



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. BOX 039

TRENTON, NEW JERSEY 08625-0039
<https://www.njstart.gov>
Telephone (609) 292-4886 / Facsimile (609) 984-2575

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

FORD M. SCUDDER
State Treasurer

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Director

October 11, 2016

Via Electronic Mail [jonathan.light@cgi.com] and USPS Regular Mail

Jonathan F. Light, Vice President, Consulting Services
CGI Technologies and Solutions Inc.
11325 Random Hills Road
Fairfax, VA 22030

RE: Bid Solicitation Specification Challenge
Bid Solicitation {RFP} # 16DPP00011 *Crash Records Electronic Data Transfer System*

Dear Mr. Light:

This correspondence is in response to your letter dated August 1, 2016, referencing the subject Bid Solicitation {Request for Proposal} (hereinafter "RFP") submitted to the Division of Purchase and Property (Division) on behalf of CGI Technologies and Solutions Inc. (CGI). In that letter, CGI challenges certain specifications of the subject RFP in accordance with N.J.A.C. 17:12-3.2 and requests its proposed changes be incorporated into a revised RFP before it is able to submit a proposal.

In consideration of CGI's specification challenge, I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of CGI's specification challenge.

By way of background, the subject RFP was issued by the Division's Procurement Bureau (Bureau) on behalf of the New Jersey Department of Transportation (DOT) to solicit quotes {proposals} (hereinafter proposals) for an updated Crash records Electronic Data Transfer System. RFP §1.1 *Purpose and Intent*. Vendors' {Bidders'} (hereinafter bidder) electronic questions were due to the Bureau by June 10, 2016. On July 22, 2016, the Bureau advised all bidders that the Bid Opening Date had been extended from July 29, 2016, to August 9, 2016. The Bureau posted Bid Amendment #3, *Answers to Questions and Additions, Deletions, Clarifications, and Modifications to the RFP*, on July 27, 2016. On August 8, 2016, the Bureau extended the Bid Opening Date to August 23, 2016. The Bid Opening date was subsequently extended to September 16, 2016, and then to October 21, 2016.

In its specification challenge, CGI states that "there are numerous terms and provisions in the RFP documents that apply multiple remedies for the same failure (liquidated damages, forfeiture of retainage, breach of warranty) thereby resulting in a set of remedies that are disproportionate to the expected price for the stated scope." CGI contends that "a number of the terms do not incorporate industry standards to protect both the State and the vendor or do not fully reflect the necessary input from the State in developing the solution." Finally, CGI notes that certain aspects of the RFP "are outside

current industry standard practice such that it places undue responsibility on the [c]ontractor.” CGI provided 10 specific specification challenge points in a chart, which is structured to include the RFP reference, CGI’s concern, and its desired change.

The record of this procurement shows that CGI submitted over 70 questions through the specified electronic Question and Answer (Q&A) process as set forth in the RFP by the Q&A submission deadline. All of these questions were considered and answered by the Bureau in Bid Amendment {Addendum} #3. A comparison of the 10 specification challenges submitted in CGI’s protest with the 70 questions submitted during the open Q&A period reveals that the Bureau considered and responded to those specification challenges previously submitted by CGI during the Q&A process.

The Q&A process resulted in 19 amendments applied to the RFP, which the Bureau determined was a reduction in the overall risk to the contractor. The following are examples of some of the changes made after the Q&A process, including Bureau responses to specific questions by CGI:

- Performance Security was removed in its entirety in response to question #11;
- Reduced Limitation of Liability from 500% to 200% in response to question #56;
- Reduced Limitation of Liability for Data Breach and Breach of Confidentiality from an uncapped amount to a \$7,000,000.00 cap in response to question #69;
- Removed Liquidated Damage (F) in response to question #10 and clarified that liquidated damages stated in paragraphs G and H only apply to Phase Four of the project;
- Allowed for maintenance time, independent of the uptime requirement in response to question #37;
- Added “tangible” to language in Bid Solicitation {RFP} § 5.17.1 in response to question #63;
- Interoperability function removed, in response to question #17;
- Reduced “uptime” requirements in response to question #33; and
- Removed the requirement in Bid Solicitation {RFP} § 3.3.1 of a 15 minute threshold to complete the NJTR-1 form, Bureau amended and made it a goal in response to question #39.

The specification challenges posed in this protest represent questions and requests previously considered by the Bureau during the Q&A process, but which did not result in changes to the RFP, as well as a new issue. CGI’s 10 specification challenge points are below, along with the corresponding question posed during the Q&A process. The Division’s Hearing Unit addresses each of these points.

