

Drafting Contracts: Background, Check-Lists, Examples

February 1, 2022

Special districts commonly enter into contracts for professional services, personal services, property transactions, intergovernmental agreements, and procurement contracts. Every Member District in the Colorado Special Districts Property and Liability Pool (the “Pool”) drafts or amends contracts with contractors, vendors, or service providers (“vendors/contractors”). An understanding of some contracting fundamentals along with careful attention to the contract language while in the negotiation stage, can help avoid contract disputes. The Pool prepared this overview of issues, check-lists, and compiled examples of typical contract provisions in order to provide its Member Districts with a framework for understanding and reviewing contracts – this information is not substitute for legal advice

Prior to execution of any contract, Member Districts are encouraged to have contracts reviewed by their insurance consultant/broker, or the Pool where a Member District participates on a direct basis; the scope of a broker’s review will typically be limited to risk transfer provisions and does not take the place legal counsel. Further, Member Districts should consult with their legal counsel, who know your District’s unique needs and background the best, when drafting or reviewing contracts.

A. Check your coverage

As you start contract drafting or review, one of the first items on your list should be to ensure that the vendor/contractor carries any of the following that the District will need: (1) relevant insurance coverage (general, auto, professional liability, environmental liability, cyber liability); (2) adequate coverage; (c) proof of insurance [as necessary]; and (4) endorsements.

The requirement that a vendor/contractor have its own insurance goes hand-in-hand with indemnification of the District. If a District is asked to act as an indemnitor and to accept liability for amounts that exceed the coverage the District has under the Pool, the District may have liability that is uninsured.

If the District is the service provider, review your District’s coverage for any disconnect between the actions your District has agreed to take and the District’s coverage. For example, the Pool Public Entity Liability Coverage Document has exclusions from coverage that may apply, including an exclusion for a District’s liability for actions taken outside of a District’s legal authority such as, but not limited to, law enforcement actions.

Consider reaching out to your District’s legal counsel, your broker, or the Pool Administrator if you have a question about whether a contract may impact your coverage under the Pool.

B. Know your District’s purchasing policy.

Most local governments have a purchasing policy or other rules or procedures that govern the procurement or contracting process. These policies often address other aspects of public contracts, including requests for information/proposals and sole sourcing exceptions. The types of approval (and execution) for a contract may vary, depending on the amount and type. Districts may also have adopted all or part of Colorado State’s Procurement Code, per Colorado Revised Statutes (“C.R.S.”) § 32-11.5-701(2). Prior to drafting or reviewing a contract, familiarize yourself with the laws and policies which govern your District.

Legal problems may arise if the public bidding requirements are not followed and if contract was not properly executed. Contract execution requires that the person who possesses the proper legal authority acts as the signatory. Further, execution of an agreement may require approval by the District’s governing body, usually by resolution, and that the resolution is approved in an open public meeting.

C. Is the contract a budgeted expenditure?

An important threshold question for contract drafting or review is to check that the contract expense or payments have been contemplated as part of the District’s budget. You may run into legal or fiscal problems if the contract cost was not a planned expense (approved by the District’s governing body).¹ This does not mean that every contract will have a line item expenditure attached to it, which is specifically or separately approved. Rather, it means that understanding the context of the expenditure is important because it may have significant legal or fiscal implications. For example, if the contract term spans several years, there may be a TABOR impact (more on that below). Or, if the contract is tied to bond revenues or state or federal grants, there may be restrictions on the use of those revenues that will impact how a contract must be drafted. Procedurally, some District purchasing policies may have special policies for contract expenditures that are “out of budget.” Further, contract expenditures that cannot be accommodated within an approved budget plan may require a budget amendment/supplemental budget.

Tip for District General or Special Counsel: attorneys often ignore any information that looks “quantitative.” Do not ignore this budget question in contract drafting or review. For small amounts, you may merely need to confirm that the expenditure is budgeted with District staff. For larger contract amounts, you may need to take more time to understand the budget context.

D. What are your District’s goals?

For attorneys, take the time to interview your client about what the intended goods/services are for the contract. Drafting or reviewing in a vacuum is very difficult. Finding out what your client’s goals are at the start, if they are not clearly evident, will save you time.

¹ Expenditures may not exceed appropriations, per the Local Government Budget Law of Colorado, C.R.S. § 29-1-110, and the improper approval of an expenditure in excess of an appropriation may result in an official’s removal from office, per C.R.S. § 29-1-115. However, the largest consideration of incurring an out-of-budget expense may be the impact to a District’s bond rating, if the District intends to seek any long-term financing for future capital projects.

E. Do you due diligence to verify the vendor’s identity.

How can you verify that the business with which you are entering into a contract actually exists? How can you verify the business’ legal name and correct address? How can you confirm that the business is properly licensed – and in good standing with licensing authorities? There are several places you may need to check, depending on the business. If the business requires licenses with your District or other federal, state, or local governments, you may want to confirm that the business has the proper licensure.

