

Governor's Executive Order #08-16
SPOTS Card Contracting Process

May 19, 2009

Executive Order #08-16, Definitions & Facts



- ❖ Minority Business Emerging: MBE
- ❖ Women-Owned Business Emerging: WBE
(Not for Emerging Small Business)
- ❖ Signed into effect on August 6, 2008 and expires on January 1, 2014.

Executive Order #08-16, cont.



Requirements:

- ❖ Establishment of Target,
- ❖ Measurement against specific commodity areas,
- ❖ Quarterly Reporting for procurement of Contracts less than \$150,000.00 to the Governor's Advocates Office, and
- ❖ Specific Commodity Categories


DAS' Aspirational Targets for Soliciting



The Targets shall be assessed by December 31, 2009 and thereafter annually.

Set Targets are as follows:

- ❖ Professional – Management Development Training – 2%
- ❖ Environmental Consulting Services – 2%
- ❖ Architectural Services – 2%
- ❖ Administrative Management: General Management Consulting Services – 5%
- ❖ Commercial and Institutional Building Construction – 5%
- ❖ Other Computer Related Services – 2%
- ❖ Specialty Trade Contractors - 5%
- ❖ Other – 5%



Additionally, the following practices are the desired targets to achieve the goals:



- ❖ Use of Direct Invite: ORPIN allows this option electronically,
- ❖ Trade Shows: DAS will aim to educate suppliers at a central location for informative purposes,
- ❖ Direct Contact: DAS will target IT Vendors that appear to have services that fit the seeking criteria of the Department's needs. The intent will be to contact companies individually to educate regarding the process and encourage response,
- ❖ Evaluation: As more information becomes available, research use of relevant evaluation language in Requests for Proposals and informal non-price-based solicitations.

Results:

- ❖ A special *Thanks* is extended to DAS/Facilities for our one and only qualifying purchase this quarter (\$9,833.00.) This purchase exceeded the target goal of 5% by 24% (29%).

What you can do to aid in “spreading the knowledge”



- ❖ Consider initial supplier contact
- ❖ Visit the Office of Minority, Women and Emerging Small Business (OMWESB) Website for Database, <http://www.oregon.gov/DCBS/OMWESB/index.shtml>
- ❖ If known, indicate the suggested suppliers when sending in Contract Services Requests into OPS/Contract Services
- ❖ If you are aware of qualifying Minority and Women-Owned Firms, you may suggest:
 - ❖ The company register in ORPIN,
 - ❖ Look into certification through the office of minority, women and emerging smalls business (DCBS)
 - ❖ Look for commodity codes matching the services and products the company can provide.



SPOTS Cards T's and C's

How do we balance Efficiency, Accountability and Risk?



This presentation describes a recent change in process which attempts to address the following:

- ❖ SPOTS Card Purchases
- ❖ T's and C's
- ❖ Awareness of other Contract Issues

Issues Faced:

- ❖ One of the goals of the SPOTS card program is to provide administrative cost savings through efficiency,
- ❖ Not all employees with SPOTS cards have purchasing/contracting training, and
- ❖ There are requirements in statute that are often in conflict with vendor agreements.

SPOTS Card Policy

107-03-030



“Terms and Conditions of a purchase must be approved by the DAS Operations Division, Contract Services prior to cardholder’s acceptance...”

Sources of Terms and Conditions

- ❖ Internet Check Box
- ❖ Agreements for Signature
- ❖ Reference within one document to another

Risks:

- ❖ Personal liability for clauses conflicting with statute,
- ❖ Unable to terminate agreement (subscriptions), no refunds
- ❖ Unexpected charges, and
- ❖ Acceptable terms in the main agreement, but unacceptable terms in an ancillary document.

Attorney Recommendations

1. Strike Out Problem Terms
 - a. List to Follow
 - b. Must have vendor agreement
 - i. Initials of both parties
 - ii. Amendment signed by both parties
2. Negotiate those not accepted for Strike Out
3. If agreement is non-negotiable
 - a. Document steps to obtain agreement
 - b. Document “non-negotiable” status
 - c. Inform terms may be unenforceable by law
4. Proceed with signature on document(s) or acceptance of terms on line.
5. **NOTE: IF ACCEPTING TERMS ON LINE AND TERMS HAVE BEEN NEGOTIATED, WE MUST MAKE SURE WE HAVE WRITTEN AGREEMENT OF MODIFICATIONS ON FILE.**



Delegation Request Process



Contact Contract Services if Interested,
process is informal



Evaluate

Evaluate Terms and Conditions to determine if it is acceptable to proceed or which terms might need to be adjusted from a business perspective.

