



Brian P. Kemp
Governor

Gregory C. Dozier
Commissioner

March 16, 2021

To Whom It May Concern:

The Technical College is one of 22 public colleges comprising the Technical College System of Georgia (TCSG), a state agency within the executive branch of Georgia's government. As a public institution funded by state appropriated dollars, there are statutory and constitutional regulations governing our ability to enter into contracts. These regulations are not typically applicable to the private businesses with whom you may regularly contract, and therefore may require some deviation in the standardized contracts you normally utilize with your customers.

In order to assist you in understanding these regulations and hopefully minimize any delays in establishing business relationships with our Colleges, I have listed some of the most common contract provisions to which our Colleges are unable to agree. Please note that all property leases, licenses, and other contracts concerning real property are subject to approval by the State Properties Commission.

1. Indemnification/hold harmless clauses

As provided under O.C.G.A. § 50-5-64.1(a)(1)(A), contracts cannot contain terms and conditions that require the College to defend, indemnify, or hold harmless another person from any liability, personal injury, or property damage arising out of the performance of contractual duties (the term "person" also includes "corporations," *see* O.C.G.A. § 1-3-3 and O.C.G.A. § 1-2-1). Any indemnification clauses in a contract will be deemed void and the contract will otherwise be enforceable as if it did not contain such clause.

Moreover, the College is prohibited by the Georgia Constitution from agreeing to indemnification clauses as they have been determined to be violations of the prohibitions against gratuities and pledges of the state's credit, as well as unauthorized waivers of the state's sovereign immunity. Ga. Const. Art. VII, § IV, ¶ VIII; Ga. Const. Art. III, § VI, ¶ VI; 1980 Op. Att'y Gen. 80-67; 1974 Op. Att'y Gen. 74-115. *See also CSX Transp., Inc. v. City of Garden City*, 588 S.E.2d 688, 690 (Ga. 2003) (Supreme Court of Georgia holding that an indemnification clause by a state governmental entity is invalid where the entity lacks the express statutory power to waive its sovereign immunity).

2. Multi-year contracts/automatic contract renewals

Under the Georgia Constitution, the General Assembly has complete and absolute control over revenue appropriations and other sources of state funds from year to year. The College's financial obligations are dependent upon these appropriations made to it in its capacity as a

unit of TCSG. Colleges may not execute a contract for the purchase of goods or services which obligates future fiscal years' appropriations. As a result, the term of a contract with the College may not extend beyond the current fiscal year and it may not be automatically renewed for subsequent years. O.C.G.A. §§ 50-5-64.1(a)(2)(E); 1974 Op. Att'y Gen. 74-115. Unless the College has on hand, at the time of execution, the appropriated and dedicated funds sufficient to meet its entire obligation under the contract, the term of the contract must expire at the close of the fiscal year in which it is executed and the fiscal year for any renewals.

The College may enter into a contract that can be renewed at its discretion each fiscal year for multiple years; however, contracts must use specific renewal clauses and funding language which will provide for the termination of the contract if funds are not appropriated in following fiscal years. O.C.G.A. § 50-5-64. Colleges can also enter into multi-year contracts that do not require any funding.

3. Governing law/jurisdiction/venue in any state other than Georgia

There are three statutes that prohibit the College from agreeing to governing law or jurisdiction outside of Georgia. As provided under O.C.G.A. § 50-5-64.1(a)(2)(C), contracts cannot contain a term that provides for the contract to be construed in accordance with the laws of another state. Georgia law also requires that any actions or disputes be brought in the superior court of Fulton County, Georgia. O.C.G.A. § 50-5-64.1(a)(2)(B); O.C.G.A. § 50-21-1(b). Finally, state law requires that all tort actions against Georgia under the Georgia Tort Claims Act be brought only in the state court or superior court of the county in which the alleged loss occurred. O.C.G.A. § 50-21-28. Tort actions based on alleged losses sustained outside of Georgia must be brought in the Georgia county of residence of the employee or official upon whose actions the claim is based. *Id.*

4. The Georgia Attorney General represents the State of Georgia

The Attorney General represents the State of Georgia, and has exclusive authority and control over all matters of litigation or potential litigation involving state agencies. Ga. Const. Art. V, § III, ¶ IV; O.C.G.A. § 45-15-3; O.C.G.A. § 45-15-34. Therefore, contracts cannot contain a term that provides for a person other than the Georgia Attorney General to serve as legal counsel for the College. O.C.G.A. § 50-5-64.1(a)(2)(A).

5. Binding arbitration/waivers of jury trial

The College is unable to agree to any binding arbitration contract provisions. O.C.G.A. §§ 50-5-64.1(a)(2)(D). Furthermore, the College does not have the authority to agree to a waiver of a jury trial and pre-litigation contractual waivers of jury trial are not enforceable in Georgia. *Bank South, N.A. v. Howard*, 264 Ga. 339 (1994). Whether a matter involving the College is resolved through arbitration or is litigated before a jury is a decision within the exclusive purview of the Attorney General and cannot be contractually limited or altered by the College.

6. Confidentiality/non-disclosure agreements (NDAs)/trade secrets

The College is subject to the Georgia Open Records Act (O.C.G.A. § 50-18-70 *et seq.*) which allows any individual to view its records and to make copies for a fee, unless the records are specifically exempt from disclosure by state or federal law. While many of our student records

are exempt, the documents, contracts, electronic data, e-mails, and other writings generated or received by the College during normal business operations are subject to public disclosure. The contract with the College, by its very nature, is a public record. As such, the College cannot agree to contract provisions that restrict it from releasing information related to the contract or information that would otherwise be subject to public disclosure under the Act. O.C.G.A. § 50-5-64.1(a)(3).

