



Tennessee Board of Regents

OFFICE OF GENERAL COUNSEL

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DEALING WITH IMPERMISSIBLE CLAUSES IN CONTRACTS

This document is intended to provide guidance in identifying impermissible clauses presented by the contractor and responding to them. If you have a clause that is very similar to one identified below, you may use the alternative language suggested without consulting with your legal counsel, as long as you use it exactly as it is written below. If the contractor won't accept the proposed alternative, or you feel that the proposed alternative doesn't really suit your needs, please consult with legal counsel regarding other possible alternatives.

1. Hold harmless / indemnification by the State.

Indemnification is the act of making compensation for loss or damage. For example, insurance is an indemnity against loss. If you have auto insurance, the company *indemnifies* you against loss. If the car is wrecked, the insurance company pays for your damages. In an indemnification or hold harmless clause, the contractor is asking TBR to insure that they will not suffer any loss related to the contract. The Tennessee Attorney General's Office has issued a number of opinions holding that hold harmless / indemnification agreements that call for the State to assume the risk of loss to another party is void and unenforceable. State agencies, such as TBR cannot agree to such a provision in a contract because they do not have any legal authority to do so.

EXAMPLE:

You (the School) shall, at your own expense, indemnify and, at the Company's option, defend the Company against any losses, damages or expenses (including, without limitation, reasonable attorneys' fees) arising from any claim, suit or proceeding brought by a third party against the Company arising out of a Customer Matter and shall pay any damages finally awarded or settlement amounts agreed upon to the extent based upon a Customer Matter (any of the foregoing indemnifiable matters, each a "Company Claim"), provided that you will not settle any Company Claim unless such settlement completely and forever releases the Company with respect thereto or unless the Company provides its prior written consent to such settlement. The Company agrees (i) to provide you with prompt written notice of any Company Claim and (ii) to provide such assistance as you may reasonably request, at your expense, in order to settle or defend any such Company Claim.

ALTERNATIVE:

Strike the entire paragraph above and add the following:

Each party shall be solely liable for payment of its portion of all claims, liability, costs, expenses, demands, settlements, or judgments resulting from negligence, actions or omissions of itself or those for whom it is legally responsible relating to or arising under this Agreement. Any and all monetary claims against the State of Tennessee, its officers, agents, and employees in performing any responsibility specifically required under the terms of this Agreement shall be submitted to the Board of Claims or the Claims Commission of the State of Tennessee and shall be limited to those provided for in T.C.A. § 9-8-307.

NOTE: This replaces the old “neither party” language.

2. Disclaimers of liability and/or limitations on amount or types of damages that the state may recover.

Disclaimers or waivers of various types of damages are clauses that limit the state’s available remedies in the event of a breach of the contract and/or injuries arising out of performance of the contract. The Attorney General has opined that these limitations of remedies waive the legal rights of the state and that no state agency has the authority to do this. Under Article I, § 17 of the state constitution, only the legislature has the authority to waive the legal rights of the state.

Recognizing that some acceptance of limitations of liability was necessary in order to do business in today’s world, the legislature adopted T.C.A. § 12-4-119, which allows the state to accept limitations of liability and limitations of warranty in contracts for personal services, professional services and consultant services if the limitation is no less than two (2) times the value of the contract. The limitation cannot include a limitation on damages for intentional torts, criminal acts or fraudulent conduct.

EXAMPLE:

12.2 Limitations of Liability. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL THE COMPANY OR ITS LICENSORS BE LIABLE TO YOU OR ANY OF YOUR AUTHORIZED USERS FOR ANY OF THE FOLLOWING TYPES OF LOSS OR DAMAGE ARISING IN ANY WAY OUT OF OR IN CONNECTION WITH THIS AGREEMENT, THE SOFTWARE, OR ASP SERVICES, WHETHER OR NOT THE COMPANY WAS ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE: (A) ANY LOSS OF BUSINESS, CONTRACTS, PROFITS, ANTICIPATED SAVINGS, GOODWILL OR REVENUE; (B) ANY LOSS OR CORRUPTION OF DATA; OR (C) ANY INCIDENTAL, INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES). IN NO EVENT SHALL THE COMPANY’S CUMULATIVE LIABILITY FOR ALL CLAIMS ARISING FROM OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE NATURE OF THE CLAIM, EXCEED THE AMOUNT OF FEES PAID BY YOU UNDER THIS AGREEMENT FOR THE PARTICULAR SOFTWARE, AND/OR ASP SERVICE WITH RESPECT TO WHICH THE RELEVANT CLAIM AROSE DURING THE TWELVE (12)-MONTH PERIOD IMMEDIATELY PRIOR TO THE EVENT, ACT OR OMISSION GIVING RISE TO SUCH LIABILITY. THIS LIMITATION OF LIABILITY IS INTENDED TO APPLY WITHOUT REGARD TO WHETHER OTHER PROVISIONS OF THIS AGREEMENT HAVE BEEN BREACHED OR HAVE PROVEN INEFFECTIVE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES THE COMPANY’S LIABILITY IS LIMITED TO THE GREATEST EXTENT PERMITTED BY LAW.

ALTERNATIVE:

12.2 Limitations of Liability. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL THE COMPANY OR ITS LICENSORS BE LIABLE TO YOU OR ANY OF YOUR AUTHORIZED USERS FOR ANY OF THE FOLLOWING TYPES OF LOSS OR DAMAGE ARISING IN ANY WAY OUT OF OR IN CONNECTION WITH THIS AGREEMENT, THE SOFTWARE, OR ASP SERVICES, WHETHER OR NOT THE COMPANY WAS ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE: (A) ANY LOSS OF BUSINESS, CONTRACTS, PROFITS, ANTICIPATED SAVINGS, GOODWILL OR REVENUE; (B) ANY LOSS OR CORRUPTION OF DATA; OR (C) ANY INCIDENTAL, INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES). IN NO EVENT SHALL THE COMPANY'S CUMULATIVE LIABILITY FOR ALL CLAIMS ARISING FROM OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE NATURE OF THE CLAIM, EXCEED THE AMOUNT OF **TWO (2) TIMES THE** FEES PAID BY YOU UNDER THIS AGREEMENT FOR THE PARTICULAR SOFTWARE, AND/OR ASP SERVICE WITH RESPECT TO WHICH THE RELEVANT CLAIM AROSE DURING THE TWELVE (12)-MONTH PERIOD IMMEDIATELY PRIOR TO THE EVENT, ACT OR OMISSION GIVING RISE TO SUCH LIABILITY. THIS LIMITATION OF LIABILITY IS INTENDED TO APPLY WITHOUT REGARD TO WHETHER OTHER PROVISIONS OF THIS AGREEMENT HAVE BEEN BREACHED OR HAVE PROVEN INEFFECTIVE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES THE COMPANY'S LIABILITY IS LIMITED TO THE GREATEST EXTENT PERMITTED BY LAW. **IN NO EVENT SHALL THIS LIMITATION OF LIABILITY APPLY TO INTENTIONAL TORTS, CRIMINAL ACTS OR FRAUDULENT CONDUCT.**

3. Disclaimers of express or implied warranties.

A. Disclaimers of warranty limit the circumstances under which the contractor will be in breach of the contract by waiving its responsibility for the quality of the goods or services to be provided under the contract. The risk of performance then falls on the State, and the State is essentially purchasing the product "as is". Disclaimers of warranty are the same as a limitation of liability and, as explained above, can only be accepted to the extent allowed by T.C.A. § 12-4-119.