In its first point, CGI requests the State be limited to a single remedy when assessing damages. CGI Specification Challenge 1:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.14 Liquidated Damages	Assessment of liquidated damages shall be in addition to, and not in lieu of, such other remedies as may be available to the State. Except and to the extent expressly provided herein, the Division shall be entitled to recover liquidated damages under each section applicable to any given incident[.]	The proposed contract includes multiple mechanisms which serve to incent the Contractor to deliver services on a timely basis: a fixed-price contract with payments tied to delivery of work products or achieving certain milestones, a provision for withholding a percentage of each invoice. Liquidated damages act as an incentive for Contractor to timely meet certain obligations under the Contract. Such credits should be tied to late delivery of Key	Will the State consider revising the 3rd and 4th paragraphs as follows: "The State has the sole discretion to determine whether liquidated damages should be assessed. Neither the State’s assessment of liquidated damages nor the Vendor {Contractor}’s payment thereof relieves the Vendor {Contractor} of its obligation to remedy any breach or nonconformance of the task, subtask, or work. The State may, in its discretion, offset payment of fees due to Vendor {Contractor} in the

		<p>Deliverables / Critical Milestones and be limited given the other protections that the State has included in the Agreement. Since the contract is specifying amounts applicable to the particular failures, the State should not also be in a position to seek an additional monetary remedy for the same failure.</p>	<p>event Vendor {Contractor} owes liquidated damages pursuant to this section, in the State's discretion. Assessment of liquidated damages shall represent the State's sole and exclusive remedy and be in addition to, and not in lieu of, the State's right to terminate the contract. If the State does not elect to exercise the remedy requiring Liquidated Damages, the State may pursue all other remedies, either pursuant to this Agreement, at law, or in equity, in respect of Contractor's failure to timely deliver Key Deliverables. Except and to the extent expressly provided herein, the Division shall be entitled to recover liquidated damages under each section applicable to any given incident."</p>
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As noted below, CGI posed the identical question during the Q&A period, which was considered by the Bureau and addressed Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
8	56	5.14	<p>The proposed contract includes multiple mechanisms which serve to incent the Contractor to deliver services on a timely basis: a fixed-price contract with payments tied to delivery of work products or achieving certain milestones, a provision for withholding a percentage of each invoice. Liquidated damages act as an incentive for Contractor to timely meet certain obligations under the Contract. Such credits should be tied to late delivery of Key Deliverables / Critical Milestones and be limited given the other protections that the State has included in the Agreement. Since the contract is specifying amounts applicable to the particular failures, the State should not also be in a position to seek an additional monetary remedy for the same failure. Will the State consider revising the 3rd and 4th paragraphs as follows: "The State has the sole discretion to determine whether liquidated damages should be assessed. Neither the State's (sic) assessment of liquidated damages nor the Vendor {Contractor}'s (sic) payment thereof relieves the Vendor {Contractor} of its obligation to remedy any breach or nonconformance of the task, subtask, or work. The State may, in its discretion, offset payment of fees due to Vendor {Contractor} in the event Vendor {Contractor} owes liquidated damages pursuant to this section, in the State's (sic) discretion. Assessment of liquidated damages shall represent the State's (sic) sole and exclusive remedy and be in addition to, and not in lieu of, the State's (sic) right to terminate the contract. If the State does not elect to exercise the remedy</p>	<p>The Bid {RFP} will not be revised as requested.</p>

			requiring Liquidated Damages, the State may pursue all other remedies, either pursuant to this Agreement, at law, or in equity, in respect of Contractor's (sic) failure to timely deliver Key Deliverables. Except and to the extent expressly provided herein, the Division shall be entitled to recover liquidated damages under each section applicable to any given incident."	
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A review of CGI's first specification challenge shows it sought to remove the language "Nothing in this section shall limit the State's right to seek damages or any other remedy at law or equity not specified in this section[]" from paragraph 3 of RFP Section 5.14. It also added the following language (underlined) to paragraph 4 of RFP Section 5.14: "Assessment of liquidated damages shall represent the State's sole and exclusive remedy and be in addition to, and not in lieu of, the State's right to terminate the contract. If the State does not elect to exercise the remedy requiring Liquidated Damages, the State may pursue all other remedies, either pursuant to this Agreement, at law, or in equity, in respect of Contractor's failure to timely deliver Key Deliverables."

Although CGI requests to limit the State to a single remedy, liquidated damages were not intended to be the State's exclusive remedy. As reflected in the RFP,

Deficient performance by Vendor {Contractor} will harm the State, although the State and Vendor {Contractor} ("the Parties") agree that it would be difficult to quantify such harm with precision. Therefore, the Parties agree that the liquidated damages specified below represent reasonable estimates of the damages the State will sustain from the Vendor {Contractor}'s performance deficiencies. Such sums shall be treated as liquidated damages and not as a penalty.

[RFP §5.14 *Liquidated Damages.*]

The amount of liquidated damages specified in the RFP were analyzed and approved by the State, which is the sole decision maker in this instance. Agreeing to CGI's requested changes would result in what the State deems to be an unacceptable risk. Therefore, this challenge is denied and the Bureau's initial response is upheld.