At a minimum, consider checking the Colorado Secretary of State website to verify that the business is licensed in Colorado,² that the name and address are correct, and that the business is in good standing. If the business is not required to be licensed in Colorado to get the contract, check the equivalent state business licensing agency where the vendor or contractor is headquartered.

F. Legal considerations in contract drafting or review

Here are some legal issues to consider as you review or draft a District contract:

1. The indemnification conundrum.

Indemnification or “hold harmless” clauses are common, but the risks they manage and the legal complications for government contracts are less well understood.

The purpose of an indemnification clause is to allocate the risk of third party injuries in the course and/or performance of a contract. For a Special District, if a contractor’s negligence causes damage to a resident, the District does not want the resident to pursue a remedy from the District. Indemnification clauses clarify that, when an injury or damage is caused by contractor negligence, the contractor (indemnitor) must hold the District as harmless and defend the District against third parties (indemnitee). These indemnity clauses usually include the caveat that a contractor’s indemnification obligation does not extend to any injury, loss, or damage which is caused by the act, omission, or other fault of the District.

There are different types and scopes of indemnification clauses. Different versions may include: (1) a one-way clause requiring the District to indemnify the contractor; (2) a one-way clause requiring the contractor to indemnify the District; (3) a parallel indemnification requirements; and/or (4) different types and scopes of actions and defenses offered [contractor indemnifies for both its negligence and the District’s negligence; the contractor may limit the maximum damages for which it will indemnify].

For local government attorneys in Colorado, the inclusion of a duty of the governmental entity to indemnify (act as “indemnitor”) is viewed with healthy skepticism. Some attorneys believe that indemnifying contractors may violate state statutory and constitutional laws that are intended to protect the public’s resources, including: the constitutional prohibition on the gift of public funds or lending of public credit; incurring expenditures without an appropriation; accepting a contingent/future liability without voter-approval under TABOR as a multi-year fiscal obligation; and accepting or waiving liability for which government is immune or is not covered by typical

² <https://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do>.

insurance or risk pool coverage.³ Please note, however, that no court decision or other controlling law has been published or enacted as of the date of this overview that interprets or clarifies that the State or any local government acting as an indemnitor violates TABOR, absent voter approval of the indemnification as multi-year fiscal obligation. A common strategy employed by local government law practitioners to address these legal concerns is to include, at a minimum, a caveat in any indemnification clause where a government client agrees to indemnify a contractor as follows: “to the extent allowed by law” or similar conditional language.⁴ Other practitioners argue that since contract provisions requiring governmental entities to act as indemnitors have been construed as statutorily barred,⁵ such provisions should instead be stricken from agreements.

a. General principles for drafting or reviewing indemnification clauses:

- **District as indemnitee.** Protect the District by including an indemnification clause that requires the contractor to hold the District harmless and defend it against third party claims arising from the contract. The whole point of contracting for services is to hire an expert to do work that it not feasible for the District to perform itself. The expert/contractor needs to accept that, if it causes injuries to others as it performs under the contract, it is not reasonable to expect that the District will pay for the contractor’s negligence that causes third party injuries. Any agreement or contract should provide indemnification of your District.
- **District as indemnitor.** Vendor/contractor forms will frequently have a one-way (requiring the District to act as the indemnitor) or reciprocal indemnification provision (requiring both parties to indemnify one another). Here are some other considerations:
 - Unless there is a very unique circumstance, there would not be any reason to accept a one-way indemnification obligation where the only duty to hold harmless was on the part of the District as indemnitor.
 - You may want to explain to the vendor/contractor that the reason the District is engaging them under an agreement for their expertise – and the District believes in and is relying on their expertise and competence in the performance of the contract. There should be no need for the District to believe otherwise. It is appropriate that the vendor/contractor to retain the risk for any third party claims from any negligence performance of the contract. Therefore, the District requests deletion of the provisions that require the District to indemnify the vendor/contractor.

³ See Herbert C. (Lee) Phillips, “Indemnity Clauses in Local Government Contracts,” 43 Colo.Law. 12, 53 (December 2014); Norman B. Beecher and Charles H. Richardson, “The Harm in Hold Harmless Clauses,” 19 Colo.Law. 6, 1079 (1990).

⁴ *Id.*

⁵ *Thyssenkrupp Safway, Inc. v. Hyland Hills Parks and Recreation Dist.*, 271 P.3d 587 (Colo. App. 2011) (concluding that a contractor’s claim was barred by section 29–1–110(1), C.R.S., which requires local governments to spend only budgeted funds and that the statutory exception for public works contracts contained in section 24–91–103.6(4), C.R.S. did not apply.

