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July 19, 2019

**Re: Letter to Contractors/Vendors Regarding Georgia College Contract Requirements**

Dear Contractor/Vendor:

As a public institution and an instrumentality of the state of Georgia, Georgia College & State University is subject to many regulations that prevent us from entering into certain contracts, or agreeing to certain contractual provisions. While these rules may occasionally make the process of negotiating a contract with certain Vendors more difficult, these rules are not unique to Georgia College; they apply to all the other public colleges and universities in Georgia. In fact, many, if not most, public institutions of higher education throughout the United States are subject to similar restrictions.

Please see below for a non-exhaustive list of Georgia College contract requirements.

**1. Legal Name of Georgia College**

The correct legal name of Georgia College is “Georgia College & State University”; however, Georgia College’s name as indicated on all contracts should read “Board of Regents of the University System of Georgia by and on behalf of Georgia College & State University.” As, Georgia College & State University is a unit of the Board of Regents of the University System of Georgia, and is not a separate legal entity. Using names such as “Georgia College & State University,” “Georgia College” or the name of a college or department within the university is not appropriate for contracts.

**2. Indemnities; Hold Harmless; Assumption of Liability**

State agencies are prohibited from agreeing to indemnify third parties. An indemnity is a contractual clause by which a contractor may ask that the University defend or hold it harmless against any claims of other persons who might suffer injury as a result of something that happens while the parties are carrying out their duties under the contract.

The Georgia Attorney General has determined that public agencies may not enter into agreements indemnifying contractors, or any other entity, against third party claims as such an agreement would act against the interest of the state. Specifically, indemnification provisions have been determined to violate the prohibition against pledges of the State’s credit and the prohibition against gratuities by the State (Ga. Const. Art. VII, Sec. IV, Par. VIII; Ga. Const. Art. III, Sec. VI, Par. VI; 1980 Op. Att’y Gen. 80-67; Op. Att’y Gen. 74-115). Indemnification provisions have also been determined to be invalid as unauthorized

attempts to contractually waive the State's sovereign immunity (1980 Op. Att'y Gen. 80-67), and possibly violate the Georgia State Tort Claims Act (GSTCA), O.C.G.A. § 50-21-20 et seq.

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 the University to defend the contractor against third party claims. If a contract clause has the effect of creating an indemnity, we would not be able to agree to it even though the word “indemnity” has been removed.

**Georgia College does not enter into contracts that obligate it to indemnify or hold harmless a contractor “to the extent permitted by law.”** There are two reasons for this: (1) From our standpoint, we know that the extent to which the law permits us to indemnify contractors is to no extent whatsoever, so it would be disingenuous for us to imply in a contract that there might be some set of circumstances under which we would defend the contractor against third-party claims – we will not agree to a contractual obligation that we know we cannot perform; (2) The “extent” clause is simply an invitation to litigate the matter in the event a third-party claim arises, and we prefer not to enter into agreements that invite litigation.

The first constitutional provision provides that the credit of the State shall not be pledged or loaned to any individual, company, or association. Debt as used in the constitution is defined in terms of an annual budget cycle that relies on annual appropriations of the legislature. Under this definition, a “pledge” would include agreeing to obligations of funds beyond the current fiscal year. The second constitutional provision relates to the “gratuities clause” which prohibits state entities from granting any donation or gratuity (gift) to a third party or forgiving any debt or obligation owed to the public. The gratuities clause essentially requires that the state entity receive a substantial benefit for the grant or use of its assets (whether using property or personnel). Finally, by virtue of the doctrine of sovereign immunity, suit may not be maintained in the courts against a state entity without the express consent of the State.

**Please do not ask us to ignore this rule.** As the University lacks the contractual authority to enter into a contract containing an indemnity clause any person who is signing such a document on the University's behalf signs it without authority to do so. We do not ask our administrators to expose themselves to personal liability by signing contracts they know cannot be enforced. The Attorney General has taken the position that it is the sole legal advisor for the state and state entities may not agree to be represented by third parties even when the matter involves the third party defending its patent rights.

Ultimately, we find that the indemnity issue is seldom a problem once contractors understand that we cannot provide indemnities, and why. If you think about what an indemnity is, it starts to look a lot like a policy of liability insurance. While the University cannot offer its contractors indemnities, there are many insurance companies that exist for precisely that purpose.

### 3. Insurance

Many contractors ask for clauses that define the manner in which the University insures itself. As a state instrumentality, the University is covered under the Georgia State Tort Claims Act (GSTCA), O.C.G.A. § 50-21-20 et seq., in which the State of Georgia waives its sovereign immunity as to covered claims, but retains it as to other claims.

