

AGREEMENT ADDENDUM FOR CONTRACTS

Section 12.4 of the Purchasing Policies and Procedures Manual (State Board Policy 8200) contains the following provision:

- 12.4 "If using an agreement provided by the vendor, care must be exercised to ensure that the agreement does not contain contractual requirements that are in violation of state statutes, such as any clause that requires a prepayment, the imposition of a penalty or termination charge should the LEA cancel the agreement, or the requirement that the LEA indemnify or hold harmless the vendor. A sample of an agreement addendum is included in Appendix C that can be attached to any agreement to modify common requirements that are not acceptable."

The addendum included in Appendix C, which is attached for your reference, is an adaption of the State form (WV-96) that has been modified for use by county boards of education.

A copy of the LEA agreement addendum is attached. The first item on the addendum regarding disputes has been modified from the version contained in Appendix C of the Purchasing Policies and Procedures Manual. Please use the attached version.

Also attached is a memorandum regarding this topic that was issued by the State Attorney General's Office in 2009. Although the requirements contained in that memorandum relate to state purchasing requirements for State agencies, and contains a reference to the WV-96 Agreement Addendum form, it emphasizes the legal concerns regarding this issue and the need for state and local governmental agencies to exercise due diligence when reviewing contracts and agreements issued by vendors to ensure that they do not contain requirements that may be contrary to State Code.

To ensure that certain common illegal requirements are not imbedded in such contracts, it is strongly recommended that all CSBOs or purchasing directors of boards of education require any vendor that is providing a vendor issued contract for the county board's signature to sign the attached agreement addendum, particularly when the contract contains terms and conditions or their equivalent.

Also, if you are submitting such contracts or agreements for the Department's legal review or approval, especially the State Board take-over county boards, be certain to include such signed addendums with the documents that are submitted for review.

AGREEMENT ADDENDUM

In the event of conflict between this addendum and the agreement, this addendum shall control:

1. **DISPUTES** - Any references in the agreement to arbitration or to the jurisdiction of any court other than the Circuit Court of the county in which the Agency is located are hereby deleted. The parties may agree to nonbinding mediation prior to litigation.
2. **HOLD HARMLESS** - Any clause requiring the Agency to indemnify or hold harmless any party is hereby deleted in its entirety.
3. **GOVERNING LAW** -The agreement shall be governed by the laws of the State of West Virginia. This provision replaces any references to any other State's governing law.
4. **TAXES** - Provisions in the agreement requiring the Agency to pay taxes are deleted. As a political subdivision of the State of West Virginia, the Agency is generally exempt from Federal, State, and local taxes and will not pay taxes for any Vendor including individuals, nor will the Agency file any tax returns or reports on behalf of Vendor or any other party.
5. **PAYMENT** - Any references to prepayment are deleted. Payment will be in arrears.
6. **INTEREST** - Should the agreement include a provision for interest on late payments, the Agency agrees to pay the maximum legal rate under West Virginia law. All other references to interest or late charges are deleted.
7. **RECOUPMENT** - Any language in the agreement waiving the Agency's right to set-off, counterclaim, recoupment, or other defense is hereby deleted.
8. **FISCAL YEAR FUNDING** - Service performed under the agreement may be continued in succeeding fiscal years for the term of the agreement, contingent upon funds being appropriated by the Legislature or otherwise being available for this service. In the event funds are not appropriated or otherwise available for this service, the agreement shall terminate without penalty on June 30. After that date, the agreement becomes of no effect and is null and void. However, the Agency agrees to use its best efforts to have the amounts contemplated under the agreement included in its budget. Non-appropriation or non-funding shall not be considered an event of default.
9. **STATUTE OF LIMITATION** - Any clauses limiting the time in which the Agency may bring suit against the Vendor, lessor, individual, or any other party are deleted.
10. **SIMILAR SERVICES** - Any provisions limiting the Agency's right to obtain similar services or equipment in the event of default or non-funding during the term of the agreement are hereby deleted.
11. **ATTORNEY FEES** - The Agency recognizes an obligation to pay attorney's fees or costs only when assessed by a court of competent jurisdiction. Any other provision is invalid and considered null and void.
12. **ASSIGNMENT** - Notwithstanding any clause to the contrary, the Agency reserves the right to assign the agreement to a State agency or another local governmental agency, board or commission of the State of West Virginia upon thirty (30) days written notice to the Vendor and Vendor shall obtain the written consent of Agency prior to assigning the agreement.
13. **LIMITATION OF LIABILITY** - The Agency, as a political subdivision of the State, cannot agree to assume the potential liability of a Vendor. Accordingly, any provision limiting the Vendor's liability for direct damages or limiting the Vendor's liability under a warranty to a certain dollar amount or to the amount of the agreement is hereby deleted. Limitations on special, incidental or consequential damages are acceptable. In addition, any limitation is null and void to the extent that it precludes any action for injury to persons or for damages to personal property.
14. **RIGHT TO TERMINATE** - Agency shall have the right to terminate the agreement upon thirty (30) days written notice to Vendor. Agency agrees to pay Vendor for services received prior to the effective date of termination.
15. **TERMINATION CHARGES** - Any provision requiring the Agency to pay a fixed amount or liquidated damages upon termination of the agreement is hereby deleted. The Agency may only agree to reimburse a Vendor for actual costs incurred or losses sustained during the current fiscal year due to wrongful termination by the Agency prior to the end of any current agreement term.
16. **RENEWAL** - Any reference to automatic renewal is hereby deleted. The agreement may be renewed only upon mutual written agreement of the parties.
17. **INSURANCE** - Any provision requiring the Agency to insure equipment or property of any kind and name the Vendor as beneficiary or as an additional insured is hereby deleted.
18. **RIGHT TO NOTICE** - Any provision for repossession of equipment without notice is hereby deleted. However, the Agency does recognize a right of repossession with notice.
19. **ACCELERATION** - Any reference to acceleration of payments in the event of default or non-funding is hereby deleted.
20. **CONFIDENTIALITY** - Any provision regarding confidentiality of the terms and conditions of the agreement is hereby deleted. Governmental contracts are public records under the West Virginia Freedom of Information Act.
21. **AMENDMENTS** - All amendments, modifications, alterations or changes to the agreement shall be in writing and signed by both parties. No amendment, modification, alteration or change may be made to this addendum without the express written approval of the Agency.