EXAMPLE:

12.1 Disclaimer of Warranty. EXCEPT AS EXPRESSLY AND SPECIFICALLY PROVIDED IN ANY ATTACHED ORDER FORM(S): (A) THE SOFTWARE AND ALL PORTIONS THEREOF, AND ANY SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE." TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE COMPANY AND ITS LICENSORS AND SUPPLIERS DISCLAIM ALL OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, SYSTEM INTEGRATION, DATA ACCURACY, MERCHANTABILITY, TITLE, NON-INFRINGEMENT AND/OR QUIET ENJOYMENT; (B) NEITHER THE COMPANY NOR ITS LICENSORS WARRANT THAT THE FUNCTIONS OR INFORMATION CONTAINED IN THE SOFTWARE OR ASP SERVICES WILL MEET ANY REQUIREMENTS OR NEEDS YOU MAY HAVE, OR THAT THE SOFTWARE OR ASP SERVICES WILL OPERATE ERROR FREE OR WITHOUT INTERRUPTION, OR THAT ANY DEFECTS OR ERRORS IN THE SOFTWARE OR ASP SERVICES WILL BE CORRECTED, OR THAT THE SOFTWARE OR ASP SERVICES IS COMPATIBLE WITH ANY PARTICULAR COMPUTER SYSTEM OR SOFTWARE; AND (C) THE COMPANY AND ITS LICENSORS MAKE NO GUARANTEE OF ACCESS TO OR OF ACCURACY OF THE CONTENT CONTAINED IN OR ACCESSED THROUGH THE SOFTWARE OR ASP SERVICES. WITHOUT LIMITING THE FOREGOING, YOU ACKNOWLEDGE THAT THE ASP SERVICES AND/OR THE SOFTWARE ARE NOT DESIGNED OR LICENSED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE CONTROLS (INCLUDING, OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION/COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, SURGICAL OR MEDICAL FACILITIES, LIFE SUPPORT OR WEAPONS SYSTEMS) AND THAT THE COMPANY SPECIFICALLY

DISCLAIMS ANY EXPRESS OR IMPLIED REPRESENTATION, WARRANTY OR CONDITION OF FITNESS FOR SUCH PURPOSES.

ALTERNATIVE:

12.1 Disclaimer of Warranty. EXCEPT AS EXPRESSLY AND SPECIFICALLY PROVIDED IN ANY ATTACHED ORDER FORM(S): (A) THE SOFTWARE AND ALL PORTIONS THEREOF, AND ANY SERVICES ARE PROVIDED “AS IS” AND “AS AVAILABLE.” TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE COMPANY AND ITS LICENSORS AND SUPPLIERS DISCLAIM ALL OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, SYSTEM INTEGRATION, DATA ACCURACY, MERCHANTABILITY, TITLE, NON-INFRINGEMENT AND/OR QUIET ENJOYMENT; (B) NEITHER THE COMPANY NOR ITS LICENSORS WARRANT THAT THE FUNCTIONS OR INFORMATION CONTAINED IN THE SOFTWARE OR ASP SERVICES WILL MEET ANY REQUIREMENTS OR NEEDS YOU MAY HAVE, OR THAT THE SOFTWARE OR ASP SERVICES WILL OPERATE ERROR FREE OR WITHOUT INTERRUPTION, OR THAT ANY DEFECTS OR ERRORS IN THE SOFTWARE OR ASP SERVICES WILL BE CORRECTED, OR THAT THE SOFTWARE OR ASP SERVICES IS COMPATIBLE WITH ANY PARTICULAR COMPUTER SYSTEM OR SOFTWARE; AND (C) THE COMPANY AND ITS LICENSORS MAKE NO GUARANTEE OF ACCESS TO OR OF ACCURACY OF THE CONTENT CONTAINED IN OR ACCESSED THROUGH THE SOFTWARE OR ASP SERVICES. HOWEVER, IN NO EVENT SHALL THE COMPANY’S LIABILITY BE LESS THAN TWO (2) TIMES THE FEES PAID BY YOU UNDER THIS AGREEMENT. WITHOUT LIMITING THE FOREGOING, YOU ACKNOWLEDGE THAT THE ASP SERVICES AND/OR THE SOFTWARE ARE NOT DESIGNED OR LICENSED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE CONTROLS (INCLUDING, OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION/COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, SURGICAL OR MEDICAL FACILITIES, LIFE SUPPORT OR WEAPONS SYSTEMS) AND THAT THE COMPANY SPECIFICALLY DISCLAIMS ANY EXPRESS OR IMPLIED REPRESENTATION, WARRANTY OR CONDITION OF FITNESS FOR SUCH PURPOSES. IN NO EVENT SHALL THIS LIMITATION OF LIABILITY APPLY TO INTENTIONAL TORTS, CRIMINAL ACTS OR FRAUDULENT CONDUCT.