The GSTCA works in much the same way as liability insurance, or self-insurance. For all the types of claims that are covered under the GSTCA, coverage is provided at a limit of \$1,000,000 per person and \$3,000,000 per occurrence. GSTCA coverage is administered by the Georgia Department of Administrative Services, Risk Management Division.

The GSTCA is different from liability insurance in that we cannot adjust the coverage limits upward or downward; the limits are set by law. Also, because it is not insurance in the conventional sense, we cannot add contractors as additional insured parties.

#### **4. Automatic Renewals**

Contracts may not allow for automatic renewals when state funds are/would be obligated in subsequent fiscal years (1974 Atty. Gen. Op. 74-115). Contracts may be renewed at the sole discretion of Georgia College. The Attorney General has taken the position that a contract may be renewed prior to the end of the fiscal year if all of the funds are available and are unencumbered during that same fiscal year (1980 Atty. Gen. Op. 80-163).

#### **5. Multiyear Contracts**

Pursuant to O.C.G.A. Sec. 50-5-64, some agreements that cross the fiscal year boundary must be on the Department of Administrative Services' Installment Purchase Form. Payment of interest is generally prohibited, but use of the Standard Installment Purchase Agreement Form allows for the payment of interest (note that this is the only statutory authority for payment of interest - Georgia College may not otherwise agree to pay interest).

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 Georgia College, we cannot presume by contract to commit the General Assembly to doing so. That power belongs to the General Assembly, exclusively. Consequently, we cannot enter into contracts that commit funds from future years' appropriations.

This does not mean that we cannot enter into any multiyear contracts. The Department of Administrative Services may enter into multiyear contracts as provided in O.C.G.A. Sec. 50-5-64. Escape clauses have been deemed to be insufficient if effectuated by state agencies other than the Department of Administrative Services. However, certain contracts such as those that do not require funding, sponsorship contracts, or contracts that are funded through non-public sources of money, in some circumstances, may be multiyear agreements. Multi-year real property leases are also allowed.

#### **6. Unliquidated (or Unknown) Expenses**

We cannot presume that we would have funds available to pay for claims that might exceed our available funding. Certainly, indemnities would fall into this category – who can say what it might cost to fund an indemnity that has no cap? But, the same thing is true as to any other potential expense that cannot be calculated, such as paying a contractor's attorneys' fees, paying for add-ons which are not priced in the contract, paying for unknown cost increases during the life of the contract, and so on.

#### **7. Taxes, Interest, Liquidated Damages, Late Payment/Cancellation Charges, litigation**

## costs/Attorney Fees

- **ATTORNEY'S FEES/COSTS.** Georgia College will not agree to pay attorney's fees or costs. The rationale is that such a payment would be a violation of the constitutional gratuities' clause.
- **DAMAGES.** The inclusion of indirect, incidental or inconsequential as types of damages payable by Georgia College is not acceptable. The UCC regards these as distinguishable from consequential damages because they are usually meant to include out of pocket expenses directly attributable to the breach (i.e., travel expenses).
- **INTEREST.** Georgia College will not agree to pay interest. The Attorney General has advised Georgia College that payment of interest would be prohibited by the gratuity's clause of the constitution and that Georgia College lacks statutory authority to agree to the payment of interest. Atty. Gen. Position Paper dated August 8, 1978; Bently v. State Board of Examiners, 152 Ga. 836 (1922).
- **LATE PAYMENT/CANCELLATION CHARGES.** Georgia College does not agree to pay late payment charges. This policy stems from an opinion of the Attorney General that late payment charges are in the nature of penalty/gratuity, which the State is constitutionally prohibited from paying.
- **TAXES.** The State is exempt from most taxes and, generally, will not agree to contract language, which requires the payment of taxes. Georgia College will not agree to reimburse the supplier for the payment of taxes. However, Georgia College will agree to language that states, "Georgia College will pay taxes lawfully imposed upon it."

## 8. Credit Agreements

The Georgia Constitution prohibits pledges of the state's credit. Consequently, the Board of Regents 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. Other state agencies do not borrow money. **Please do not ask us to fill out credit applications in conjunction with contracts.** We simply cannot do that.

## 9. Interest

Georgia College will not agree to pay interest. The Attorney General has advised the payment of interest would be prohibited by the gratuity's clause of the constitution and that Georgia College lacks statutory authority to agree to the payment of interest. Atty. Gen. Position Paper dated August 8, 1978; Bently v. State Board of Examiners, 152 Ga. 836 (1922).

