



Nathan Deal  
Governor

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To Whom It May Concern:

The Technical College is one of 25 public colleges comprising the Technical College System of Georgia, a state agency within the executive branch of Georgia's government. As a public institution funded by state appropriated dollars, there are statutory and constitutional regulations governing our ability to enter into contracts. These regulations are not typically applicable to the private businesses with whom you may regularly contract, and therefore may require some deviation in the standardized contracts you normally utilize with your customers.

In order to assist you in understanding these regulations and hopefully minimize any delays in establishing business relationships with our Colleges, I have listed some of the most common contract provisions to which our Colleges are unable to agree.

**1. Indemnification/Hold Harmless Clauses**

There are three separate legal principles that prohibit the College from entering into an agreement to defend a vendor or other third party and/or to hold them harmless from any liability, personal injury and property damage arising out of the performance of contractual duties.

First, indemnification provisions have been determined to be void as unauthorized attempts to contractually waive the State's sovereign immunity. An opinion of the Attorney General of Georgia (the "Attorney General") counsels that an unauthorized attempt to waive sovereign immunity through an indemnification agreement would be ultra vires and void. 1980 Op. Att'y Gen. 80-67. The Supreme Court of Georgia confirmed this position, holding that an indemnification clause by a state governmental entity is invalid where the entity lacks the express statutory power to waive its sovereign immunity. *CSX Transp., Inc. v. City of Garden City*, 588 S.E.2d 688, 690 (Ga. 2003).

Second, indemnification provisions violate the gratuities prohibition of the Georgia Constitution. The Georgia Constitution prohibits the granting any donation or gratuity or forgiving any debt or obligation owing to the public. Ga. Const. art. III, § VI, ¶ VI(a). It also prohibits the granting or authorization of extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into. *Id.* An opinion of the Attorney General also opines that indemnification provisions are gratuitous undertakings in violation of the gratuities prohibition. 1980 Op. Att'y Gen. 80-67.

Third, indemnification provisions violate the debt restriction on Georgia agencies and authorities. The Georgia Constitution prohibits the credit of the state from being pledged or loaned to any individual, company, corporation or association. Ga. Const. art. VII, § IV, ¶ VIII. Again, the Attorney General has interpreted the constitutional debt restriction as a prohibition upon a state agency from contractually agreeing to any indemnification and “hold harmless” provisions. 1980 Op. Att’y Gen. 80-67. An indemnification provision is open-ended in nature and thus violates this debt restriction.

**2. Multi-year contract terms**

Under the Georgia Constitution, the General Assembly has complete and absolute control over revenue appropriations and other sources of state funds from year to year. The College’s financial obligations are dependent upon these appropriations made to it in its capacity as a unit of the Technical College System of Georgia. Colleges may not execute a contract for the purchase of goods or services which obligates future fiscal years’ appropriations. As a result, the term of a contract with the College may not extend beyond the current fiscal year, unless the College has on hand at the time of execution, the appropriated and dedicated funds sufficient to meet its entire obligation under the contract. The College may enter into a contract that can be renewed at its discretion each fiscal year for multiple years; however, contracts must use specific renewal clauses and funding language which will provide for the termination of the contract if funds are not appropriated in following fiscal years. Colleges can also enter into multi-year contracts that do not require any funding. All property leases and other contracts concerning real property are subject to approval by the State Properties Commission.

**3. Governing law/venue in any state other than Georgia/waiver of jury trial**

There are two statutes that prohibit the College from agreeing to jurisdiction or governing law outside of Georgia. Georgia law requires that actions be brought only in the superior court of Fulton County, Georgia when involving an alleged breach of written contract by a state agency. O.C.G.A. § 50-21-1(b). Additionally, Georgia law requires that all tort actions against Georgia under the Georgia Tort Claims Act be brought only in the state court or superior court of the county in which the alleged loss occurred. O.C.G.A. § 50-21-28. Tort actions based on alleged losses sustained outside of Georgia must be brought in the Georgia County of residence of the employee or official upon whose actions the claim is based. *Id.* As such, the College can only agree to jurisdiction in Georgia.

In addition, the College is unable to agree to any arbitration or waiver of jury trial contract provisions. The Attorney General has exclusive jurisdiction in all legal matters related to the executive branch of Georgia government. O.C.G.A. § 45-15-34. The Attorney General is the “legal advisor of the executive branch” and is required to “represent the state in all civil actions tried in any court.” O.C.G.A. §§ 45-15-3(4) & (6). Whether a matter involving the College is litigated before a jury or resolved through arbitration is a decision within the exclusive purview of the Attorney General and cannot be contractually limited or altered by the College.

**4. Confidentiality/Non-Disclosure**

The College is subject to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.) which allows any individual to view its records and to make copies for a fee, unless the records are specifically exempt from disclosure by state or federal law. While many of our student records are exempt from disclosure, the documents, contracts, electronic data, e-mails and other writings generated or received by the College during normal business operations are subject to public disclosure. The contract with the College, by its very nature, is a public record. As such, the College cannot agree to contract provisions that restrict it from releasing information related to the contract or information that would otherwise be subject to public disclosure under Georgia Open Records Act. There may be provisions for maintaining the confidentiality of valid trade secrets, provided the vendor identifies the information as such when submitting it to the College and it is accompanied by an affidavit affirmatively declaring it as a trade secret. See O.C.G.A. § 50-18-72(a) (34).

**5. Insurance**

As part of the Technical College System of Georgia, the College is self-insured under the State of Georgia, Department of Administrative Services, Risk Management Division, against employer liability and tort claims, including comprehensive automobile liability, in the amount of one million (\$1,000,000) per person and three million (\$3,000,000) per occurrence; the College also maintains workers' compensation insurance for its employees through the State of Georgia.

Provisions mandating that the College purchase insurance, increase policy limits, or name the vendor or other third party as an additional insured party cannot be included in contracts with the College. The College may be liable only for personal injury or property damage caused by acts or omissions of its employees in the performance of the contract to the extent provided by the Georgia Tort Claim Act (O.C.G.A. § 50-21-20 et seq.).

**6. Credit Agreements/Interest/fees for late payments**

The College has no legal authority to borrow money, as that right is exclusive to the State by the issuance of bonds thru the Georgia State Finance and Investment Commission. As a result, Colleges may not complete credit applications in conjunction with contracts or agree to the payment of interest on late payments. The Attorney General has advised payment of interest and late fees are also prohibited by the gratuities clause of the constitution.

**7. Unknown damages, costs or expenses**

The legal principles that prohibit the College from agreeing to indemnification clauses also prevent it from entering into any contract that requires it to pay attorney's fees, cost of add-on goods or services not priced in the contract, unknown cost increases during the life of the contract or any other expense that cannot be calculated. The College is specifically prohibited from agreeing to pay unknown damages of a third party or paying a contract termination fee.

Our Colleges have had successful, long-standing business relationships with a variety of vendors who understand the contractual limitations of public institutions. Companies that do business with our Colleges recognize them as stable, responsible customers who are committed to meeting their financial obligations. We hope you are able to recognize our value as a customer and will accommodate the contractual restrictions in your negotiations with the College. If you have any questions or concerns regarding the College's ability to contract for your goods or services, you may contact the College's Vice President of Administrative Services or the Technical College System of Georgia's Office of Legal Services.

Sincerely,



Linda Osborne-Smith  
Executive Director of Legal Services  
Technical College System of Georgia