In its second point, CGI requests the Bureau limit liquidated damages specified under RFP Section 5.14(G) to the highest single metric, deferring application of the liquidated damages metric until after the warranty period expires, and capping liquidated damages at 10% of the monthly hosting fee. CGI submits in its Specification Challenge 2:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.14 Liquidated Damages	G. System Failure – Liquidated damages of \$5000 per month may be assessed against the Vendor {Contractor} in the event that the database and the web server fails to meet 99.89% uptime, calculated on a monthly basis, or in the event that the website fails to meet 99.67% uptime, calculated on a monthly basis. The liquidated damages for (1)	We have carefully reviewed the items for which the State is seeking liquidated damages including the updates made in Amendment 1 to the RFP. Reputable hosting and managed services providers will be severely challenged to accept the applicability of both a warranty obligation and an SLA for the same failure as well as multiple penalties for failures that may have the same root cause (e.g., if the web server is not available the user	We believe the State would be better served if it revised the last sentence of this item to: "The liquidated damages for (1) the database and the web server and (2) website may be assessed independently; <u>except in the event that a single issue affects more than one service level, only the service level metric with the highest liquidated damages amount will apply. Assessment of the Liquidated Damages for System Failure will occur only after the end of the</u>

	<p>the database and the web server and (2) website may be assessed independently.</p>	<p>won't be able to access the database). We appreciate that in Amendment #1 to the RFP, the State changed the System Failure metric to only apply to Phase Four; however this still overlaps with the warranty period of one hundred eighty (180) days after Acceptance being sought by the State. Typically the applicability of the SLA credit (or liquidated damages as written) would begin following the end of the warranty period and would be capped by a percentage of the monthly hosting fee (e.g., 10%).</p>	<p><u>Warranty Period specified in Section 5.11(a). In no event will the Liquidated Damages assessed in any given month exceed ten percent (10%) of the then-current monthly hosting fee."</u></p>
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The Bureau previously addressed in Bid Amendment {Addendum} # 3 a similar request posed by CGI during the Q&A process:

Question #	Page #	RFP Section Reference	Question	Answer
10	56	5.14	<p>We have carefully reviewed the items for which the State is seeking liquidated damages. Reputable hosting and managed services providers will be severely challenged to accept the risk of the applicability of liquidated damages in addition to the remedy already provided in RFP Section 5.9 for F-Security Incident at a reasonable cost to the State. Additionally, G - Support and H - System Failure are typically addressed in the Service Level Agreement negotiated by the State and the Contractor. We understand the State is seeking a warranty period of one hundred eighty (180) days after Acceptance. Typically the applicability of the SLA credit (or liquidated damages as written) would begin following the end of the warranty period and would be tied to a percentage of the monthly hosting fee. We believe the State would be better served if it changed the last paragraph (before the individual items) to read: ? (sic) Vendors {Bidders} should explain how the system?s (sic) performance will be measured. The Vendor {Bidder} should describe what it considers acceptable performance from an end-user?s (sic) point of view (e.g. system availability). Both the measures and the frequency of measurement will be included in a Service Level Agreement prior to implementation. The following is a sample listing of items the State would expect to be addressed in the proposal.? (sic)</p>	<p>Bid {RFP} Section 5.14 will be amended as follows:</p> <p>1. Bid section 5.14 (F) Security Incidents will be deleted in its entirety.</p> <p>2. Section 5.14 (G) will become (F) and Section 5.14 (H) will become (G) and only apply in Phase Four. Accordingly, the fifth paragraph of Section 5.14 is amended as follows:</p> <p>"Vendors {Bidders} are encouraged to offer greater liquidated damage amounts (or more stringent SLAs) in their proposal if they choose to do so. If a Vendor {Bidder} proposes liquidated damage amounts (or more stringent SLAs) that are, in the State's sole judgment, less stringent than those listed below, the Liquidated Damage</p>

				amounts in this RFP shall prevail. See also Section 4.1.”
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After reviewing question 10 above as submitted during the Q&A period, the Bureau determined that the State was adequately protected from data breach and security incidents through the indemnification protections contained in RFP Section 5.9.1. For this reason, the liquidated damages included in RFP Section 5.14(F) were removed. The response to question 10 also clarified this only applied in Phase 4 of the project, pertaining to ongoing support and maintenance. All other applications of liquidated damages and other remedies not separately addressed continued to apply. The Bureau’s answer also amended RFP Section 5.14 to allow bidders to propose higher or more stringent uptime and credit matrices in submitted proposals. The Bureau chose not to take on any additional risk and made no other revisions based upon this question. Further, as noted above, the State reserves the right to assert multiple liquidated damages that may apply to a single incident.

Regarding CGI’s request, as specified in RFP Section 5.17.3, which deleted and replaced Section 5.11 of the New Jersey State Standard Terms and Conditions (SSTC), that the assessment of liquidated damages for a system failure occur only after the end of the warranty period, the Bureau previously clarified (in Answer #10 to the Q&A above) that the damages specified in RFP Section 5.14(G) will only apply during Phase Four, *System Management Phase*. The Bureau confirmed that the remedies the State had established in RFP Section 5.17.3(b) *Custom Software* and RFP Section 5.14 *Liquidated Damages* under (H) *System Failure*, covered two very distinct areas.

