agreements

If this is an agreement of more than \$2,500 with a carrier for commercial office moving services, Contractor shall abide by the requirements contained in the State Administrative Manual, section

3810, regarding collective bargaining agreements, payment of prevailing wages, and standards and conditions of employment.

16. Special Provisions for Elevator Maintenance Agreements.

If this is an elevator maintenance agreement, the Term of this Agreement shall be for a period of no less than five years even if the coversheet specifies a shorter term, subject to the termination provisions in this Agreement.

17. Special Provisions regarding Contractor Insurance

17.1. Coverage Amounts.

(A) *Commercial General Liability.* In addition to any other insurance required under this Agreement, Contractor shall provide and maintain at Contractor's expense Commercial General Liability coverage if this Agreement involves the hazardous activities or any other activity specified in the *Judicial Branch Contracting Manual*, chapter 8, appendix D, section 11. The policy must cover bodily injury and property damage liability, including coverage for the products – completed operations hazard and liability assumed in a contract, personal and advertising injury liability, and contractual liability, at minimum limits of \$1 million per occurrence, combined single limit.

(B) *Other Liability.* In addition to any other insurance required under this Agreement, unless waived in writing by the JBE, Contractor shall provide and maintain at Contractor's expense the following additional coverage during the term of this Agreement:

(1) *Workers Compensation and Employer's Liability.* If Contractor has employees, Contractor must maintain workers' compensation coverage to meet minimum requirements of the California Labor Code, and it must provide coverage for employer's liability bodily injury at minimum limits of \$1 million per accident or disease;

(2) *Professional Liability.* If this Agreement involves the furnishing of consulting services or professional services for the direct benefit of the JBE, Contractor must maintain errors and omissions coverage with minimum limits of \$1 million or more per claim, unless the JBE determines the risk of a lower limit is commercially reasonable under the circumstances, but not to be less than \$500,000 per claim or the limit Contractor actually maintains, whichever is greater.

(3) *Commercial Automobile Liability.* If Contractor will use a vehicle in the performance of this Agreement, Contractor must maintain commercial automobile liability coverage covering bodily injury and property damage liability and applicable to all vehicles used in Contractor's performance of this Agreement whether owned, non-owned, leased, or hired. The minimum liability limit must be \$1 million per occurrence, combined single limit.

(4) *Commercial Crime Insurance.* If Contractor performs this Agreement regularly on the JBE's premises, or handles or has regular access to the JBE's funds or property of significant value, Contractor must maintain commercial crime insurance covering dishonest acts including loss due to theft of money, securities, and property; forgery, and alteration of documents; damage to JBE buildings, and property; and fraudulent transfer of money, securities, and property. The minimum liability limit must be approved by the JBE and relate to the value of property at risk.

17.2. "Claims Made" Coverage. If any required insurance is written on a "claims made" form, Contractor shall maintain the coverage continuously throughout the Term, and, without lapse, for three years beyond the termination or expiration of this Agreement and the JBE's acceptance of all Services provided under this Agreement. The retroactive date or "prior acts inclusion date" of any "claims made" policy must be no later than the date that Services commence under this Agreement.

17.3. Umbrella Policies. Contractor may satisfy basic coverage limits through any combination of basic coverage and commercial umbrella liability insurance.

17.4. Aggregate Limits of Liability. The basic coverage limits of liability may be subject to annual aggregate limits. If this is the case the annual aggregate limits of liability must be at least two times the limits required for each policy, or the aggregate may equal the limits required but must apply separately to this Agreement.

17.5. Deductibles and Self-Insured Retentions. Contractor shall declare to the JBE all deductibles and self-insured retentions that exceed \$100,000 per occurrence. Any increases in deductibles or self-insured retentions that exceed \$100,000 per occurrence are subject to the JBE's approval. Deductibles and self-insured retentions do not limit Contractor's liability.

17.6. Additional Insured Status. Contractor shall require Contractor's commercial general liability insurer, Contractor's commercial automobile liability insurer, and, if applicable, Contractor's commercial umbrella liability insurer to name Judicial Branch Entities and Judicial Branch Personnel² as additional insureds with respect to liability arising out of Contractor's Services under this Agreement.

17.7. Certificates of Insurance. Before Contractor begin performing Services, Contractor shall give the JBE certificates of insurance attesting to the existence of coverage, and stating that the policies will not be canceled, terminated, or amended to reduce coverage without 30 or more days' prior written notice to the JBE. Any replacement certificates of insurance are subject to the approval of the JBE, and, without prejudice to the JBE, Contractor shall not perform work before the JBE approves the certificates.

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17.8. Qualifying Insurers. For insurance to satisfy the requirements of this section, all required insurance must be issued by an insurer with an A.M. Best rating of A - or better that is approved to do business in the State of California.

17.9. Required Policy Provisions. Each policy must provide, as follows:

(A) *Insurance Primary; Waiver of Subrogation.* The basic coverage provided is primary and non-contributory with any insurance or self-insurance maintained by Judicial Branch Entities and Judicial Branch Personnel, and the basic coverage insurer waives any and all rights of subrogation against Judicial Branch Entities and Judicial Branch Personnel; and

(B) *Separation of Insureds.* The commercial general liability policy, or, if maintained in lieu of that policy, the commercial umbrella liability policy, applies separately to each insured against whom a claim is made and/or a lawsuit is brought, to the limits of the insurer's liability.

17.10. Partnerships. If Contractor is an association, partnership, or other joint business venture, the basic coverage may be provided by either of the following methods:

(A) *Separate.* Separate insurance policies issued for each individual entity, with each entity included as a named insured or as an additional insured; or

(B) *Joint.* Joint insurance program with the association, partnership, or other joint business venture included as a named insured.

17.11. Consequences of Lapse. If required insurance lapses during the Term, the JBE is not required to process invoices after such lapse until Contractor provide evidence of reinstatement that is effective as of the lapse date.

18. Audit and Records

18.1. Audit. Contractor shall allow the JBE's designees and the JBE to review and audit Contractor's documents and records relating to this Agreement, subject only to a lawyer's duty of confidentiality owed to a represented party. Contractor shall correct errors and deficiencies by the 20th day of the month following the review or audit.

18.2. Ownership. The JBE is the exclusive owner of all records and other material collected or produced in connection with Contractor's performance under this Agreement. Upon request at any time, subject only to the duty of confidentiality owed to a represented party, Contractor shall give original materials to the JBE or to another party at the JBE's direction. Contractor shall maintain all other materials in an accessible location and condition for a period of not less than four years after the later of:

- Contractor's receipt of final payment under this Agreement; and
- The JBE's resolution with Contractor of the findings of any final audit.

18.3. Copies. Contractor may retain copies of any original documents Contractor provides to the JBE.

19. Choice of Law and Jurisdiction

California law, without regard to its choice-of-law provisions, governs this Agreement. Jurisdiction for any legal action arising from this agreement shall exclusively reside in state or federal courts located in California, and the parties hereby consent to the jurisdiction of such courts.