- You may point out that provisions requiring the District to act as indemnitor would be difficult to enforce, and may work against the validity of the contract.
 - If the vendor/contractor is unwilling to remove the District-as-reciprocal indemnitor, include the caveat (“to the extent allowed by law”). Also, do not accept any indemnification clause where the District’s indemnification would exceed any tort liability coverage or which could be construed as waiving the District’s governmental immunity.
- **Statutory limitations on indemnification.** C.R.S. § 13-50.5-102 speaks to contributory negligence as well as indemnification of the parties to a contract, including subsection (8) which provides that any public contract for architectural, engineering, design, construction, [or similar] services which includes indemnification is only enforceable as to the percentage of the contractor’s fault and must be determined only after fault is adjudicated. Otherwise, the indemnification is void as against public policy.
 - **Contractor or employee?** A recent Colorado Court of Appeals case, *Lopez v. City of Grand Junction*, --- P.3d ---- (Colo. App. 2018), raises serious questions about liability for a contractor’s actions in the performance of maintenance on a public utility project. The basis of the holding is too ambiguous to identify whether it nullifies any and all indemnification of a District by a contractor. But, practitioners should be aware of the case and be willing to contemplate whether this decision will impact the provisions of an agreement.

2. Taxpayer Bill of Rights (TABOR)

For most purposes, TABOR requires a voter-approval process for tax increases or to retain revenues above the TABOR limit (de-Brucing). However, TABOR requires voter-approval for long-term obligations – and this provision is commonly used for public debt financing tools, like bonds. However, you will often see this clause in all types of Colorado governmental contracts:

Nothing in this Agreement is intended or shall be deemed or construed as creating any multiple-fiscal year direct or indirect debt or financial obligation on the part of the Customer within the meaning of Colorado Constitution Article X, Section 20 or any other constitutional or statutory provision. All financial obligations of Customer under this Agreement are subject to annual budgeting and appropriation, in its sole discretion. Notwithstanding anything in this Agreement to the contrary, in the event of non-appropriation, Customer shall immediately notify Vendor/Contractor of such occurrence, and this Agreement shall terminate effective December 31 of the then-current fiscal year.

This provision is included when a governmental contract covers more than one fiscal period or includes an option to renew in order to express that the intent of the agreement is not to create a multiple-year financial obligation that would require voter-approval under TABOR.

If you are working with an out-of-state vendor/contractor, this provision is likely to be misunderstood by vendors/contractors to be some sort of back-door for the District to evade its payment obligations. You may have to spend some time educating the people on the other side of the table about Colorado’s unique constitution and TABOR – and provide them examples of other contracts – to give them the context for the District’s inclusion of that provision.

3. No mechanic’s liens for public construction projects

The Colorado Mechanics Lien Act, Article 22 of Title 38, C.R.S., does not apply to projects constructed by governmental agencies.⁶ In lieu of a lien, the Colorado Public Works Act (“CPWA”), Article 26 of Title 38, C.R.S., creates a statutory avenue for protection of subcontractors or suppliers to provide labor and materials to a contractor on public projects, including rights against the contractor’s payment bond, rights against the contractor’s performance bond, and a right to establish a lien against retained contract funds.

Many public works contracts require, prior to final settlement, that a contractor submit evidence either that there are no outstanding amounts due to its subcontractors or suppliers. This evidence may include a formal claim waiver form which subcontractors execute to demonstrate that they have received full payment.

4. Special legal obligations for software or other information technology (IT) contracts

a. PII and data breach

In 2018, new legislation (House Bill 18-1128) was enacted to strengthen Colorado’s laws on personal information and data breach notification. Colorado had pre-existing requirements that personally identifiable information (PII) needed to be retained by private and public entities with care and caution, but the new law strengthened these requirements by requiring records management policies. Further, the new legislation required that private entities with which the government contracts have an obligation to notify the governmental party about data breaches and to cooperate with repair and notification of the breach (notification generally within 30 days of the breach). Therefore, if the contract you are drafting or reviewing contemplates management of such PII data, you may want to address this obligation in the agreement so that the vendor/contractor understands this statutory requirement.

b. Payment systems

If you are contracting with an outside entity as a payment processor, make sure that you have contemplated the need for security and/or secure payment provisions (see below template language for credit card payment processing).

⁶ *South-Way Const. Co. v. Adams City Serv.*, 169 Colo. 513, 516–17, 458 P.2d 250, 251 (1969); *Flaugh v. Empire Clay Prods.*, 157 Colo. 409, 411, 402 P.2d 932, 933 (1965).

c. Intellectual property or license violations

As you draft or review, be aware of any intellectual property issues that may arise in the course of an IT agreement.

d. Colorado Open Records Act (CORA) and “confidentiality”

IT companies often include confidentiality provisions because, understandably, they want to protect their product. However, these provisions may be so broadly drafted so as to conflict with the District’s obligation to provide public records for inspection. Review this issue carefully, and depending on the specific needs of the vendor/contractor, include a provision that requires the vendor/contractor to pay for legal costs if there is a disagreement with a requester about whether information is subject to CORA.

e. We want your customer data!