Section (b) *Custom Software*, which addresses product defects defined as software errors or flaws in the developed code that required the Warranty Language in the amount of 180 days, remedy for the product developed, protects the state from defects of the solution; RFP Section 5.14, which addresses system failures as defined by “system up-time” during the M&O phase, as a remedy for operation failure, not product failure, protects the State from system failures. Because each section pertains to a different circumstance, it is proper that the State ensure simultaneous protection of warranty and liquidated damages for system uptime.

Finally, related to CGI point 2, the Bureau did not previously consider the request to add the language “In no event will the Liquidated Damages assessed in any given month exceed ten percent (10%) of the then-current monthly hosting fee.” However, the amount of liquidated damages was analyzed and approved by the DOT, the Office of Information Technology (OIT), the Division of Law (DOL), and the Bureau. The risk that damages would far outweigh the amount of fees paid to the contractor under the contract is mitigated by RFP Section 5.17.1, *Indemnification*, which added a limitation of liability provision to the entire agreement, limited the contractor’s damages to 200% of fees paid.¹

Based on the foregoing, Specification Challenge #2 is denied.

In its third point, CGI objects to the requirement that the proposed solution conform to State and Federal requirements and requests the RFP be amended to include a reference to a “written deliverable outline or use case.” CGI Specification Challenge 3:

RFP Reference	Section	RFP Language	CGI Concern	Desired Change
3.3.1	Develop		Successful projects are those where	To that end, we request the State

¹ As amended in answer to question #56 in Bid Amendment {Addendum} # 3, this amount was reduced from 500% of fees paid to 200%.

Digital NJTR-1 Form		broad regulatory and program requirements are transcribed into specific, objective statements, values or criteria that can be expressly validated through written deliverable tables of contents or use cases to be exercised during software user acceptance testing. Generic provisions relating to conformity with Federal and State requirements do not provide adequate specificity as to how the State desires the software to meet such requirements in a custom development scenario.	update this section accordingly "Ensure that the digital form meets all Federal and State requirements as per the agreed upon written deliverable outline or use case, as appropriate:[...]"
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This identical request was previously submitted to the Bureau and was responded to in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
40	26	3.3.1	Successful projects are those where broad regulatory and program requirements are transcribed into specific, objective statements, values or criteria that can be expressly validated through written deliverable tables of contents or use cases to be exercised during software user acceptance testing. To that end, we request the State update this section accordingly "Ensure that the digital form meets all Federal and State requirements as per the agreed upon written deliverable outline or use case, as appropriate:[...]"	The BID {RFP} will not be revised as requested.

In responding to this request previously, the State, including the subject matter experts at DOT, considered CGI's request but determined that the suggested language would not be added. As noted in RFP Section 3.1.1, *Vendor {Contractor} Requirements*, the contractor shall "[i]ncorporate all federal regulations and requirements from [Model Minimum Uniform Crash Criteria] and Fixing America's Surface Transportation Act (FAST ACT) in all aspects of this System[.]" Similarly, RFP Section 3.3.1, *Develop Digital NJTR-1 Form*, requires the contractor shall "[e]nsure that the digital form is in 100% compliance with all Federal and State requirements[.]"

It is standard State practice to require the contractor remain in compliance with all applicable laws. While the State may provide citation to or highlight some relevant regulations, the material requirement to deliver a system that is in compliance with all applicable laws remains the responsibility of the contractor. Further, the specific software/project deliverables are addressed in RFP Section 3.0, which complements the requirement to comply with applicable federal and State requirements.

Based on the forgoing, CGI's specification challenge #3 is denied.

In its fourth point, CGI seeks amongst other things, too add a 30-day cure period to RFP Section 5.13.3, *Remedies For Failure To Comply with Material Blanket PO {Contract} Requirements*, requests limitations on the State's ability to seek "cover damages," and requests all damages for failure to comply with contractual requirements be subject to the limitation of liability.

CGI Specification Challenge 4:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.13.3 Remedies for failure to comply with material blanket PO {contract} requirements	In the event that the Vendor {Contractor} fails to comply with any material Blanket PO {Contract} requirements, the Director may take steps to terminate this Blanket PO {Contract} in accordance with the SSTC, authorize the delivery of Blanket PO {Contract} items by any available means, with the difference between the price paid and the defaulting Vendor's {Contractor's} price either being deducted from any monies due the defaulting Vendor {Contractor} or being an obligation owed the State by the defaulting Vendor {Contractor}, as provided for in the State administrative code, or take any other action or seek any other remedies available at law or in equity.	A cost of cover provision should be tied to the Contractor's uncured material failure and should be tied to the procurement by the State of substantially similar services and deliverables and the cost associated with the procurement should be properly mitigated. CGI also requests a longer cure period prior to the State having the right to procure third party services at CGI's expense, to cure the default. Finally, costs associated with the cover remedy stated in this section should be subject the Limitation of Liability.	"In the event that the Vendor {Contractor} fails to comply with any material Blanket PO {Contract} requirements, the Director may take steps to terminate this Blanket PO {Contract} in accordance with the SSTC, and if the Vendor {Contractor} does not cure the breach within the <u>a</u> cure period <u>of at least thirty 30 calendar days</u> , authorize the delivery of remaining Blanket PO {Contract} items by any reasonable available means, <u>provided however, (1) the State has taken steps to mitigate such costs, (2) the third party scope of work and services are substantially the same as the work and services terminated under the Blanket PO {Contract}, (3) with the difference between the price paid and the defaulting Vendor's {Contractor's} price either being deducted from any monies due the defaulting Vendor {Contractor} or being an obligation owed the State by the defaulting Vendor {Contractor} subject to the limits set forth in Section 4.1.1 as modified in RFP Section 17.1.1 limitation of liability, as provided for in the State administrative code, or take any other action or seek any other remedies available under the Contract at law or in equity.</u> "