There are provisions in the Act for maintaining the confidentiality of valid trade secrets that are required to be submitted to the College by law, regulation, bid, or request for proposal. These provisions are outlined in O.C.G.A. § 50-18-72(a)(34). Vendors who wish to protect their trade secrets are encouraged to review them carefully before submitting such information to the College.

7. Insurance

As a unit of TCSG, the College is self-insured under the State of Georgia's Department of Administrative Services – Risk Management Division against employer liability and tort claims (including comprehensive automobile liability) in the amount of one million dollars (\$1,000,000) per person and three million dollars (\$3,000,000) per occurrence. O.C.G.A. § 45-9-4. The College also maintains workers' compensation insurance for its employees through the State of Georgia, and accident insurance for its students through TCSG.

Contracts with the College cannot include provisions mandating that the College purchase insurance, increase policy limits, name a vendor or other third party as an additional insured party, or agree to additional insurance requirements. The College may be liable only for claims arising from certain negligent acts or omissions of its employees in the performance of the contract to the extent provided by the Georgia Tort Claims Act (O.C.G.A. § 50-21-20 *et seq.*).

8. Credit agreements

The College has no legal authority to borrow money as that right is exclusive to the State by the issuance of bonds through the Georgia State Finance and Investment Commission. As a result, the College cannot complete credit applications in conjunction with contracts. The College also cannot allow vendors to check its bank accounts, or authorize its bank to provide credit references or banking information to a vendor as this may appear to be a prohibited pledge of the State's credit. Ga. Const. Art. VII, § IV, ¶ VIII.

9. Interest/late payment charges/cancellation fees

The Georgia Constitution prohibits the granting any donation or gratuity or forgiving any debt or obligation owing to the public. Ga. Const. Art. III, § VI, ¶ VI(a). It also prohibits the granting or authorization of extra compensation to any public officer, agent, or contractor after the service has been rendered or the contract entered into. *Id.* The gratuities clause essentially requires that the College receive a substantial benefit for the grant or use of its assets. Furthermore, the Georgia Constitution prohibits the credit of the state from being pledged or loaned to any individual, company, corporation or association. Ga. Const. Art. VII, § IV, ¶ VIII. A "pledge" would include agreeing to obligations of funds beyond the current fiscal year. The Attorney General has advised that the payment of interest, late payment charges, and

contract cancellation/termination fees would violate these constitutional provisions and, therefore, the College is prohibited from agreeing to pay these fees.

10. Attorneys' fees/litigation costs/unknown damages, costs, or expenses

The legal principles that prohibit the College from agreeing to indemnification clauses or interest and late payment/cancellation charges also prevent it from entering into any contract that requires it to pay attorneys' fees, litigation costs, the cost of add-on goods or services not priced in the contract, unknown cost increases during the life of the contract, or any other expense that cannot be calculated at the time of contract execution. The College is specifically prohibited from agreeing to pay unknown damages of a third party.

11. Unknown terms and conditions

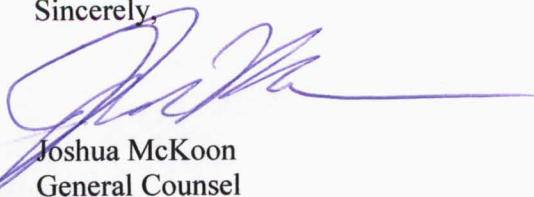
Unknown obligations may violate various laws such as the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. As a result, contracts cannot contain a term that requires the College to be bound by terms and conditions that are unknown at the time of signing such contract or which may be unilaterally changed. O.C.G.A. § 50-5-64.1(a)(1)(B). This includes contract provisions that incorporate additional obligations by reference, such as a hyperlink to terms and conditions located on the vendor's website.

12. Security interest/liens/UCC filings

O.C.G.A. § 20-4-14 establishes the powers and duties of TCSG and its Colleges. While the statute provides for the ability to contract and to receive and hold title to equipment, it does not confer, either expressly or by implication, the ability to grant a security interest in purchased equipment. Courts have consistently held that State of Georgia governmental entities "ha[ve] only such powers as the legislature has expressly, or by necessary implication conferred upon it." *Bentley v. Board of Medical Examiners*, 152 Ga. 836, 838 (1922); *Floyd County Board of Commissioners v. Floyd County Merit System Board*, 246 Ga. 44 (1980); *Bryant v. Employees Retirement System of Georgia*, 216 Ga. App. 737 (1995). As such, the College may not agree to contractual provisions that grant to a vendor a security interest in any real or personal property; and the College cannot agree to the filing of a UCC-1.

Our Colleges have had successful, long-standing business relationships with a variety of vendors who understand the contractual limitations of public institutions. Companies that do business with our Colleges recognize them as stable, responsible customers who are committed to meeting their financial obligations. We hope you are able to recognize our value as a customer and will accommodate the contractual restrictions in your negotiations with the College. If you have any questions or concerns regarding the College's ability to contract for your goods or services, you may contact the College's Vice President of Administrative Services or TCSG's Office of Legal Services.

Sincerely,



Joshua McKoon
General Counsel
Technical College System of Georgia