In the new economy, companies are offering services or products that are discounted with the assumption that their costs will be indirectly offset by gathering your customer data and taking ownership of customer data to generate additional revenue. Be aware that if a price looks too good to be true, there may be something you are missing. If your District goes into this agreement with a full understanding, and your “customers” are likewise consent to the use of their information (for marketing, for market research ...), the agreement may be perfectly fair. But, consider the consequences, especially in light of data breaches, consent of “customers,” and the higher standard to which government entities are held by the public when gathering customer information.

f. Exception from verifying status

Be aware that there is a software exception in CRS § 8-17.5-101(6)(b)(V) from the definitions of “public contract for services” which is tied to the prohibition on entering into an agreement with a contractor who knowingly employs a worker without authorization (the term “illegal alien” was replaced in statute in House Bill 21-1075).

G. Insurance

Government contracts generally include a requirement that the vendor/contractor carries requisite insurance and may specify the levels of insurance required. Some agreements may require additional steps, including proof of insurance, or require an endorsement to add the District to the policy/policies. One thing to note on drafting or review of an endorsement provision is that vendors/contractors for whom professional liability insurance is required by the contract may object to professional liability insurance endorsements on the same grounds as they question the enforceability of indemnification provisions.⁷ Further, the scope of professional liability insurance is different from a general liability policy, in that it covers errors and omissions of the professional.

Here is a general explanation of types of public contracts and an overview of the insurance coverage that may be necessary for each type:

⁷ See Section F.1.a. above (“The indemnification conundrum”) for discussion of C.R.S. § 13-50.0-102(8).

Insurance Requirements by Type of Contract

Professional Services Contracts	Used to contract with providers (consultants) for professional services who are licensed by the state, such as attorneys, architects or engineers. Contracts will likely require General Liability, Auto Liability, Professional Liability (for professional services), Workers' Compensation, and Indemnity Clause.
Personal Services Contracts	Used to contract for personal services such as instructors or trainers. Contracts will likely require General Liability, Auto Liability, Workers' Compensation, and Indemnity Clause.
Public Contracts	Used for the purchase of goods and services. Contracts will likely require General Liability, Auto Liability, Workers' Compensation, and Indemnity Clause. For road construction, guidelines used by the Colorado Department of Transportation (CDOT) are often considered.
Purchase Order Agreements	Used for the purchase of supplies. At a minimum, the contract will likely require General Liability and an Indemnity Clause.
Lease Agreements:	Where a District leases out district-owned buildings to a third-party, contracts will likely require General Liability, Auto Liability, Workers' Compensation, Waiver of Subrogation Clause, and Indemnity Clause.
IT Professional/ Vendor Contracts	Used for vendors or consultants providing hardware, pre-packaged software, portal access, colocation, cloud services, managed dedicated servers programs and other IT Professionals. In addition to require General Liability, Auto Liability, Workers' Compensation, and Indemnity Clause, contracts will likely require IT Professional Liability or Cyber Liability insurance that includes: Security and Privacy Liability, including privacy breach response costs, regulatory fines and penalties; Media Liability, including infringement of copyright and trademark; Cyber Extortion; and Privacy.

H. Contract review and negotiation is an art, not a science

As you approach reviewing a contract that has been prepared by someone else, remember that you are negotiating language. Depending on the nature and volume of changes you may need, you may have to agree to language that addresses your client's interests, but is not the language you would prefer. Here are some tips on negotiating language changes:

- Identify those changes that your client must have.
- Understand the need for the changes you have proposed – and be willing to explain those reasons to your client and to the vendor/vendor's counsel. *(If a vendor does not frequently contract with governmental entities or perform work in Colorado, it may not be familiar with legal requirements governing Colorado Special Districts.)*
- Carefully review the proposed contract to make sure it does not already include necessary provisions, just stated differently.
- Be willing to listen to the other party's concerns. *(You may not have a full understanding of the technical aspects of the contract, how the vendor's business operates, or how the contract will be implemented by the parties.)*
- Be willing to draft compromise language. If you draft the changes, you have more control.

I. Check Lists

As you approach drafting the legal provisions, below are checklists for typical provisions in government contracts.

Checklist items with an asterisk (*) have a template provision in the Appendix.

A. Before drafting or reviewing:

- Is the Vendor/Contractor properly licensed and in good standing?
- Is the contract amount supported by budget?
- If sole sourced, is there a valid exception? Has purchasing policy been followed?
- Per local laws, purchasing policies, who must execute?
- If approval is by the governing body – what is the form of approval (by motion, resolution, ordinance) and what lead time or advanced briefing is necessary?
- If approved by governing body, are minor changes permitted without governing body's approval? (Consider a delegation clause that allows non-substantive changes to be administratively approved.)