## 10. Waivers of Jurisdiction and Service; Arbitration; Laws of Another State; Substantive Law

Georgia College cannot agree to submit to the laws or jurisdiction of another state, substantive law, waiver of formal service of process, or to binding arbitration. Such agreement would implicate the state's sovereign immunity and usurp the Georgia Attorney General's authority granted by the Georgia Constitution – indicating the Attorney General is the state's attorney for all purposes – including, management of litigation for all state agencies. Georgia College cannot supplant this authority by agreeing in advance to control the manner in which litigation would be managed in the event of a conflict or dispute. As a

result, venue for any action or dispute arising in contract shall be proper is Superior Court Fulton County, Georgia. O.C.G.A. § 50-21-1(b).

Any contract between the University and another party includes by implication the existing law of the state of Georgia. In the instance in which sovereign immunity may be waived by Georgia law, it is limited to contracts that include the law of Georgia. The state is liable only upon contracts authorized by law. When it enters into a contract, it does so voluntarily and authorizes its liability. To preserve its sovereign immunity, the University may not agree to waive provisions of Georgia law. A state agency cannot waive the State's sovereign immunity and assume liability for actions not covered by the Georgia State Tort Claims Act. Therefore, the University may not agree to submit to the laws or jurisdiction of another state, substantive law, waiver of formal service of process, binding arbitration or mandatory dispute resolution.

Georgia College will not agree to binding arbitration. Based on the State's sovereign immunity and the Attorney General's authority over civil litigation, Georgia College is not authorized to agree to binding arbitration. The Attorney General has exclusive authority and control over all matters of litigation or potential litigation involving State agencies, and neither the 1983 Georgia Constitution nor any Act of the General Assembly authorizes Georgia College to limit the type or scope of judicial action, or the result obtainable therefrom by the State. Provisions which effectively waive the right of the Attorney General to bring actions on behalf of the State are prohibited.

It does not mean, for example, that we would absolutely refuse to arbitrate a dispute if one arose, but simply that decisions of that nature are reserved for the Attorney General and we cannot sign a contract that would usurp this constitutional authority. We are, however, always willing to consider mediation as a non-binding dispute resolution alternative.

#### **11. Limitations of Liability**

Georgia College does not have the authority to prejudice the rights of the State to sue or otherwise enforce a contract by agreeing to a limit on or a waiver of liability. Provisions which effectively waive or limit the right of the Attorney General to bring actions on behalf of the State are prohibited. (also see Damages above).

#### **12. Confidentiality**

As a state institution, Georgia College is subject to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.). While many types of records are protected by the Family Educational Rights and Privacy Act (FERPA), the Health Insurance Portability and Accountability Act (HIPAA), and various exceptions contained within the Georgia Open Records Act, this Act gives any party the right to inspect and receive copies of most university records, including documents, contracts, and communications related to Georgia College's normal course of business. We cannot agree, for example, to provisions that attempt to prohibit Georgia College from releasing bid or contract documents, or the release of communications between Georgia College and a contractor/vendor, to any party that submits a request to inspect and obtain such records. If there are trade secrets or other proprietary information contained in records submitted to Georgia College, the proper process for exempting those records from release should be followed pursuant to the Georgia Open Records Act. Additionally, Georgia College generally considers pricing information to be subject to public disclosure. See *State Rd. & Tollway Auth. V. Elec. Transaction Consultants Corp.*, 306 Ga. App. 487 (2010).

**13. Assignment**

A contractor may not assign its right to payment without subjecting the third party to all of the defenses and claims the University would have against the contracting party. An assignment clause constitutes a waiver of defenses and recourse. Such a clause implicates allowance for a party to receive payment of state funds without providing a public service. Therefore, the University may not agree to an assignment clause.

**14. Acceleration**

Acceleration clauses implicate the State's obligation to operate within a fixed budget forcing the State to make payments for which no money has been appropriated or budgeted and are not due in a particular fiscal year.

**15. Do Not Hire**

A provision that the University will not hire a contractor's employees should be deleted on public policy grounds. The policy of Georgia College is to hire into each position the individual whose education and experience make him or her the person best able to perform the specific requirements of the job. Writing the proposed covenant into any of our contracts with service providers makes it impossible to carry out that public policy. The "best-qualified individual" may in any particular case be the service provider's present employee, and, consistent with the State policy, the University needs to be in a position to hire that person. Thus, the University will reject all such clauses as "a violation of Georgia public policy."

**16. Upfront Payments**

Georgia College is not authorized to make payment prior to receipt of goods/services. (Pursuant to the State of Georgia Accounting Procedures Manual, payables for normal operating expenditures should be recognized when the goods and services have been received. Accounting Manual Reference: Section: Vendor Management; Subsection: Payment Method).

**17. Ethics**

Offeror shall comply with the University System of Georgia Board of Regents Ethics Policy (Board Policy 8.2.18.1). Georgia College prohibits any form of discrimination, harassment or retaliation against or by any member of the faculty, staff, administration, student body, volunteers, or visitors based upon race, color, religion, sex, national origin, age, whistleblower status, disability, gender identity or expression, genetics, or any other characteristic protected by state or federal law. Offeror and Offeror's employees will be required to know and adhere to the Title IX policy.