4. Limitation on time within which State may bring suit.

The contractor may try to limit the time within which the state may bring suit under the contract. Limiting the time within which the State may bring suit is an impermissible waiver of sovereignty; only the legislature can say how and when the State shall sue or be sued.

EXAMPLE:

Any suit to enforce the terms of this Agreement must be brought within one (1) year from the date of termination of the Agreement.

ALTERNATIVE:

There is no alternative for this clause. You must require that it be deleted.

5. No termination date.

Every agreement must contain a provision setting out the term. The State operates on a balanced budget system. Each contract is subject to the sufficient appropriation of

funds. If a contract extends beyond the fiscal year, the right to terminate if funds are not appropriated must be specifically included. State purchasing procedures permit certain contracts to extend for up to sixty (60) months. Tennessee Department of Finance Rule 0620-3-3-.07 (5). However, ONLY real property procedures permit agreements in excess of 5 years.

EXAMPLE:

The term of this Agreement shall be one (1) year commencing upon execution and shall renew automatically for additional one year terms.

ALTERNATIVE:

The term of this Agreement shall be one (1) year commencing upon execution and shall renew automatically for additional one year terms, unless notice of termination is given by School, as provided for herein. Under no circumstances shall the term of this contract extend beyond five (5) years from the effective date.

OR

The term of this Agreement shall be one (1) year commencing upon execution and shall renew automatically for additional one year terms, unless notice of termination is given by School. Such notice of termination must be given in writing no less than thirty (30) days prior to renewal date.

6. Advanced deposits or payments required.

We cannot agree to make such deposits or payments. TCA § 12-4-703 requires payment to be made for products or services when delivered or provided. Such provisions must be deleted

7. State shall pay any taxes associated with the contract.

As State agencies, TBR institutions are not liable for the payment of Tennessee property tax or sales or use taxes. (TCA §§ 67-5-203 and 67-6-322.) As there are a great many other taxes (federal, foreign, other states) that may come into play, the preferred language would be to limit the school's liability for taxes to those "required by law".

EXAMPLE:

5. Taxes. It is the Customer's responsibility to pay all taxes or other government charges relating to the Services, transfer, use, ownership, service, or possession of any equipment relating to this Agreement.

ALTERNATIVE:

5. Taxes. To the extent required by law, it is the Customer's responsibility to pay all taxes or other government charges relating to the Services, transfer, use, ownership, service, or possession of any equipment relating to this Agreement.

8. Assessment of penalties and liquidated damages against the State.

The extent to which the state can be held liable for contract damages is strictly defined by statute. T.C.A. § 9-8-307(d) provides that the state shall be liable for actual damages only. This statute also prohibits the payment by the state of attorneys' fees and litigation expenses, punitive damages, liquidated damages and penalties. We cannot agree to clauses that provide for payment of any of these.

EXAMPLE:

15.7 Remedies. The parties agree that any breach of this Agreement would cause irreparable injury for which no adequate remedy at law exists; therefore, the parties agree that equitable remedies, including without limitation, injunctive relief and specific performance, are appropriate remedies to redress any breach or threatened breach of this Agreement, in addition to other remedies available to the parties. All rights and remedies hereunder shall be cumulative, may be exercised singularly or concurrently and shall not be deemed exclusive except as provided in Sections 9, 12 and 13. If any legal action is brought to enforce any obligations hereunder, the prevailing party shall be entitled to receive its legal fees, court costs and other collection expenses, in addition to any other relief it may receive.