B. General Provisions

- An identification of the parties
- Authority to sign/execute contract*
- Date of contract execution/effective date
- Term of the contract/termination
- Termination for cause*
- Payment schedule
- Description of services, goods...
- Choice of law
- Notification (to whom, by what method, to which address?)
- Execution/signature by authorized persons representing the parties, including titles
(*may or may not include a certification/notarized signature*)

C. Miscellaneous Provisions

- Severability clause*
- Amendments*
- Merger clause
- Choice of law*
- Attorneys' fees
- Mandatory arbitration
- Force majeure (“act of nature,” rather than inconvenient to vendor)
- No third party beneficiaries*
- Contractor cannot bind the Customer*
- Public entity, exempt from property and sales/use tax*

D. Multi-year contracts (or renewable terms)

- TABOR/subject to appropriation clause*

E. Insurance

An agreement, depending on type, may require some but not all of the following:

- Insurance - recitation of types of insurance required*
- Insurance - Workers' Comp*
- Insurance - General Liability*
- Insurance – Auto*
- Insurance - Professional Liability
- Insurance - Endorsed to Customer*
- Insurance - Certificates to Customer*
- Insurance - Material Breach to fail to maintain*
- Insurance - alternative to specific provisions*

F. Indemnification

An agreement, depending on type, may require indemnification:

- Indemnification*
- Indemnification - Governmental Immunity*

G. Contractor/Vendor Provisions

- Contractor, not employee, no workers' comp or other benefits*
- Contractor responsible for taxes*
- Workers without authorization/e-verify [but note software or other exceptions in CRS § 8-17.5-101(b)(V)*]
- Compliance with Laws; Customer Policies and Procedures*

H. Software, Software-as-a-Service, Other Information Technology Issues

An agreement, depending on type, may require some but not all of the following:

- Service Level Agreement*
- Data - Ownership and Confidentiality
- Data - Extract upon Termination*
- Data Breach*
- CORA*
- Indemnification, including IP/License Violations*
- Payment Processing – Security Standards*

1. General Provisions	
Authority to execute agreement	Customer and Contractor each warrant and represent to the other that: (i) it has the power and authority to grant the rights and perform the obligations to which it commits herein; (ii) the execution of this Agreement by the person representing it shall be sufficient to render this Agreement binding upon it; and (iii) neither its performance hereunder nor the exercise by the other party of rights granted by the warranting party hereunder shall violate any applicable laws or regulations, or the legal rights of any third-parties, or the terms of any other agreement to which the warranting party is or becomes a party.
Termination for cause	If either Party materially breaches any of its duties or obligations in the Agreement, and such breach is not cured, or the breaching Party is not diligently pursuing a cure to the non-breaching Party's sole satisfaction, within thirty (30) calendar days after written notice of the breach, then the non-breaching Party may terminate this Agreement for cause as of a date specified in such notice.
Termination - refund of prepaid amounts	Upon the expiration or termination of this Agreement for any reason, the Customer shall pay to Vendor all undisputed amounts due and payable hereunder. In the event of termination by the Customer for material breach by Vendor, then Vendor shall refund to the Customer a prorated amount of any prepaid annual fees.
Applicable Laws/Choice of Law/Governing Law	This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado and the federal laws of the United States of America. Service Provider hereby consents and submits to the jurisdiction and forum of the state and federal courts in the State of Colorado in all questions and controversies arising out of this Agreement. <i>Note: you may also want to designate in which State District Court any controversy should be filed.</i>

2. Miscellaneous Provisions	
Severability Clause	If any provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. This Agreement may be executed in contemporaneous counterparts, which, taken together, shall form one legal instrument
Amendments	No amendment to or modification of this Agreement is effective unless it is in writing and signed by an authorized representative of each party. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.
No Third Party Beneficiaries	It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the Company and the Client, and nothing contained in this Agreement shall give or allow any such claim or right of action by any other third party on such Agreement.
Contractor cannot bind the Customer	Contractor does not have the authority to act for the Customer, or to bind the Customer in any respect whatsoever, or to incur any debts or liabilities in the name of or on behalf of the Customer.
Public entity is exempt from tax	<p>As a local government [and subdivision of the State], and pursuant to Article 10, § 4 of the Colorado State Constitution and Colorado Revised Statutes (“C.R.S.”) §§ 39-3-105 and 39-26-704(1), Customer is exempt from any taxes levied on real or personal property or on the sale or use as a consumer in its capacity as a governmental entity. Said taxes shall not be included in the contract price or subsequent charges for additional services.</p> <p><u>If contractor needs to use the public entities’</u></p> <ul style="list-style-type: none"> • Customer will furnish the required certificates of tax exemption to Contractor for use in the purchase of supplies and materials to be incorporated into the work. • Customer’s exemption does not apply to construction tools, machinery, equipment, or other property purchased by or leased by Contractor, or to supplies or materials not incorporated into the work.

3. TABOR

TABOR – no intent to create multi-year obligation

Nothing in this Agreement is intended or shall be deemed or construed as creating any multiple-fiscal year direct or indirect debt or financial obligation on the part of the Customer within the meaning of Colorado Constitution Article X, Section 20 or any other constitutional or statutory provision. All financial obligations of Customer under this Agreement are subject to annual budgeting and appropriation, in its sole discretion. Notwithstanding anything in this Agreement to the contrary, in the event of non-appropriation, Customer shall immediately notify Vendor of such occurrence, and this Agreement shall terminate effective December 31 of the then-current fiscal year.