Problems and Clauses

Department of Justice OAR 137-045-0055 (2) (e) identifies contract provisions that typically require deletion or modification.

They are:

- a. Governing law or choice of law;
- b. Jurisdiction or venue;
- c. Arbitration;
- d. Indemnity, Hold Harmless;
- e. Responsibility;
- f. Attorney fees or collection costs;
- g. Punitive or exemplary damages;
- h. Interest;
- i. Third party beneficiary;
- j. Commitment to pay for performance beyond the end of the current biennium, or with funds not currently available;
- k. Taxes;
- l. Confidentiality;
- m. Statute of Limitations;
- n. Contractor as agent or employee;
- o. Financing Agreements;
- p. Representation, legal advice or legal opinions by counsel not authorized by the Attorney General.

Specific Terms and Conditions



Department of Justice (DOJ) requires agencies to “delete or modify any provision in a proposed Public Contract that is substantially in any of the following forms”:

Governing Law (or choice of law)



No:

The laws of a state other than Oregon govern this contract. Standard language from template for a contract:

Yes:

Governing Law... This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim...

Jurisdiction or Venue



No:

A lawsuit to enforce, or arising out of, this contract must be brought in a state court located outside Oregon or a federal court.

Standard Language from Template for a PSK Contract



❖ Yes:

Governing Law; Venue; Consent to Jurisdiction. This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "Claim") between Agency (and/or any other agency or department of the State of Oregon) and Contractor that arises from or relates to this Contract shall be brought and conducted solely and exclusively within the Circuit Court of Marion County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this section be construed as a waiver by the State of Oregon of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court. CONTRACTOR, BY EXECUTION OF THIS CONTRACT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.

Dispute Resolution/Arbitration

This contract is subject to binding arbitration



- ❖ No:

Binding Arbitration:

Mandatory, and has an impartial adjudicator whose parties to the dispute “have agreed” will be final and binding. (not the same as mediation, expert determination, alternative dispute resolution or judicial proceedings).

- ❖ Yes:

Arbitration can be either voluntary or mandatory, and can be either binding or non-binding. It tends to be in “small print” in certain agreements, within lengthy click-through agreements or websites. Non-binding arbitration is acceptable.

Indemnity, Hold Harmless

- ❖ No:
The State of Oregon or the Agency shall indemnify or hold harmless the other party.

Standard language from template for a contract:

- ❖ Yes:
 - i. GENERAL INDEMNITY. CONTRACTOR SHALL DEFEND, SAVE, HOLD HARMLESS, AND INDEMNIFY STATE, ITS AGENCIES, OFFICERS, DIRECTORS, AGENTS AND EMPLOYEES FROM AND AGAINST ALL CLAIMS, SUITS, ACTIONS, LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES OF ANY NATURE WHATSOEVER (“CLAIMS”) RESULTING FROM, ARISING OUT OF, OR RELATING TO THE ACTS OR OMISSIONS OF CONTRACTOR OR ITS OFFICERS, EMPLOYEES, SUBCONTRACTORS, OR AGENTS UNDER THIS CONTRACT.
 - ii. Indemnity for...etc.

Responsibility

- ❖ No:
The State of Oregon or the Agency assumes or becomes responsible for unfunded liabilities or obligations, such as under uncapped, contingent, or open ended responsibility clauses.
- ❖ Yes:
Unless such liabilities or obligations are expressly made subject to the limits of Oregon law in the contract, including Article XI, section 7 of the Oregon Constitution and the Oregon Tort Claims Act.

Attorney Fees/Collection Costs



- ❖ No:

The State of Oregon or the Agency shall pay the other party's attorney fees or the prevailing party in any lawsuit recovers its attorney fees from the losing party.

Standard language from a Goods contract:

- ❖ Yes:

Except for defense costs and expenses pursuant to section 4.N, neither Agency nor Contractor is entitled to recover attorney's fees, court and investigative costs, or any other fees or expenses associated with pursuing a remedy for damages arising out of or relating to this Contract.

Punitive/Exemplary Damages

❖ No:

The State of Oregon or the Agency shall pay punitive, exemplary, or treble damages for the breach of contract or for any claims arising out of the contract.

