OPEN LETTER TO SUPPLIERS, VENDORS AND CONTRACTORS REGARDING PROCUREMENT CONTRACTS

Dear Supplier/Vendor/Contractor:

Thank you for your interest in doing business with Valdosta State University (hereinafter "VSU"). As an instrumentality of the State of Georgia and a member institution of the Board of Regents of the University System of Georgia, VSU is subject to a number of laws, rules and regulations that prohibit us from entering into certain kinds of contracts or agreeing to certain contract provisions. While these rules may occasionally make the process of negotiating a contract with VSU more challenging, these rules are not unique to VSU. They apply to all of the other public colleges and universities in Georgia and, indeed, to all State of Georgia agencies as well. There are several special legal considerations to keep in mind when negotiating a contract. Some of the more common issues are as follows:

1. Legal name of VSU

The official name of VSU is "The Board of Regents of the University System of Georgia by andon behalf of Valdosta State University" and should appear on all of VSU's contracts. VSU is part of the Board of Regents of the University System of Georgia, and while the Board of Regents has delegated to its individual member institutions the authority to sign contracts for their day-to-day operations, it should be noted that VSU is not an entity separate and apartfrom the Board of Regents. Using names such as "VSU" or "Valdosta State University" or the name of a college or department within the university is not appropriate.

2. Indemnity/hold harmless provisions

An indemnity provision requires one party to defend the other party against any claims of third parties who might be injured or suffer damages as a result of something that happens during the performance of the contract. The Georgia Attorney General (who is the chief legalofficer of the State of Georgia) has determined that public agencies cannot enter into agreements indemnifying any person or entity against third party claims. This includes, among others, suppliers, vendors and contractors. 1980 Op. Atty Gen. Ga. 141.

Occasionally a contractor will attempt to deal with this restriction by rewriting an indemnity clause so as to eliminate the words "indemnity" or "indemnify" while leaving the intent of the clause intact – that is, to obligate VSU to defend the contractor against third party claims. If acontract clause has the effect of creating an indemnity on our part, VSU will not be able to agree to that clause, even if the word "indemnity" has been removed.

VSU does not enter into agreements that obligate it to indemnify a contractor "to the extent permitted by law". As a result of the official opinion of the Attorney General, we know that the extent to which the law permits us to indemnify contractors is to no extent whatsoever. It would be disingenuous for VSU to imply in an agreement that there might be some set of circumstances under which it would defend a person against a third-party claim. VSU will not agree to something that it knows it cannot do. Also, the "extent" clause is simply an invitation to litigate the matter in the event a third-party claim arises, and VSU does not wish to enter into agreements that invite

litigation. Because the VSU lacks the contractual authority to enter into an indemnity provision, any person who signs an agreement containing such a provision on VSU's behalf does so without any authority. VSU will not ask its personnel to expose themselves to personal liability by signing contracts that they know cannot be enforced.

3. Insurance

Many contractors ask for clauses that define the manner in which VSU insures itself. As a state instrumentality, VSU is covered under the Georgia Tort Claims Act (O.C.G.A. § 50-21-20 *et seq*.). The State of Georgia waives its sovereign immunity as to claims covered under The Georgia Tort Claims Act but retains it as to other claims. The Georgia Tort Claims Act works in much the same way as liability insurance, or self-insurance. For all the types of claims that are covered under this Act, coverage is provided at a limit of $1,000,000 per person, $3,000,000 per occurrence. The coverage is provided through the Georgia Department of Administrative Services, Risk Management Division. VSU cannot agree with additional insurance requirements, DOAS Risk Management controls such decisions.

4. Multiyear contracts

The authority to commit taxpayer funds to various agencies for various purposes from year to year belongs to the Georgia General Assembly. While the Board of Regents of the University System of Georgia receives an appropriation every year, and the Board of Regents allocates a portion of that appropriation each year to VSU, it cannot presume by contract to commit the General Assembly to doing so. That power belongs to the General Assembly exclusively. Consequently, VSU cannot enter into contracts that commit funds from future years' appropriations. The Georgia Attorney General has opined that this prohibition would extend to contracts that have automatic renewal provisions. 1974 Op. Atty Gen. Ga. 242.