4. Insurance	
Insurance - recitation of types of insurance required	Vendor agrees to procure and maintain, at its own cost, the policies of insurance set forth herein. Vendor shall not be relieved of any liability, claims, demands, or other obligations assumed pursuant to this Agreement by reason of its failure to procure or maintain insurance, or by reason of its failure to procure or maintain insurance in sufficient amounts, durations, or types. The coverages required below shall be procured and maintained with forms and insurers acceptable to the Customer. All coverages shall be continuously maintained from the date of commencement of services hereunder. The required coverages are:
Insurance - Workers' Comp	Workers' Compensation insurance as required by the Labor Code of the State of Colorado and Employers Liability Insurance. Evidence of qualified self-insured status may be substituted.
Insurance - General Liability	General Liability insurance with minimum combined single limits of ONE MILLION DOLLARS (\$1,000,000) each occurrence and TWO MILLION DOLLARS (\$2,000,000) aggregate. The policy shall include the Customer, its officers and its employees, as additional insureds, with primary coverage as respects the Customer, its officers and its employees, and shall contain a severability of interests provision.
Insurance - Auto	Comprehensive Automobile Liability insurance with minimum combined single limits for bodily injury and property damage of not less than ONE HUNDRED AND FIFTY THOUSAND DOLLARS (\$150,000) per person in any one occurrence and SIX HUNDRED THOUSAND DOLLARS (\$600,000) for two or more persons in any one occurrence, and auto property damage insurance of at least FIFTY THOUSAND DOLLARS (\$50,000) per occurrence, with respect to each of Vendor's owned, hired or non-owned vehicles assigned to or used in performance of the services. The policy shall contain a severability of interests provision. If Vendor has no owned automobiles, the requirements of this paragraph shall be met by each employee of BNP providing services to the Customer under this contract.
Insurance - Endorsed to Customer	Vendor's general liability insurance, automobile liability and physical damage insurance shall be endorsed to include the Customer, and its elected and appointed officers and employees, as additional insureds, unless the Customer in its sole discretion waives such requirement. Every policy required above shall be primary insurance, and any insurance carried by the Customer, its officers, or its employees, shall be excess and not contributory insurance to that provided by Vendor. Such policies shall contain a severability of interests provision. The Vendor shall be solely responsible for any deductible losses under each of the policies required above.
Insurance - Certificates to Customer	Certificates of insurance shall be provided by the Contractor as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be subject to review and approval by the Customer. No required coverage shall be cancelled, terminated or materially changed until at least 30 days prior written notice has been given to the Customer. The Customer reserves the right to request and receive a certified copy of any policy and any endorsement thereto.
Insurance - Material Breach to fail to maintain	7.4 Failure on the part of the Contractor to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of contract upon which the Customer may immediately terminate this Agreement, or at its discretion may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection

	<p>therewith, and all monies so paid by the Customer shall be repaid by Contractor to the Customer upon demand, or the Customer may offset the cost of the premiums against any monies due to Contractor from the Customer.</p>
<p>Insurance - alternative to specific provisions</p>	<p>Vendor shall carry insurance of the type and in amounts sufficient to cover its indemnification obligations under this Agreement. The parties understand and agree that Customer is relying on, and does not waive or intend to waive by any provision of this contract, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, § 24-10-101 et seq., C.R.S., as from time to time amended, or otherwise available to Customer, its officers, or its employees.</p>

5. Indemnification	
Indemnification	To the fullest extent permitted by law, the Contractor agrees to indemnify and hold harmless the Customer, and its elected and appointed officers and its employees, from and against all liability, claims, and demands, on account of any injury, loss, or damage, which arise out of or are connected with the Services hereunder, if such injury, loss, or damage is caused by the negligent act, omission, or other fault of the Contractor or any subcontractor of the Contractor, or any officer, employee, or agent of the Contractor or any subcontractor, or any other person for whom Contractor is responsible. The Contractor shall investigate, handle, respond to, and provide defense for and defend against any such liability, claims, and demands. The Contractor shall further bear all other costs and expenses incurred by the Customer or Contractor and related to any such liability, claims and demands, including but not limited to court costs, expert witness fees and attorneys' fees if the court determines that these incurred costs and expenses are related to such negligent acts, errors, and omissions or other fault of the Contractor. The Customer shall be entitled to its costs and attorneys' fees incurred in any action to enforce the provisions of this Section. The Contractor's indemnification obligation shall not be construed to extend to any injury, loss, or damage which is caused by the act, omission, or other fault of the Customer.
Indemnification - Governmental Immunity	Vendor shall carry insurance of the type and in amounts sufficient to cover its indemnification obligations under this Agreement. The parties understand and agree that Customer is relying on, and does not waive or intend to waive by any provision of this contract, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, § 24-10-101 et seq., C.R.S., as from time to time amended, or otherwise available to Customer, its officers, or its employees.