❖ Yes:

Language obtained from a set of terms for a software agreement: “To the maximum extent legally permitted, our aggregate liability (whether for negligence, breach of contract, ...) ...shall in no circumstances, exceed the cost of the defective...products or services..., State shall not be liable for: Special, Punitive, Incidental, Indirect, or Consequential damages, or...”

Interest

❖ No:

The State of Oregon or the Agency is obligated to pay interest on an overdue account if the payment is less than forty-five days overdue or the interest is higher than eight per cent per annum.

❖ Yes:

Standard language from template for a

Contract: "...interest within the limits permitted under ORS 293.462"

ORS: 293.462 Payment of overdue account charges; rules.



1. It is the policy of the State of Oregon to pay any overdue account charges incurred by state agencies which do not promptly pay for goods and services provided by private businesses.
2. The overdue account charges to be paid under this section shall be the same as the usual overdue account charges to the general clientele of the vendor.
3. Moneys appropriated from the General Fund to an agency or the establishment of maximum limits for expenditures of an agency authorized to procure goods or services from private businesses shall be used to pay overdue account charges incidental to procurement of the goods or services at the rate of two-thirds of one percent per month, but not more than eight percent per annum on overdue claims.
4. Overdue claims shall be those that have not been paid within 45 days from the latest of the following dates: The date of the receipt of the invoice, the date of the initial billing statement if no invoice is received, or the date the claim is made certain by agreement of the parties or by operation of law. However, overdue account charges shall not accrue on any purchases made by any state agency during time of civil emergency or in the event of a natural disaster which prevents the timely payment of accounts. In such instances accounts shall be paid in as timely a manner as possible.
5. Where claims have been paid, the date of the check or warrant in payment of the claims shall be used to determine if the claim has been paid in a timely manner. It shall be rebuttably presumed that the check or warrant was correctly dated.
6. Moneys for payment of overdue account charges shall not be provided in the biennial budget of a state agency, but agencies may make special requests to provide moneys for such charges, separately from other budget requests in accordance with rules adopted by the Oregon Department of Administrative Services.
7. In the event overdue account charges cannot lawfully be paid from federal funds, then such charges shall be paid from any moneys available to the agency for payment of administrative expenses. If other moneys are not available to pay overdue account charges, the agency shall submit to the Legislative Assembly during a legislative session or to the Emergency Board during the interim between legislative sessions a request for moneys to pay these charges. [1979 c.406 §2]

Third Party Beneficiary

- ❖ No:

A person not a party to the contract is stated to be a beneficiary of the contract or has the right to bring a legal action under the contract or to enforce the contract.

Typical Contract language:

- ❖ Yes:

Third Party Beneficiaries. Agency and Contractor are the only parties to this Contract and are the only parties entitled to enforce the terms of this Contract. Nothing in this Contract gives, is intended to give, or shall be construed to give or provide any benefit or right not held by or made generally available to the public, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.

Commitment to pay for performance beyond the end of the current biennium or with funds not currently available:



❖ No:

Customer agrees to promptly pay directly to any additional charges and other liabilities Customer becomes obligated to pay based on Customer's use of Lifecycle Extensions or Customer's failure to comply with the Agreement or this Attachment or applicable licensing and pricing terms, including, without limitation, any such failure identified through exercise of its verification rights under this Agreement.

❖ Yes:

Pursuant to ORS 293.462, Customer agrees to [promptly] pay directly to IBM any additional charges and other liabilities Customer becomes obligated to pay pursuant to the Agreement based on Customer's use of Lifecycle Extensions or Customer's failure to comply with the Attachment or the Agreement as it applies to [or] this Attachment or applicable licensing and pricing terms, including [, without limitation,] any such failure identified through IBM's exercise of its verification rights under this Agreement.

