Terms and Conditions/Question and Response Document No. #2
Request for Proposals
Consulting and Technical Services (CATS) II
RFP #060B9800035
October 30, 2008

56. Question: RFP Section 2.2.1.2 (Custom Software), the State cites that it shall "solely own any custom software, including, but not limited to application modules developed to integrate with a COTS, source-codes, maintenance updates, documentation, and configuration files, when developed under a TO Agreement." What is the State's definition of Custom Software?

Response: Custom software means software, including source code, developed in whole or in part, to meet the project requirements for a TO Agreement, and also means the computer program that results from that development. This definition has been added to the RFP by Amendment #4

57. Question: RFP Section 2.2.1.4 (Data), the State cites that Data, databases and derived data products created, collected, manipulated, or directly purchased as part of a TORFP shall become the property of the State. The purchasing State agency is considered the custodian of the data and shall determine the use, access, distribution and other conditions based on appropriate State statutes and regulations. Our software is built on a component model. As such, modules can be reused over and over in vastly different applications. Because certain functionality in these modules is fairly standard, the resulting compiled code will often be very similar, even if rewritten from scratch. To avoid allegations of "derivative works" under copyright law, we strive to do all consulting work on a joint-ownership model. Does the State understand and, upon further dialogue and discussion, could come to agreement with our position on joint-ownership?

Response: Please refer to Section 6.6 of Attachment A and the State's definition of data as added to the RFP through Amendment #4.

58. Question: Attachment A Contract, Section 9, Loss of Data
This section imposes upon Contractor responsibility for ensuring that all data is backed up and recoverable and for recreating any lost data. We note that Task Orders issued under this RFP will vary widely as to scope and purpose. Therefore, we interpret this section to apply only to a Task Order that includes within its scope the performance backing up state data. Please confirm that this is correct.

Response: This language would apply to any TORFP issued under the resulting CATS II Master Contract.

59. Question: Attachment A – CATS II Contract, Section 6.2 and 7.2. There seems to be an inconsistency between the provisions of Section 6.2 and 7.2. Section 6.2 allows a

Contractor to state reasons why ownership of deliverables should not be transferred to the State, while Section 7.2 states that ownership of products that are not works for hire shall nonetheless be transferred to the State. In order to reconcile this apparent inconsistency, we interpret the intended meaning of these clauses as follows: a Task Order may provide that not all deliverables will be intended to constitute works for hire, and Contractor may have valid reasons to retain ownership rights in deliverables (e.g., deliverables that incorporate or are based upon intellectual property of the Contractor or third parties). In those instances, a Task Order may allow Contractor to grant to the State a paid-up license to use such deliverable in lieu of transferring all right, title and interest in such deliverable. Please confirm that this interpretation is correct.

Response: The State agrees that Section 6.2 and 7.2 are inconsistent. Under Section 7.2 as currently drafted, if a Contract deliverable is not a work-for-hire, the Contractor must relinquish, transfer and assign to the State the rights, title and interest that the Contractor has in the deliverable. Section 6.2 gives the Contractor an opportunity to explain, in writing, why, if a deliverable is not a work-for-hire, the Contractor believes, nevertheless, that it should not have to relinquish, transfer and assign all of its right, title and interest to the State for that deliverable. If the Contractor explains and justifies, to the State's complete satisfaction, why it should not relinquish, transfer and assign its rights, title and interest in that deliverable, the State may reconsider whether those rights, title and interest should remain with the State. Amendment #4 to the RFP revises Section 7.2 to address the inconsistencies.

60. Question: Attachment A – CATS II Contract, Section 27, Limitation of Liability
A standard contract practice followed by both the Federal Government and by commercial entities is to exclude liability for consequential damages for both parties. The Uniform Commercial Code and also the Federal Acquisition Regulation Section 52-214(p) recognize this. Accordingly, we ask that the State do the same here and include in the Limitation of Liability a similar exclusion of liability for consequential damages in either the form set forth in the Federal Acquisition Regulation or a commercial version:

FAR: "Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items."

Commercial: "Neither party is liable to the other for any indirect, consequential, exemplary, special, incidental or punitive damages, including without limitation loss of use or lost business, revenue, profits, or goodwill, arising in connection with this agreement, under any theory of tort, contract, indemnity, warranty, strict liability or negligence."

Response: No, the State will not consider the requested inclusion of language.