6. Contractor/Vendor Provisions	
<p>Contractor, not employee, no WC</p>	<p>It is the expressed intent of the parties that the Contractor is an independent contractor and not the agent, employee or servant of the Customer.</p> <p>Contractor has and retains control of and supervision over the performance of Contractor's obligations hereunder and control over any persons employed by Contractor for performing the Services hereunder.</p> <p>The Customer will not provide training or instruction to Contractor or any of its employees regarding the performance of the Services hereunder.</p> <p>CONTRACTOR IS NOT ENTITLED TO WORKERS' COMPENSATION BENEFITS EXCEPT AS MAY BE PROVIDED BY THE INDEPENDENT CONTRACTOR NOR TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS UNEMPLOYMENT COMPENSATION COVERAGE IS PROVIDED BY THE INDEPENDENT CONTRACTOR OR SOME ENTITY OTHER THAN THE CUSTOMER.</p> <p>Neither the Contractor nor any of its officers or employees will receive benefits of any type from the Customer.</p> <p>Contractor represents that it is engaged in providing similar services to other clients and/or the general public and is not required to work exclusively for the Customer.</p> <p>All Services are to be performed solely at the risk of Contractor and Contractor shall take all precautions necessary for the proper and sole performance thereof.</p> <p>Contractor will not combine its business operations in any way with the Customer's business operations and each party shall maintain their operations as separate and distinct.</p>
<p>Contractor responsible for taxes</p>	<p>Contractor shall satisfy all tax and other governmentally imposed responsibilities including, but not limited to, payment of federal and social security taxes, unemployment taxes, workers' compensation and self-employment taxes, and other federal, state, or local taxes. No taxes of any kind shall be withheld or paid by the customer.</p>

<p>Workers without authorization (previously illegal aliens)[note exceptions in in CRS § 8-17.5-101(b)(V)]</p>	<p>Contractor shall be solely responsible for compliance with all applicable federal, state, and local laws, including the ordinances, resolutions, rules, and regulations of the Customer; for payment of all applicable taxes; and obtaining and keeping in force all applicable permits and approvals.</p> <p>The Contractor shall not knowingly employ or contract with a worker without authorization to perform work under this contract. The Contractor shall not enter into a contract with a subcontractor that fails to certify to the Contractor that the subcontractor shall not knowingly employ or contract with a worker without authorization to perform work under this contract. The Contractor will participate in either the E-verify program or the Department program, as defined in C.R.S. § § 8-17.5-101(3.3) and 8-17.5-101(3.7), respectively, in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work under the public contract for services. The Contractor is prohibited from using the E-verify program or the Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed.</p> <p>If the Contractor obtains actual knowledge that a subcontractor performing work under this contract for services knowingly employs or contracts with a worker without authorization, the Contractor shall:</p> <ul style="list-style-type: none"> a. Notify the subcontractor and the Customer within three days that the Contractor has actual knowledge that the subcontractor is employing or contracting with a worker without authorization; and b. Terminate the subcontract with the subcontractor if within three days of receiving the notice required pursuant to this paragraph the subcontractor does not stop employing or contracting with the worker without authorization; except that the Contractor shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with a worker without authorization.
<p>Compliance with Laws; Customer Policies and Procedures</p>	<p><u>Example 1:</u> Both parties agree to comply with all applicable federal, state, and local laws, executive orders and regulations issued, where applicable. The Company shall comply with the policies and procedures of the Client where the same are posted, conveyed, or otherwise made available to the Company.</p> <p><u>Example 2:</u> Contractor shall be solely responsible for compliance with all applicable federal, state, and local laws, including the ordinances, resolutions, rules, and regulations of the Customer; for payment of all applicable taxes; and obtaining and keeping in force all applicable permits and approvals.</p>