This same request, though reordered in specification challenge 4, was a question during the electronic question and answer period, and the Bureau provided the following respond in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
62	56	5.13.3	A cost of cover provision should be tied to the Contractor's uncured material failure and should be subject to reasonable "In the event that the Vendor {Contractor} fails to comply with any material Blanket PO {Contract} requirements, the Director may take steps to terminate this Blanket PO {Contract} in accordance with the SSTC, and if the Vendor {Contractor} does not cure the breach within the cure period, authorize the delivery of remaining Blanket PO {Contract} items by any reasonable available means, provided however, (1) the State has taken steps to mitigate such costs, (2) the third party scope of work and services are substantially the same as the work and services terminated under the Blanket PO {Contract},	The Bid {RFP} will not be revised as requested.

			(3) with the difference between the price paid and the defaulting Vendor?s {Contractor?s} (sic) price either being deducted from any monies due the defaulting Vendor {Contractor} or being an obligation owed the State by the defaulting Vendor {Contractor} subject to the limits set forth in Section 4.1.1 as modified in RFP Section 17.1.1 limitation of liability, as provided for in the State administrative code, or take any other action or seek any other remedies available at law or in equity."	
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In providing its answer in Bid Amendment {Addendum} #3, the Bureau determined it would not alter the SSTC and would not accept the requested change. As provided in the SSTC, which all bidders were provided, the Director is not required to terminate a contract for a contractor’s failure to comply with a material contractual requirement; it is merely permissible. In the event a contractor did fail to comply, a contractor is provided 10 days notices with an opportunity to respond, prior to contract termination. Therefore, CGI’s desired change is not acceptable to the State.

The Bureau also did not agree to modify the State’s ability to seek cover damages as requested by CGI. It is within the State’s sole discretion determine the level of risk assumed by limiting its remedies. Based on the foregoing, CGI’s fourth specification challenge point is denied.

In its fifth point, CGI requests the indemnification coverage be limited to claims resulting from the contractor’s gross negligence or willful misconduct. CGI Specification Challenge 5:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.17.1 Indemnification	4.1(a)(i) For or on account of the loss of life, tangible property or injury or damage to the person, body or tangible property of any person or persons whatsoever, which shall arise from or result directly or indirectly from the work and/or products supplied under this Blanket PO {Contract} or the order;	Reputable contractors do not typically indemnify the State for all issues that arise related to the contract regardless of whether the contractor was at fault. Indemnities should be to protect the State from specific third party claims to the extent they are caused by factors entirely within the Contractor’s control (e.g., from gross negligence or willful misconduct).	Accordingly, we request the State consider revising the provision to read: “For or on account of the loss of life, tangible property or injury or damage to the person, body or tangible property of any person or persons whatsoever, <u>to the extent arising which shall arise</u> from or result directly or indirectly from the <u>gross negligence or willful misconduct of the Contractor in performing work and/or products supplied</u> under this Blanket PO {Contract} or the order;”

During the electronic Question and Answer period, a similar question was posed, which the Bureau responded to in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
63	59	5.17.1	Reputable contractors do not typically indemnify the State for all issues that arise related to the contract regardless of whether the contractor was at fault; only things entirely within the contractor’s control. Accordingly, we request the State consider the following language for (a)(i) For or on account of the loss of life, tangible property or damage to the person, body or tangible property of any person or persons whatsoever, to the extent arising from or to the extent	Bid {RFP} Section 5.17.1(a)(i) will be amended as follows: “For or on account of the loss of life, tangible property or injury or damage to the person, body or tangible

			result directly or indirectly from the Contractor's gross negligence or willful misconduct in providing the work and/or products under this Blanket PO {Contract} or the order"	property of any person or persons whatsoever, which shall arise from or result directly or indirectly from the work and/or products supplied under this Blanket PO {Contract} or the order;"
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Based upon the question submitted during the Q&A process, the Bureau amended RFP Section 5.17.1(a)(i) to include “tangible” property, but was unwilling to further modify the SSTC regarding indemnification. Limiting the State’s indemnification protection to the contractor’s gross negligence or willful misconduct would necessarily place more risk on the State. The State is not obligated or willing to assume such risk and will not alter these terms.