There are instances where a multi-year contract is permissible. A multiyear contract that does not require funding is allowed under Georgia law. Also, a multi-year contract with appropriate termination provisions may be permissible.

In order to avoid impermissibly committing state funds, VSU will generally need to divide a multiyear contract into multiple contract terms. Most commonly, the contract structure will define an initial term of twelve months or less followed by up to four one-year renewal terms which may be exercised at the sole discretion of the institution. No contract may exceed five years without prior written approval from the State Purchasing Division (*See* Georgia Procurement Manual, section 3.6.2. Requirements for Multi-Year Agreements).

5. Unliquidated expenses; late fees; interest

In much the same way that VSU cannot presume that its appropriation for next year would permit it to fund a multiyear contract, it cannot presume that it would have funds available to pay for claims that might exceed its available funding. Certain indemnities would fall into this category – who can say what it might cost to fund an indemnity that has no cap? The same is true as to any other potential expenses that cannot be calculated at the time of the execution of the agreement, such as paying a party's attorney's fees, paying for add-ons not priced in the agreement, paying for unknown cost increases during the life of the contract, paying for travel expenses, etc. Interest and fees on late payments would also fall under this prohibition. First, Georgia law does not give any state agency the authority to pay interest or fees on late payments. Second, agreeing to pay interest or fees on late payments would be a prohibited pledge of credit to pay an open-ended contingent amount in addition to the contract price in violation of Article 7, Section 4, Paragraph 8 of the State Constitution. Finally, such a payment would likely constitute an impermissible gratuity because it would increase compensation after the fact and thereby violate Article 3, Section 6, Paragraph 6 of the State Constitution.

6. Taxes

According to the Georgia Procurement Manual (which provides operational and administrative rules made by the Georgia Department of Administrative Services and bears the same weight, significance and effect as Georgia law), VSU is prohibited from paying or reimbursing a supplier for taxes which may be lawfully imposed on the supplier but will pay any taxes that may be lawfully imposed on it and for which it is legally obligated to pay. However, VSU is exempt from a number of state and federal taxes, including but not limited to sales and use tax (*See* Georgia Procurement Manual, section 7.5.1.1. Taxes).

7. Net 30; FOB (free on board) destination

Pursuant to Georgia Procurement Manual, VSU's standard procedure for paying invoices owed is to make payment, whenever possible, within 30 days of the receipt and acceptance of an undisputed invoice or VSU's formal receipt and acceptance of the provided goods, equipment and/or services, whichever is later (*See* Georgia Procurement Manual, section 7.5.2.1. Net 30).
Also, VSU will adhere to the Georgia Procurement Manual's General Instructions to Suppliers, which designates the standard shipping method as FOB (Free on Board) destination, freight prepaid and allowed. (*See* Georgia Procurement Manual, section 4.5.1. General Instructions).

8. Credit agreements; credit applications

VSU, as a member institution of the Board of Regents of the University System of Georgia, lacks the legal authority to borrow money. When the State of Georgia borrows, it does so by issuing bonds through the Georgia State Finance and Investment Commission. VSU cannot fill out credit applications in connection with any agreement. VSU, as part of the Board of Regents, is an excellent customer with a reputation for honoring its financial obligations promptly.

9. Waivers of jurisdiction and service; arbitration; laws of another state

Under Georgia's constitution, the Attorney General is the State's attorney for all purposes – including management of litigation. Article 5, Section 3, Paragraph 2 of the State Constitution. VSU cannot override the Attorney General's authority by agreeing in advance to control the way litigation would be managed in the event of a dispute. VSU cannot agree that it would submit to the laws or jurisdiction of another state, that it would waive formal service of process, or submit to binding arbitration. Decisions of that nature are reserved for the Attorney General to make at the time the dispute arises. VSU cannot sign a contract that takes away the Attorney General's Constitutional Authority.