ALTERNATIVE:

Delete the original paragraph entirely and substitute:

15.7 Remedies. *Any and all monetary claims against the State of Tennessee, its officers, agents, and employees in performing any responsibility specifically required under the terms of this Agreement shall be submitted to the Board of Claims or the Claims Commission of the State of Tennessee and shall be limited to those provided for in T.C.A. § 9-8-307.*

9. Binding arbitration clause.

In order to save costs of litigation, arbitration has become a popular method of contract resolution. It involves a neutral arbitrator and the contract parties. Only the Attorney General can enter into a settlement agreement that is binding upon the State. TCA §§ 8-6-301 and 20-13-103. Therefore, the institution can NEVER agree to binding arbitration. The institution may agree to participate in arbitration or mediation, should it choose to do so, as long as no agreement reached during arbitration is binding unless approved by the Tennessee Attorney General.

EXAMPLE:

15.3 Conflict Resolution. Except with respect to controversies or claims regarding either party's Confidential Information or proprietary rights under this Agreement, in the event any controversy or claim arises in connection with any provision of this Agreement, the parties shall try to settle their differences amicably between themselves by referring the disputed matter to their respective designated representatives for discussion and resolution. Either party may initiate such informal dispute resolution by sending written notice of the dispute to the other party, and if such representatives are unable to resolve such dispute within thirty (30) days of initiating such negotiations, either party may seek the remedies available to such party under law. Notwithstanding the foregoing, nothing in this Section 15.3 will be construed to limit either party's rights under Sections 9 and 15.7.

ALTERNATIVE:

15.3 Conflict Resolution. Except with respect to controversies or claims regarding either party's Confidential Information or proprietary rights under this Agreement, in the event any controversy or claim arises in connection with any provision of this Agreement, the parties shall try to settle their differences amicably between themselves by referring the disputed matter to their respective designated representatives for discussion and resolution. Either party may initiate such informal dispute resolution by sending written notice of the dispute to the other party, and if such representatives are unable to resolve such dispute within thirty (30) days of initiating such negotiations, either party may seek the remedies available to such party under law. Notwithstanding the foregoing, nothing in this Section 15.3 will be construed to limit either party's rights under Sections 9 and 15.7. The provisions of this section are subject to the requirements of T.C.A. §8-6-301 and T.C.A. § 20-13-103.

10. Award of attorneys' fees and costs in case of breach by the State.

We never agree to pay attorneys' fees or other expenses of litigation, other than court costs. TCA § 9-8-307(d). See No. 8, above.

11. Governing law other than Tennessee; consent to jurisdiction outside Tennessee.

The majority of contracts will contain a provision stating that the contract will be construed under the laws of the state of the other party. Such a provision would be considered a waiver of sovereign immunity, which we have no legal authority to do. We cannot agree to be subject to any law but that of the State of Tennessee.

12. Provisions requiring payment of interest, late charges or finance charges in excess of Tennessee Prompt Pay Act.

The Tennessee Prompt Pay Act, TCA § 12-4-701, et seq., governs the amounts payable if the State makes a late payment under a contract. Interest shall be 1 1/2% per month beginning on the day after payment is due. If the contract does not provide for a date that payment is due, § 12-4-703 provides that payment is due within forty-five (45) days after receipt of the invoice. If interest remains unpaid after sixty (60) days, it is added to the principal, and interest on subsequent late payments is calculated on remaining

principal plus accrued interest. The institution is responsible for the payment of late interest from its own funds and may not seek an additional appropriation to pay the amount.

EXAMPLE:

1. A. The total Contract Price for JCI's Services is \$20,000. This amount will be paid to JCL in monthly installments. All payments will be due and payable within 30 days of the invoice date and such timely payment by Customer shall be a condition precedent to JCI's obligation to perform its Services. A penalty of two percent (2%) of the amount due per month shall accrue for payments received after the payment due date.

ALTERNATIVE:

1. A. The total Contract Price for JCI's Services is \$20,000. This amount will be paid to JCL in monthly installments. All payments will be due and payable within 30 days of the invoice date and such timely payment by Customer shall be a condition precedent to JCI's obligation to perform its Services. A penalty of two percent (2%) of the amount due per month, or the amount specified in T.C.A. §§ 12-4-701, et seq, whichever is less, shall accrue for payments received after the payment due date.