Based on the foregoing, CGI’s specification challenge #5 is denied.

In its sixth point, CGI requests the Bureau delete the provision that limits obligation or liability for intellectual property claims only when the contractor advises the State of potential claims arising from infringement, and the State still directs the contractor to proceed.

CGI Specification Challenge 6:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.17.1 Indemnification	4.1(c)(3) Notwithstanding the foregoing, Vendor {Contractor} has no obligation or liability for any claim or suit concerning third-party Intellectual Property Rights arising from: [...] (3) the Vendor’s {Contractor’s} compliance with the State’s designs, specifications, requests, or instructions, provided that if the State provides Vendor {Contractor} with such designs, specifications, requests, or instructions, Vendor {Contractor} reviews same and advises that such designs, specifications, requests or instructions present potential issues of patent or copyright infringement and the State nonetheless directs the Vendor {Contractor} to proceed with one or more designs, specifications, requests or instructions that present potential issues of patent or copyright	In custom development projects, the Vendor is relying on the State's instructions and although the intellectual property infringement language takes this into consideration, the language goes on to put additional burdens on the Vendor to review such designs, specifications, requests, or instructions, and advise the State if there is a potential issue of patent or copyright infringement. This requirement is overly burdensome to the Contractor and will only serve to increase the price and extend the project schedule so that diligent contractors may undertake appropriate due diligence.	We request the State revise this sub paragraph as follows: " (3) the Vendor’s {Contractor’s} compliance with the State’s designs, specifications, requests, or instructions, provided that if the State provides Vendor {Contractor} with such designs, specifications, requests, or instructions, Vendor {Contractor} reviews same and advises that such designs, specifications, requests or instructions present potential issues of patent or copyright infringement and the State nonetheless directs the Vendor {Contractor} to proceed with one or more designs, specifications, requests or instructions that present potential issues of patent or copyright infringement;"

infringement;		
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A similar question was posed during the electronic question and answer period, which the Bureau responded to in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
64	59	5.17.1	In custom development projects, the Vendor is relying on the State's instructions and although the intellectual property infringement language takes this into consideration, the language goes on to put additional burdens on the Vendor to review such designs, specifications, requests, or instructions, and advise the State if there is a potential issue of patent or copyright infringement. This requirement is overly burdensome to the Contractor and will only serve to increase the price and extend the project schedule so that diligent contractors may undertake appropriate due diligence. We request the State revise (c)(3) as follows: " the Vendor?s {Contractor?s} compliance with the State?s designs, specifications, requests, or instructions;"	The Bid {RFP} will not be revised as requested.

In issuing its response in Bid Amendment {Addendum} # 3, the Bureau determined it would not accept or change the indemnification provisions relating to intellectual property claims. CGI seeks to avoid liability for intellectual property claims if it complies with the State's designs, specifications, requests, or instructions. However, the contractor is in the best position to research and make determinations related to whether or not its solution, addressing the State's designs, specifications, requests, or instructions, violates another's intellectual property. Without the expertise of the contractor's assessment of the risk of third party claims posed by the specifications and its solution, and the impact that deleting the "notification" requirement might have on the intellectual property infringement risk posed to the State, the Bureau was unwilling to modify this language.

As noted previously, the State will not take on a greater amount of risk associated with CGI's request for altered language as it relates to intellectual property claims. Thus, this specification challenge by CGI is denied.

In its seventh point, CGI requests that carve-outs for indirect, special, punitive, and exemplary damages be added to the limitation of liability. CGI Specification Challenge 7:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.17.1 Indemnification	4.1.1(b) The Vendor {Contractor} shall not be liable for consequential or incidental damages.	We have a long history of successful performance in support of the State under contracts that include a disclaimer of indirect, special, punitive and exemplary damages. The absence of such a disclaimer increases liability for performance and would make it difficult for large or publicly held IT firms, to participate in these types of projects since such liability places risk on the Contractor inordinate to their performance responsibilities and	Please revise the provision to read: "The Vendor {Contractor} shall not be liable for consequential, <u>indirect, special, punitive, exemplary,</u> or incidental damages."

		associated ability to secure appropriate insurance.	
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During the electronic question and answer period, a similar question, reproduced below, was submitted, which the Bureau responded to in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
70	61	5.17.1	Subparts b and c are duplicative. The absence [sic] of a disclaimer of indirect damages increase liability for performance and would make it difficult for large or publicly held IT firms, to participate in these types of projects since such liability places risk on the Contractor inordinate to their performance responsibilities and associated ability to secure appropriate insurance. We have a long history of successful performance in support of the State under contracts that have included exclusions for "indirect, special, punitive or exemplary damages even if Contractor has been advised of the possibility of such damages." Will the State please consider adding such an exclusion in the Blanket PO {Contract}?	<p>Bid {RFP} Section 5.17.1, Limitation of Liability 4.1.1 (c) will be amended as follows:</p> <p>Subpart c "The Vendor {Contractor} shall not be liable for consequential or incidental damages" will be removed as duplicative of b.</p>

RFP Section 4.1.1(a), *Limitation of Liability*, provides that a contractor is liable to the State only for "actual, direct damages resulting from the [contractor's] performance or non-performance of, or in any manner related to, this Blanket PO {Contract}" Because the contractor will only be liable for "actual, direct damages," it is not necessary to specify the converse: that a contractor will not be liable for indirect damages. Rather, this is implicit. The addition of "special," "punitive," and "exemplary" damages to the limitation of liability would materially and unacceptably alter the State's assumption of risk and it is not standard business practice for the State to accept these express limitations regarding liability.