10. Confidentiality

While certain records are protected by the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA), as an instrumentality of the State of Georgia, VSU is subject to the Georgia Open Records Act. O.C.G.A. § 50-18-70 *et seq*. Under this Act, certain records are subject to public disclosure, including "all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or on behalf of an agency or when such documents have been transferred to a private person or entity by an agency for storage or future governmental use." O.C.G.A. §50-18-70(b)(2). Consequently, VSU cannot agree to contract provisions which provide that the terms and conditions of the agreement will be confidential.

11. Assignments

The Georgia Procurement Manual states that "contracts are not assignable or delegable in whole or in part without the express written consent of a state entity. Contracts may only be assigned to responsible suppliers" (DOAS GPM, sec 7.6.4. Assignment and Delegation). Therefore, VSU is prohibited from agreeing to provisions that allow assignment without prior written consent.

12. Publicity/Use of Name or Logo

Pursuant to Board of Regents policy mandates, VSU is required to maintain control of its trademarked properties, including any of its service marks, trade names, seals, symbols, designs, slogans, and logotypes, and may not allow for its use without prior written consent (*See* BOR Policy Manual, sec 7.11.8 Trademarks).

13. Anti-Boycott Certification

Pursuant to Georgia law OCGA 50-5-85, effective July 1, 2016, "The state [including all state entities] shall not enter into a contract with an individual or company if the contract is related to construction or the provision of services, supplies, or information technology unless the contract includes a written certification that such individual or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." This mandate applies to all contracts with Georgia State entities (such as VSU) valued at $1,000 or more. The Certification states that your company is currently engaged in a boycott of Israel and will not engage itself in such a boycott for the duration of the contract.

14. Contract signing authority on behalf of VSU

The Board of Regents of the University System of Georgia has delegated to the Presidents of its member institutions the power and authority to execute certain agreements and contracts on its behalf and further grants to them the authority to explicitly delegate said contract signing authority to other employees of the respective member institutions. In accordance with that authority, VSU has established a Delegation of Contract Signing Authority policy which is available for review on the webpage of the VSU Office of Legal Affairs or by accessing the following web address:

https://www.valdosta.edu/administration/policies/documents/delegation-of-contract-signing-authority.pdf

Generally, without express written delegation by the President to the contrary, the authority to sign contracts and agreements is limited to the following positions: 1) President; 2) Provost and Vice President of Academic Affairs; 3) Vice President of Finance and Administration; 4) Vice President for Enrollment, Marketing and Communications; 5) Director of Physical Plant and Facilities Planning; 6) College or University Procurement Officer (CUPO); 7) University Senior Buyer; 8) Vice President of Student Affairs; and 9) Director of Athletics. The scope and limitation of each Delegated Signatory's authority is explicitly defined by the Delegated Contract Signing Authority policy provided above. No other member of VSU, faculty, or staff may sign agreements or contracts on behalf of VSU and VSU will only be bound by contracts formed and signed in agreement with the policy provided above.

In closing, while the abovementioned legal issues are not the only provisions VSU is prevented from agreeing to, they are the most common. The University Attorney and or Procurement Manager will review and approve every contract that VSU forms and will provide final determination on what contract provisions are acceptable to VSU in any given situation. Your understanding of the unique challenges and the special rules that apply to public institutions in the contract process is greatly appreciated, and we believe, will be well worth the effort.

If you have any additional questions regarding the manner in which VSU does business, please contact us.

Procurement and Contract Services may be reached by phone at (229) 333-5708 or by email at Procurement@valdosta.edu. Our office hours are 8:00 a.m. to 5:00 p.m., Monday through Friday.

Kind Regards,
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