ACCEPTED BY:

VENDOR:

Local Education Agency: _____ Company Name: _____

Signed: _____ Signed: _____

_____ Title: _____

Date: _____ Date: _____



STATE OF WEST VIRGINIA
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ATTORNEY GENERAL

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MEMORANDUM

TO: All State Purchasing Officers

FROM: Dawn E. Warfield
Deputy Attorney General

DATE: August 14, 2009

RE: WV-96 Agreement Addendum

The attached form WV-96 Agreement Addendum (revised 10/07) should be used whenever a vendor submits alternative contractual terms and conditions for your signature. Often, these are on preprinted forms that have not been amended or reviewed by the Purchasing Division of the Department of Administration or the Attorney General. The WV-96 Addendum was developed by the Purchasing Division and the Attorney General's Office to eliminate the most common conflicts with State law that are found in contract documents submitted for our review.

A WV-96 Agreement Addendum is not needed when State Purchasing terms and conditions are the only ones being used, and it is not a substitute for any other terms and conditions. It is intended to *amend* documents submitted by a vendor, and has no significance standing alone. The WV-96 must be dated on or *after* the signature date on the vendor's quote or agreement, and must be signed by the *same persons* who signed the vendor's agreement. As a general rule, the vendor should sign first on any contract documents. If they refuse to sign the WV-96 Addendum, you should *not* sign their documents.

Most of the provisions of the WV-96 Addendum are not negotiable. This is particularly true when the WV-96 has been made a mandatory part of an RFP or RFQ – in which case *none* of its provisions are negotiable. Therefore, when a vendor objects to certain items in the WV-96, please *do not* amend, retype or otherwise alter the Addendum (or allow them to do so), and *do not* sign any Addendum that has been altered without the prior written approval of the Purchasing Division and me. Instead, you should request that the vendor submit their objections and any proposed alternative language to you in writing, and forward them to me for review, using one of the following procedures:

1. If the final contract will be awarded through the Purchasing Division, the state Buyer should send me a copy of the Purchasing file, with all relevant documents such as the RFP or RFQ, the vendor's quote, their proposed terms and conditions, and their written objections to the WV-96 with proposed alternative language, if any.

(OR)

2. If the contract will be issued under an agency's delegated purchasing authority, the agency procurement officer should send me copies of all relevant contract documents, including the vendor's quote, their proposed terms and conditions, and their written objections to the WV-96 with proposed alternative language, if any.

Due to legal requirements for the procurement of contracts over \$25,000, I cannot accept a request from an agency procurement officer to negotiate a WV-96 for a contract to be issued by the Purchasing Division. Additionally, please *do not* tell vendors to contact me directly. Without the relevant contract documents to place their issues into context, it is impossible for me to negotiate any resolution. It is also a waste of the agency's money, because I must bill for my time spent dealing with such matters. Once I have received the necessary information from you, I can usually reach a quick resolution with the vendor.

When dealing with these issues, we will normally require the name of the contact person who has the authority to negotiate and approve terms for the vendor. Usually this is a corporate attorney and not the sales person with whom you have been dealing. You should not attempt to negotiate the terms of the WV-96 Agreement Addendum with a vendor. Once an agreement has been negotiated, we will send copies of the approved terms to you or to the Purchasing Division for signature.

In some instances we have negotiated master terms and conditions with a vendor (such as IBM, Oracle or Microsoft, for example) that eliminate the need for a WV-96 Agreement Addendum. If you are told by a vendor that they have reached an agreement with the Attorney General's Office, ask to see that agreement *in writing*. You may call me to confirm such an agreement before signing any documents.

If you have any questions, I may be reached by telephone at (304) 558-2021, by fax at (304) 558-0140, or by e-mail at dawn.warfield@wvago.gov.

DEW/sc
Attachment (WV-96)