Based on the foregoing, CGI's specification challenge #7 is denied.

In point eight, CGI requests the State delete revised SSTC Section 5.11(a), which is part of revisions incorporated into RFP Section 5.17.3 *Performance Guarantee of Vendor {Contractor}* and replaces Section 5.11 of the SSTC. CGI Specification Challenge 8:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.17.3 Vendor {Contractor} Performance Guarantees	5.11(a) Commercial Off the Shelf Software	The State "seeks a complete customized software solution with sole ownership of the intellectual property belonging to the State of New Jersey" the language in 5.11(a) incorporated in RFP Section 5.17.3. This provision creates ambiguity for bidders since owners of a COTS solution would not readily relinquish ownership of their pre-existing intellectual property.	We request the State clarify by adding "In consideration of the State's requirement for a custom developed solution, 5.11(a) is not applicable to the solution. The State will not entertain a COTS solution."

CGI had previously requested that this section be deleted during the electronic question and answer period, which the Bureau responded to in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
74	61	5.17.3	Section 5.11.A Commercial off the Shelf Software should be removed given the restrictions in Section 5.8 which state "No pre-existing intellectual property or base product shall be incorporated or included into the solution. The State seeks a complete customized software solution with sole ownership of the intellectual property belonging to the State of New Jersey."	The Bid {RFP} will not be revised as requested. See answer to question #12.

Question #	Page #	RFP Section Reference	Question	Answer
12	52	5.8	Per this section, "The State shall retain ownership of all data contained within the System and any related subsystems, including tracking and monitoring tools." Please clarify what is meant by "tracking and monitoring tools" as these likely are third party products utilized by the Contractor in order to meet its service level and ongoing support obligations. The RFP also states "No pre-existing intellectual property or base product shall be incorporated or included into the solution" which would preclude the Contractor from procuring a license to the tool for subsequent use by the State. Should the State desire the Contractor to procure such third party IP on behalf of the State, additional language supporting pass-through of the 3rd party IP owner's license terms would be necessary.	Bid {RFP} Section 5.8 will be amended as follows: "The State shall retain ownership of all data contained within the System and any related subsystems," To be removed: "including tracking and monitoring tools." Third party license terms are subject to Section 4.1.

Section 5.11 of the SSTC, as modified by Section 5.17.3 of the RFP, *Vendor {Contractor} Performance Warranties*, and subsection (a), *Commercial Off the Shelf Software (COTS)*, provide that the product licensed to the State shall operate as described in the RFP and that in the event of a breach of warranty, the contractor shall correct the product errors. As outlined in Section 3.6.1, *General Requirements*, the RFP requires that tracking and monitoring tools be incorporated into the website component and that the contractor "shall utilize website monitoring tools that provide at-a-glance statistics (dashboard) of website performance in order to detect bottlenecks or errors." The Amendment {Addendum} noted above removed "tracking and monitoring tools" from RFP Section 5.8. Because the tracking and monitoring tools will not be owned by the State, the Bureau determined that it was necessary to leave COTS warranty language in the RFP. Because there is no custom development requirement in the RFP for the functionality of monitoring traffic or tracking activity on the website, the COTS language is required for this specific requirement. Therefore, it is necessary to retain the provisions of both RFP Section 5.8 and SSTC Section 5.11(a).

Based on the foregoing, CGI's specification challenge #8 is denied

In its ninth point, CGI requests that parts of RFP Section 5.17.3, which modifies SSTC Section 5.11, namely Section 5.11(c), that require the refund of fees paid in the event of a defect in IT services cannot be cured be deleted. CGI Specification Challenge 9:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.17.3 Vendor {Contractor}	IT Services c(1)Vendor {Contractor}	With respect to the stated remedy for breach of the warranty for IT	Please change as follows: "In the event of any breach of this warranty,