- ❖ Constitutional reference: *Article XI, Section 7*
Section 7. Credit of State Not to Be Loaned; Limitation Upon Power of Contracting Debts. The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars, except in case of war or to repel invasion or suppress insurrection or to build and maintain permanent roads; and the Legislative Assembly shall not lend the credit of the state nor in any manner create any debts or liabilities to build and maintain permanent roads which shall singly or in the aggregate with previous debts or liabilities incurred for that purpose exceed one percent of the true cash value of all the property of the state taxed on an ad valorem basis;

and every contract of indebtedness entered into or assumed by or on behalf of the state in violation of the provisions of this section shall be void and of no effect. This section does not apply to any agreement entered into pursuant to law by the state or any agency thereof for the lease of real property to the state or agency for any period not exceeding 20 years and for a public purpose. [Constitution of 1859; Amendment proposed by initiative petition filed July 2, 1912, and adopted by the people Nov. 5, 1912; Amendment proposed by H.J.R. 11, 1920 (s.s.), and adopted by the people May 21, 1920; Amendment proposed by S.J.R. 4, 1961, and adopted by the people Nov. 6, 1962; Amendment proposed by S.J.R. 19, 1963, and adopted by the people Nov. 3, 1964]

- ❖ DAS has no authority, by statute, to enter into any contracts that would expose the State to any unknown liabilities and doing so is a violation of the Oregon Constitution.
- ❖ Contracts with this type of obligation, if audited, could result in loss of future federal monies (grants, etc.).

Taxes

- ❖ No:
The State of Oregon or the Agency must pay taxes incident to the contract that are not directly imposed upon the State of Oregon or the Agency.

- ❖ Yes: It's not unusual to see taxes included in the following Contracts:
 1. Building or Office Space Lease – Real Property Taxes
 2. Equipment Lease – Personal Property Taxes

Confidentiality



- ❖ No:
The State of Oregon or the Agency is obligated to keep information confidential unless the obligation is made subject to the provisions of the Oregon Public Records Law.

- ❖ Yes:
12.8 Licensee agrees to maintain the confidentiality of the financial terms of this AGREEMENT, and USAGE and MAINTENANCE AGREEMENTS, except for the internal business purposes of LICENSEE, including access to LICENSEE's government and/or accounting auditors. This confidentiality shall survive termination or expiration of this AGREEMENT.

- ❖ 12.8 LICENSEE agrees to maintain the confidentiality of the financial terms of this AGREEMENT, and USAGE and MAINTENANCE AGREEMENTS, except for the internal business purposes of LICENSEE, including access to LICENSEE's government and/or accounting auditors, subject to the disclosure obligations of Oregon Public Records Laws. This confidentiality shall survive termination or expiration of this AGREEMENT.

Confidentiality Important References:



- ❖ Inspection of Public Records – ORS 192.410 through 192.505.
- ❖ Public records conditionally exempted from disclosure – ORS 192.501
- ❖ Trade Secrets – 192.501 (2)

Statute of Limitations

- ❖ No:
 - The State of Oregon or the Agency must file a legal action arising out the contract within a specified time period.
- ❖ It is desired that contracts do not contain any limitations regarding filing of legal action.

Contractor as Agent or Employee

- ❖ No:
The contractor is deemed to be an agent of the State of Oregon or the Agency for liability or other purposes or is the equivalent of an employee of the State of Oregon or the Agency.
- ❖ The State will always be responsible for the actions of any Contractors and certain functions cannot be contracted out.
- ❖ Contractors must NOT be treated as employees.
- ❖ Is Contractor a Hidden Employee? Ways to reinforce the line between Contractor and Employee:
 - a. Contractors should provide their own telephones (cell phones);
 - b. Contractors should provide their own computers (laptops);
 - c. If Contractor uses the state email system to perform Work under the Contract, it must be readily apparent that Contractor is not a state employee;
 - d. Agency may determine and modify Delivery Schedules for Work but must not control the means or manner of Contractor's performance.

Typical Contract Language

Independent Contractor; Responsibility for Taxes and Withholding



a. Contractor shall perform all Work as an independent contractor. The Agency reserves the right (i) to determine and modify the delivery schedule for the Work and (ii) to evaluate the quality of the Work Product, however, the Agency may not and will not control the means or manner of Contractor's performance. Contractor is responsible for determining the appropriate means and manner of performing the Work.

Financing Agreements

- ❖ No; unless approved:
Agreements as defined in ORS 283.085, including installment sales and lease purchase agreements.
- ❖ A Finance Lease is also called a Capital Lease.
Typically, a finance lease will give the lessee control over an asset for a large proportion of the asset's useful life, providing them the benefits and risks of ownership.
- ❖ Requires approval of the State Treasurer
- ❖ ORS 283.087 – Financing Agreement Limitations

Representation, legal advice or legal opinions by counsel not authorized by the Attorney General



- ❖ No; unless approved:

The Oregon Attorney General must give written authorization to any legal counsel purporting to act in the name or, or represent the interest of, the State of Oregon or its officers, employees and agents prior to such action or representation.