Note: If the contract is with a federal agency, the Federal Debt Collection Act, 31 U.S.C. Section 3717, may control the payment of late interest charges.

13. Provisions requiring confidentiality and nondisclosure that violate the Tennessee Open Records Act, TCA § 10-7-101, et. seq.

Contracts will often include provision requiring the institution to keep all materials and information related to the contract confidential. There are several statutes that require state entities to disclose information in their possession or control. The Public Records Act, T.C.A. Title 10, Chapter 7, is the law of general application. T.C.A. § 10-7-504(7) provides that all proposals, evaluations and related records pertaining to personal, professional and consultant contracts are open for public inspection once the evaluation by the State is complete. T.C.A. § 12-3-213 provides that all records of purchases are open to the public. We cannot agree to keep records confidential if we are required by law to disclose them.

EXAMPLE:

11. CONFIDENTIALITY

11.1 Nondisclosure and Nonuse. Each party will keep the other party's Confidential Information confidential. Specifically, each party receiving Confidential Information agrees not to disclose such Confidential Information except to those directors, officers, employees and agents of such party (i) whose duties justify their need to know such information and (ii) who have been clearly informed of their obligation to maintain the confidential, proprietary and/or trade secret status of such Confidential Information. Each party acknowledges that it has all requisite authority under applicable laws to provide the other party with access to Confidential Information. Each party receiving Confidential Information further agrees that it will not use such Confidential Information except for the purposes set forth in this Agreement. Each party receiving Confidential Information shall treat such information as strictly confidential, and shall use the same care to prevent disclosure of such information as such party uses with respect to its own confidential and

proprietary information, provided that in any case it shall not use less than the care a reasonable person would use under similar circumstances.

11.2 Notice. The receiving party will promptly notify the disclosing party in the event the receiving party learns of any unauthorized possession, use or disclosure of the Confidential Information and will provide such cooperation as the disclosing party may reasonably request, at the disclosing party's expense, in any litigation against any third parties to protect the disclosing party's rights with respect to the Confidential Information.

11.3 Terms of Agreement. Except as otherwise provided by law, neither party shall disclose the terms of the Agreement to any third party; provided, however, that either party may disclose the terms of this Agreement to its professional advisers, or to any potential investor or acquirer of a substantial part of such party's business (whether by merger, sale of assets, sale of stock or otherwise), provided that such third party is bound by a written agreement or legal duty on terms at least as strict as those set out in this Section 11 to keep such terms confidential.

11.4 Exceptions to Confidential Treatment. Notwithstanding the foregoing, the preceding provisions of this Section 11 will not apply to information that: (i) is publicly available or in the public domain at the time disclosed; (ii) is or becomes publicly available or enters the public domain through no fault of the recipient; (iii) is rightfully communicated to the recipient by persons not bound by confidentiality obligations with respect thereto; (iv) is already in the recipient's possession free of any confidentiality obligations with respect thereto at the time of disclosure; (v) is independently developed by the recipient; or (vi) is approved for release or disclosure by the disclosing party without restriction. Each party may disclose Confidential Information to the limited extent necessary: (a) to comply with the order of a court of competent jurisdiction or other governmental body having authority over such party, provided that the party making the disclosure pursuant to the order will first have given notice to the other party and made a reasonable effort to obtain a protective order; (b) to comply with applicable law or regulation requiring such disclosure; or (c) to make such court filings as may be required to establish a party's rights under this Agreement. Further, if the Company is required by applicable law, legal process or government action to produce information, files, documents or personnel as witnesses with respect to these TOS or the Services provided to you by the Company, you shall reimburse the Company for any professional time and expenses including reasonable external or internal legal costs incurred to respond to the request, unless the Company is a party to the proceeding or the subject of the investigation.