Performance Guarantees	<p>warrants that all Services will be provided in a professional manner consistent with industry standards. The State shall notify Vendor {Contractor} of any Services warranty deficiencies within ninety (90) days from performance of the deficient Services.</p> <p>(2) In the event of any breach of this warranty, the Vendor {Contractor} shall re-perform the deficient Services, or if Vendor {Contractor} cannot substantially correct a breach in a commercially reasonable manner, the State may end the relevant Services and recover the fees paid to Vendor {Contractor} for the deficient Services.</p>	<p>Services 5.11(c), the State has already included multiple mechanisms (retainage and liquidated damages) which serve as incentives to the Contractor to perform. A contractual right for the State to also recover fees paid to the Contractor for deficient services discourages more active participation in the procurement on the part of reputable, experienced contractors as such a provision presents an inordinate risk to the Contractor.</p>	<p>the Vendor {Contractor} shall re-perform the deficient Services, or if Vendor {Contractor} cannot substantially correct a breach in a commercially reasonable manner, the State may end the relevant Services and recover the fees paid to Vendor {Contractor} for the deficient Services."</p>
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A similar question was presented during the electronic question and answer period, which the Bureau reviewed and answered in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
76	61	5.17.3	<p>With respect to the stated remedy for breach of the warranty for IT Services 5.11(c), the State has already included multiple mechanisms (retainage and liquidated damages) which serve as incentives to the Contractor to perform. A contractual right for the State to also recover fees paid to the Contractor for deficient services discourages more active participation in the procurement on the part of reputable, experienced contractors as such a provision presents an inordinate risk to the Contractor.</p>	<p>The Bid {RFP} will not be revised as requested.</p>

Specifically, CGI suggests in its specification challenge that the State relinquish its ability to recover fees paid to the contractor for deficient services. While the State has established other contractual mechanisms which serve as incentives for the contractor to perform in accordance with the RFP, the remedy for deficient services in the event that the contractor cannot substantially correct these issues is complementary to the other rights reserved to the State. The State will not relinquish this contractual remedy to assume a greater risk.

Based upon the foregoing, CGI's point is denied.

In its final point, CGI requests the addition of a gross negligence or misconduct trigger for notification and notification compliance obligations under RFP Section 5.9.2, *Data Security Standards*. CGI Specification Challenge 10:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
5.9.2	The Vendor {Contractor}	While we acknowledge the	Please modify this section as follows:

	<p>must comply with all applicable State and Federal laws that require the notification of individuals in the event of unauthorized release of personally identifiable information or other event requiring notification. In the event of a breach of any of the Vendor {Contractor}'s security obligations or other event requiring notification under applicable law ("Notification Event"), [...]</p>	<p>requirement to accept responsibility for notifications resulting from breach of our security obligations; however, it would present an inappropriate level of risk to also indemnify the State for any claims related to an "other event requiring notification under applicable law" that was caused by the State or other third party not under our control.</p>	<p>"The Vendor {Contractor} must comply with all applicable State and Federal laws that require the notification of individuals in the event of unauthorized release of personally identifiable information or other event requiring notification <i>to the extent such other event resulted from the gross negligence or misconduct of the Contractor.</i> In the event of a breach of any of the Vendor {Contractor}'s security obligations or other event <i>to the extent such other event resulted from the gross negligence or misconduct of the Contractor or from conditions</i> requiring notification under applicable law ("Notification Event") [...]"</p>
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A previously submitted question posed similar language, which the Bureau responded to in Bid Amendment {Addendum} # 3:

Question #	Page #	RFP Section Reference	Question	Answer
81	54	5.9.2	<p>While we acknowledge the requirement to accept responsibility for notifications resulting from breach of our security obligations; however, it would present an inappropriate level of risk to also indemnify the State for any claims related to an ? (sic) other event requiring notification under applicable law? (sic) that was caused by the State or other third party not under our control. Accordingly, we request the State to please modify this section as follows: ? (sic) The Vendor {Contractor} must comply with all applicable State and Federal laws that require the notification of individuals in the event of unauthorized release of personally identifiable information or other event requiring notification to the extent such other event resulted from the gross negligence or misconduct of the Contractor or from conditions or events beyond its reasonable control. In the event of a breach of any of the Vendor {Contractor}'s (sic) security obligations or other event to the extent such other event resulted from the gross negligence or misconduct of the Contractor or from conditions or events beyond its reasonable control requiring notification under applicable law (?Notification Event?) (sic),[...]"</p>	<p>The Bid {RFP} will not be revised as requested.</p>

Similar to aforementioned specification challenges, the Bureau was unwilling to materially reduce the protections afforded the State. The proposed solution to the RFP may involve data elements that could trigger notification obligations, including drivers' license numbers, names, addresses, and phone numbers. Accordingly, reducing the threshold that triggers the contractor's indemnification obligations would materially diminish the State's rights and increase liability to the State. The State is unwilling to take on the greater risk. Based on the foregoing, CGI's final point is denied.

As outlined above, the specification challenges posed by CGI are denied. Each of CGI's challenges was previously considered and where appropriate, and in the sole discretion of the State, addressed by the Bureau, in consultation with DOL, OIT, and the Division of Risk Management. The State cannot honor these specification challenges as they will result in the State assuming unprecedented and unacceptable levels of risks.

The RFP is upheld and the Procurement Bureau is directed to proceed with the subject solicitation. I note that the decision to submit a proposal is solely at the discretion of the bidder. This is my final agency decision.

Sincerely,

A handwritten signature in blue ink that reads "magriff". The signature is stylized and cursive.

Maurice A. Griffin
Chief Hearing Officer

MAG:DF

c: P. MacMeekin
J. Descoteaux
R. Gibson