**18. Contract clauses that impose obligations by reference**

Georgia College will not agree to contract provisions that incorporate additional obligations by reference, including but not limited to, references to policies located at a specific web address. Any and all terms of the contract which are modified or amended shall be binding upon either Party so long as such changes are agreed to in writing by the Parties and executed by the designated individuals authorized to amend or modify the contract.

**19. Best Effort Provisions, Warranties, and Guarantees**

Any provision that requires Georgia College to unconditionally assure or promise a certain

result or outcome. The Attorney General has advised that warranty provisions requiring State agencies to provide a warranty violate the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. The reason is that resources may have to be expended to satisfy such warranty or guarantee. Best efforts provisions have been held to be warranties and/or guarantees.

**20. Any provision requiring Georgia College to be bound by terms and conditions that are unknown at the time of signing the agreement.**

Unknown obligations may violate various laws such as the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. As a practical matter, entering into contracts that call for an unspecified sum of money to change hands make it extremely difficult to budget. Such provisions in an agreement would be void as a matter of law, and should be avoided at the time the agreement is entered.

**21. Patent and Copyright Indemnification**

The Attorney General has taken the position that it is the sole legal advisor for the state and state entities may not agree to be represented by third parties, even when the matter involves the third party defending its patent rights.

**22. Joint Ownership of Intellectual Property**

The State is constitutionally prohibited from becoming a joint owner or stockholder in or with any individual, company, association, or corporation. Therefore, Georgia College is prohibited from agreeing to joint ownership of intellectual property. (Ga. Const. Art. VII § IV, Para. VIII).

**23. Use of Georgia College Name, Symbols and Trademarks**

The name, logo, or trademark of Georgia College shall not be used by any independent business enterprise that is not under the complete control of the University System of Georgia, excluding approved Cooperative Organizations, to imply an official relationship with Georgia College. (Board of Regents Policy Manual 6.2)

**24. State Security/Background Checks**

Each USG institution shall review services provided by its suppliers and assess the risk when the services require regular interaction with students, employees, monies, sensitive or confidential data, or regular access to secured facilities containing critical institutional-level infrastructure. When an institution determines that background checks of suppliers' employees should be required, the institution must seek appropriate contractual protections, including requiring that the supplier obtain appropriate background checks for all such supplier employees and defend, indemnify, and hold harmless the Board of Regents of the University System of Georgia for failing to do so. Suppliers shall be fully responsible for implementing and enforcing all appropriate background check requirements. Additionally, suppliers maintain full responsibility for the actions of their employees and contractual provisions shall provide that suppliers shall defend, indemnify, and hold harmless the Board of Regents of the University System of Georgia for the actions of the suppliers' employees.

**25. Drug Free Workplace**

Pursuant to O.C.G.A. § 50-24-3 and § 50-24-4, Georgia College must include specific certifications regarding the provision of a drug free workplace and prohibition against

engaging in certain activities relating to unlawful drug-related activities. This language is non-negotiable.

**26. E-Verify**

Pursuant to O.C.G.A. § 13-10-91, a public employer shall not enter into a contract for the performance of services unless the contractor registers and participates in the federal work authorization program. If a supplier is providing services under a contract with a total compensation amount of \$2,500 or greater, (even if such services will be performed outside of the State of Georgia), Georgia College requires a notarized affidavit from the supplier attesting to the following:

- The affiant has registered with, is authorized to use, and uses the federal work authorization program;
- The user identification number and date of authorization for the affiant;
- The affiant will continue to use the federal work authorization program throughout the contract period; and
- The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

Additional information regarding the State’s E-Verify requirements can be found at:  
<http://www.audits.ga.gov/NALGAD/IllegalImmigrationReformandEnforcementAct.html>

There are a few other special rules that come up from time to time, but these are the rules that appear most often. Georgia College enters into hundreds of contracts every year, with a huge array of vendors and contractors from various fields. Georgia College has an impact worth millions of dollars a year on the local economy. Though the special rules that apply to public institutions can make doing business with us a little different, the value of a business relationship with Georgia College is well worth the effort for our vendors. On very rare occasions, these rules do prevent us from entering into a contract with a vendor, but the University works hard, and creatively, to find ways to work with vendors to build good business relationships while staying within the rules set forth for state agencies. Ultimately, we find that most of our vendors are willing to work just as hard, and just as creatively, to achieve the goal. We appreciate the understanding that all of our vendors show. If there is any further information that you need to help you understand the rules that govern Georgia College, please contact us at [contracts@gcsu.edu](mailto:contracts@gcsu.edu).

Respectfully,



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