ALTERNATIVE:

11. CONFIDENTIALITY

11.1 Nondisclosure and Nonuse. Each party will keep the other party's Confidential Information confidential. Specifically, each party receiving Confidential Information agrees not to disclose such Confidential Information except to those directors, officers, employees and agents of such party (i) whose duties justify their need to know such information and (ii) who have been clearly informed of their obligation to maintain the confidential, proprietary and/or trade secret status of such Confidential Information. Each party acknowledges that it has all requisite authority under applicable laws to provide the other party with access to Confidential Information. Each party receiving Confidential Information further agrees that it will not use such Confidential Information except for the purposes set forth in this Agreement. Each party receiving Confidential Information shall treat such information as strictly confidential, and shall use the same care to prevent disclosure of such information as such party uses with respect to its own confidential and proprietary information, provided that in any case it shall not use less than the care a reasonable person would use under similar circumstances.

11.2 Notice. The receiving party will promptly notify the disclosing party in the event the receiving party learns of any unauthorized possession, use or disclosure of the Confidential Information and will provide such cooperation as the disclosing party may reasonably request in any litigation against any third parties to protect the disclosing party's rights with respect to the Confidential Information.

(Original 11.3 was deleted entirely and 11.4 renumbered)

11.3 Exceptions to Confidential Treatment. Notwithstanding the foregoing, the preceding provisions of this Section 11 are subject to the requirements of T.C.A. Title 10, Chapter 7 and any other provisions of law pertaining to disclosure of state records. Further, the preceding provisions will not apply to information

that: (i) is publicly available or in the public domain at the time disclosed; (ii) is or becomes publicly available or enters the public domain through no fault of the recipient; (iii) is rightfully communicated to the recipient by persons not bound by confidentiality obligations with respect thereto; (iv) is already in the recipient's possession free of any confidentiality obligations with respect thereto at the time of disclosure; (v) is independently developed by the recipient; or (vi) is approved for release or disclosure by the disclosing party without restriction. Each party may disclose Confidential Information to the limited extent necessary: (a) to comply with the order of a court of competent jurisdiction or other governmental body having authority over such party

14. Multiple year contracts.

Tennessee is a balanced budget state. Funds for operation are appropriated on an annual basis. No contract may extend beyond the fiscal year in which it is executed unless it gives the state an express right to terminate in the event funds are not appropriated for the continuation of the agreement. Tennessee Constitution Article II, Sect. 24, Tennessee Department of Finance Rule 0620-3-3-.06 (3) (c).

15. Miscellaneous provisions that crop up from time to time.

A. The institution may not consent to the issuance of an injunction in the event of breach. An injunction against the State may only be issued pursuant to court order.

B. Travel expenses and per diem expenses may not exceed those set by TBR policy.

C. The risk of loss for goods in transit may not pass to the State before delivery unless the seller provides adequate insurance.

D. A contract may not be amended or extended if the termination date has passed. Once the contract has expired, there is no legal document remaining to either amend or extend.

D. The State may not be required to purchase or obtain insurance including liability insurance, performance bonds, or property insurance. TCA § 9-8-108 (a) (3) (C) and 9-8-108 (a) (4).

E. State may not be required to pay for labor not employed by the State unless the costs are covered in the contract.

16. “Belt and suspenders” provision

When you have an agreement in which there are several uses of the phrase “to the extent permitted by law” or some version thereof, the best practice is to add the following language at the end of the agreement, as a separate numbered paragraph.

____(school)_____ is a public institution of higher learning. As an entity of the State of Tennessee, under the Constitution and laws of the State of Tennessee it possesses certain rights and privileges, is subject to certain limitations and restrictions, and only has such authority as is granted to it under the Constitution and laws of the State of Tennessee. Notwithstanding any other provision to the contrary, nothing in this Agreement is intended to be, nor shall it be construed to be, a waiver of the sovereign immunity of the State of Tennessee or a prospective waiver or restriction of any of the rights, remedies, claims and privileges of the State of Tennessee. Moreover, notwithstanding the generality or specificity of any provision herein, the provisions of this Agreement as they pertain to ____ (school) _____ are enforceable only to the extent authorized by the Constitution and laws of the State of Tennessee.

(Revised September 2011)