7. Software, Software-as-a-Service, Other Information Technology Issues	
<p>Service Level Agreement – <i>this is an example and would have to be tailored</i></p>	<p><u>Example 1:</u> The products/services provided to Customer by Vendor shall be available 99.9% of the time, excluding unavailability due to Customer’s inability to maintain internet access or due to any failure in internet access caused by a third-party internet provider, and excluding scheduled downtime, which downtime shall not exceed four (4) hours in duration in any one month period, of which Customer is notified at least 12 hours in advance and which shall occur outside of normal business hours (“Availability Requirement”). In the event the products/services do not meet the Availability Requirement (a “Service Level Failure”) in any calendar month, Vendor shall provide Customer with a credit on the next monthly invoice equal to the pro-rated charges for one (1) full day of the affected services (i.e., 1/30 of the monthly fee, assuming a 30-day month) for each day during which there was a Service Level Failure in such calendar month (a “Service Credit”).</p> <p>Vendor shall back up data provided by Customer and Customer customers (“Customer Data”) at an off-site location at least as frequently as follows: for the first seven (7) days after such data has been provided, every fifteen (15) minutes; for the second seven (7) days after such data has been provided, every four (4) hours; and, after fourteen (14) days since such data has been provided, daily. Vendor shall ensure Customer Data can be restored from such backups in the event of server failure or other failure resulting in data loss. Vendor shall ensure Customer Data is retained in such backups for the entire term of the Agreement.</p>
<p>Data - Extract upon Termination – <i>this is an example and would have to be tailored</i></p>	<p>Vendor shall export to the Customer all Customer Data in the native format, a sortable format, or in a format of the Data agreed to by both parties and shall destroy all Customer Data within ninety (90) calendar days of Customer’s account converting to inactive status.</p>
<p>Data Breach – <i>these are examples and would have to be tailored</i></p>	<p><u>Example 1:</u> Customer’s data, including third-party data entered, may include “Personal Information” or “Personal Identifying Information” (both terms hereinafter referred to as “Personal Information”), as those terms are defined in C.R.S. § 24-73-103(1)(g). In maintaining, storing, and processing of Personal Information, Vendor shall comply with the obligations of a “Third-Party Service Provider” as that term is defined in C.R.S. §§ 24-73-102(5) and 24-73-103(1)(i). Such obligations include, but are not limited to, implementation and maintenance of reasonable security procedures and practices that are: (a) appropriate to the nature of the personal identifying information disclosed to Vendor; and (b) reasonably designed to help protect personal identifying information from unauthorized access, use, modification, disclosure, or destruction. C.R.S. § 24-73-102(2). In the event of a security breach that compromises Personal Information, the Vendor shall give notice to and cooperate with the Customer, including notifying the Customer in the most expedient time and without unreasonable delay. C.R.S. § 24-73-103(2)(g).</p> <p><u>More Specific Requirements – would be in addition to Example 1:</u> If Vendor becomes aware that a security breach of Personal Information may have occurred, Vendor shall notify Customer within 3 days. Such notice shall at minimum contain (a) the date, estimated date, or estimated date range of the security breach; and (b) a description of the Personal Information that was acquired or reasonably believed to have been acquired as part of the security breach. The</p>

	<p>Customer may request, and upon such request Vendor shall provide, additional information relevant to the security breach; provided that, Vendor shall not be required to disclose confidential business information or trade secrets. Vendor shall, at its sole expense, indemnify, defend and hold harmless Customer, its elected and appointed officers and its employees, from and against all liability, claims, and demands, on account of any injury, loss, or damage, arising out of any third party claim, action or proceeding brought against Customer, its elected and appointed officers and its employees for any security breach of Personal Information.</p> <p><u>Example 2:</u> For purposes of C.R.S. §§ 24-73-102(5) and 24-73-103(1)(i), the Vendor acknowledges that it is a “third-party service provider” contracted to maintain, store, or process personal identifying information on behalf of a governmental entity. Further, the Vendor has a statutory duty, per C.R.S. § 24-73-103(2)(g) to notify and cooperate with the Customer in the event of a security breach that compromises personal information in the most expedient time and without unreasonable delay.</p>
<p>CORA</p>	<p><u>Example 1:</u> The Parties acknowledge the Customer's legal requirement to disclose certain information as required by the Colorado Open Records Act (“CORA”) in Article 72 of Title 24 of the Colorado Revised Statutes (“C.R.S.”) governing the Customer.</p> <p><u>Example 2 - Indemnification for CORA legal costs:</u> The Vendor agrees to defend, indemnify and hold the Customer and its officers and employees harmless from and against all attorney fees and costs, incurred by or awarded against the Customer in connection with any litigation brought pursuant to C.R.S. § 24-72-204(5) challenging the Customer's denial of inspection and copying of the Confidential Information of Vendor.</p>
<p>Indemnification, including IP/License Violations</p>	<p>Vendor shall indemnify, defend and hold harmless Customer and Customer's officers, directors, employees, agents, permitted successors and permitted assigns (each, a "Customer Indemnitee") from and against any and all losses, damages, liabilities, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys' fees (collectively, “Losses”) incurred by such Customer Indemnitee arising out of or relating to: (1) any claim, suit, action or proceeding (each, an "Action") by a third party to the extent that such Losses arise from any allegation in such Action that Customer's use of the Services (excluding Customer Data or Content and third-party materials) in compliance with this Agreement infringes a U.S. intellectual property right; or (2) any Action by a third party to the extent that such Losses arise from any negligent, unlawful, or willful and wanton act or omission, or breach of this Agreement, on the part of Vendor and its subcontractors and affiliates, and each of its and their respective officers, directors, employees, agents, successors and assigns (each, a "Vendor Indemnitee") acting pursuant to this Agreement.</p>
<p>Payment Processing</p>	<p>Vendor represents and warrants that it is, and throughout the term of the Agreement shall remain, in compliance with the Payment Card Industry Data Security Standards (“PCI Standards”). Vendor shall, at its sole expense, indemnify, defend and hold harmless Customer, its elected and appointed officers and its employees, from and against all liability, claims, and demands, on account of any injury, loss, or damage, arising out of any third party claim, action or proceeding brought against Customer its elected and appointed officers and its</p>

	employees for non-compliance with PCI Standards by Vendor or any of its officers, employees, agents or subcontractors.
--	--