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Anatomy of an IT Procurement

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Requirements in Federally-Funded Procurements

- Grant Assurances
- Special Performance Requirements
- Other Federal Requirements: OMB Circulars and the *Common Rule*
- Federal Requirements: Minimum Intellectual Property Rights
- Procurement Standards and Requirements

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Market Research

Vendor Meetings, RFIs, Draft RFP, Commercial Practices, Vendor Summits, Constraints on Vendor Contacts?, Risks?

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Rights in Intellectual Property

- Patents, © copyrights, trademarks® and trade dress™, trade secrets
- Ownership v License Rights
- A problem: lots of rights but no documentation ordered!



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A State's IP Grant

Any software, research, reports, studies, data, photographs, negatives or other documents, drawings, models, materials, or work product of any type, including drafts, prepared by Contractor in the performance of its obligations under this contract (the "Work Product"), shall be the exclusive property of the State and all Work Product shall be delivered to the State by Contractor upon completion, termination, or cancellation of this contract. The rights of the State with respect to such Work Product shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use such Work.

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Typical License Rights

The state is granted an irrevocable, nontransferable, nonexclusive, paid-up, perpetual license to display publicly, perform copy, reproduce, prepare derivative works, and distribute any works, drawings, documents, data, or software delivered under this contract. For purposes of this license, the "State" includes any other person or entity performing services for the state to the extent required for use, modification, or maintenance of the works, drawings, documents, data, or software delivered under this contract.

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Liability Allocation

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One State's Indemnity

Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees and related costs, incurred as a result of any act or omission by Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract

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NASPO Ts and Cs

HOLD HARMLESS: The contractor shall release, defend, indemnify and hold harmless NASPO, the Participating States, and the Purchasing Entities, as well as the officers, agents and employees of NASPO, the Participating States and the Purchasing Entities, from and against any damage, cost or liability, including reasonable attorneys fees for any or all injuries to persons, property or claims for money damages arising from acts or omissions of the contractor, its employees or subcontractors or volunteers.

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NASPO Ts and Cs

PATENTS, COPYRIGHTS, ETC: The Contractor shall release, defend, indemnify, and hold harmless NASPO, the Participating States, and the Purchasing Entities, as well as the officers, agents and employees of NASPO, the Participating States and the Purchasing Entities, from liability of any kind or nature, including the Contractor's use of any copyrighted or uncopyrighted composition, process, patented or unpatented invention, article or appliance furnished or used in performance of this contract.

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IP Indemnification (cont.)

Contractor's [indemnity] obligation shall not extend to any combination of the product with any other product, system or method, unless the product or system is:

- (a) provided by Contractor or Contractor's subsidiaries or affiliates;
- (b) specified by the Contractor to work with the product;
- (c) reasonably required to use the product in its intended manner, and the infringement could not have been avoided by substituting another reasonably available product, system or method capable of performing the same function; or
- (d) reasonably expected to be used in combination with such other product, system or method.

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Measurement of Damages

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Seller Limitation of Liability

In no event shall Seller be liable for any costs, expenses, or damages arising under or related to this contract that exceed the amount paid for any deliverable causing the claim. Neither party shall be liable for direct, indirect, special, consequential, incidental, multiple, or punitive damages, including anticipated lost profits or lost revenues from business interruption.

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Seller Limitation of Liability (Typical Buyer Addition)

This Limitation of Liability shall not apply to claims or liability based on personal injury (including death), damage to tangible property, or intellectual property infringement.

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NASPO Ts and Cs (Cont'd)

WARRANTY: The contractor acknowledges that the Uniform Commercial Code applies to this master price agreement. In general, the contractor warrants that: (a) the product will do what the salesperson said it would do . . . (d) the product will be suitable for any special purposes that the Purchasing Entity has relied on the contractor's skill or judgment to consider when it advised the Purchasing Entity about the product, (e) the product has been properly designed and manufactured . . . The contractor agrees to warrant and assume responsibility for each hardware, firmware, and/or software product (hereafter called the product) that it licenses, or sells, to the Purchasing Entity under this master price agreement.

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Seller Warranty Disclaimer

NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE, IS PROVIDED HEREUNDER.

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NASPO Ts and Cs (Cont'd)

TERMINATION: Unless otherwise stated in the solicitation, any contract entered into as a result of this solicitation may be terminated by either party upon 60-days notice, in writing, prior to the effective date of the termination. Further, any Participating State may terminate its participation upon 30-days written notice, unless otherwise limited or stated in the special terms and conditions of the solicitation. Any termination under this provision shall not effect the rights and obligations attending orders outstanding at the time of cancellation, including any right of any Purchasing Entity to indemnification by the Contractor, rights of payment for goods/services delivered and accepted, and rights attending any warranty or default in performance in association with any order.

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Balancing Risk . . .

<p><u>Limit Liability</u></p> <ul style="list-style-type: none"> • No alternative source e.g. no time • Government Immunity Limits? • Known contractor • Consistent with Commercial practice 		<p><u>Do Not Limit</u></p> <ul style="list-style-type: none"> • Alternative sources within time required • Contractor in best position to control risk • Commercial-risks that are insurable
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Who Decides?

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Solicitation Issues

- Funding and Contingency
- Managing Change in Scope and Requirements
 - Changes Provisions
 - Use of Allowances
- How to structure the negotiation: the purposes of negotiation



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Solicitation Issues (Cont'd)

- Proposal and Discussions
 - Proposing Exceptions to Ts and Cs
 - Responsiveness and RFPs
 - State Amenability to Exceptions
 - Clarifications and Discussions
 - Scope/Adequacy of Discussions
 - Proposal Revisions and BAFOs
- Post-award Discussions

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Conclusions About Practices Among States



Practice from here To Here
Exceptions → Nonresponsive	Exceptions permitted, but some states consider during evaluation
Inflexibility in IP negotiation	Willingness to negotiate IP rights
No limitation on liability	Will negotiate overall caps
Will not exclude damages	Consequential, indirect, incidental damage exclusions
Clarification only, no BAFOs	Substantive negotiation/BAFOs
Little payment terms negotiation	Negotiation of milestones payment

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Questions?

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