- ❖ ORS 180.220 (1) provides that DOJ represents the State of Oregon in all civil actions and other legal proceedings.

- ❖ ORS 180.220 (2) provides: *No state officer, board, commission, or the head of a department or institution of the state shall employ or be represented by any other counsel or attorney at law.*

Representation cont.

- ❖ ORS 180.235 give the Oregon Attorney General the right to hire special attorneys general.
- ❖ OAR 137-009-0000 sets forth the rules for hiring Special Assistant Attorneys General (SAAGs).

Typical Contract Language



❖ Yes:

CONTROL OF DEFENSE AND SETTLEMENT:

CONTRACTOR SHALL HAVE CONTROL OF THE DEFENSE AND SETTLEMENT OF ANY CLAIM THAT IS SUBJECT TO SECTIONS 11.a OR 11.b; HOWEVER, NEITHER CONTRACTOR NOR ANY ATTORNEY ENGAGED BY CONTRACTOR SHALL DEFEND THE CLAIM IN THE NAME OF THE STATE OF OREGON OR ANY AGENCY OF THE STATE OF OREGON, NOR PURPORT TO ACT AS LEGAL REPRESENTATIVE OF THE STATE OF OREGON OR ANY OF ITS AGENCIES, WITHOUT FIRST RECEIVING FROM THE OREGON ATTORNEY GENERAL, IN A FORM AND MANNER DETERMINED APPROPRIATE BY THE ATTORNEY GENERAL, AUTHORITY TO ACT AS LEGAL COUNSEL FOR THE STATE OF OREGON, NOR SHALL CONTRACTOR SETTLE ANY CLAIM ON BEHALF OF THE STATE OF OREGON WITHOUT THE APPROVAL OF THE ATTORNEY GENERAL. THE STATE OF OREGON MAY, AT ITS ELECTION AND EXPENSE, ASSUME ITS OWN DEFENSE AND SETTLEMENT IN THE EVENT THAT THE STATE OF OREGON DETERMINES THAT CONTRACTOR IS PROHIBITED FROM DEFENDING THE STATE OF OREGON, OR IS NOT ADEQUATELY DEFENDING THE STATE OF OREGON'S INTERESTS, OR THAT AN IMPORTANT GOVERNMENTAL PRINCIPLE IS AT ISSUE AND THE STATE OF OREGON DESIRES TO ASSUME ITS OWN DEFENSE.

Unrevised

Intellectual Property Indemnification



❖ No:

OPNET shall defend third party infringement claims against LICENSEE, at OPNET's expense, and pay any final judgment, if LICENSEE: (a) notifies OPNET promptly in writing of such claim; (b) permits OPNET to defend and/or settle such claim; and (c) cooperates fully with OPNET. This obligation shall only apply where the infringement is inherent in the SOFTWARE, and not caused by a modification, a combination with other programs, or by a use in violation of this AGREEMENT.

Revised

Intellectual Property Indemnification



New language is indicated by underlining and deleted language is indicated by [brackets]

❖ Yes:

The Oregon Attorney General must give written authorization to any legal counsel purporting to act in the name of, or represent the interest of, the State of Oregon ("State") or its officers, employees and agents prior to such action or representation. The State, acting by and through its Department of Justice, may assume its own defense, including that of its officers, employees, and agents, at any time when in the State's sole discretion it determines that (I) proposed counsel is prohibited from the particular representation contemplated; (II) counsel is not adequately defending the interest of the State or its officers, employees and agents; (III) important governmental interests are at stake; or (IV) the best interests of the State are served thereby.

Continued - Revision



In the event the State elects to assume its own defense, OPNET's obligations under this Section are discharged with respect to the action assumed. Under no circumstances, however, shall Licensee or any entity or person acting on behalf of Licensee, enter into any settlement of any dispute arising out of this Agreement which grants any rights to any third party to OPNET's Software, Documentation or other intellectual property without written consent by OPNET. With written authorization from the State, OPNET shall defend third party infringement claims against LICENSEE, at OPNET's expense, and pay any final judgment, if LICENSEE: (a) notifies OPNET promptly in writing of such claim; (b) permits OPNET to defend and/or settle such claim; and (c) cooperates fully with OPNET. This obligation shall only apply where the infringement is inherent in the SOFTWARE, and not caused by a modification, a combination with other programs, or by a use in violation of this AGREEMENT.