



REQUIREMENTS FOR CITY OF ATLANTA CONTRACTS

State of Georgia Requirements: State agencies, including Georgia municipal corporations like the City of Atlanta, have long been barred from agreeing to certain contractual terms by the State of Georgia Constitution and other state laws, regulations, and policies. Many of the prohibited contract terms were recently codified into statute in O.C.G.A. § 50-5-64.1. Pursuant to O.C.G.A. § 50-5-64.1, a contract containing a term prohibited under the law will be void and the contract will be otherwise enforceable as if it did not contain such term.

Below is a list of state prohibited contract terms that apply to every City contract regardless of form (i.e., MOU, IGA, Procurement, etc.) or purpose (donation, services, technology, cooperation, etc.):

1. Indemnification and/or hold harmless

Any provision that requires the City to pay all losses another party may incur. State agencies are prohibited from agreeing to indemnify third parties. Indemnification provisions have been determined to violate the prohibition against pledges of the State's credit and the prohibition against gratuities by the State (Ga. Const. Art. VII, Sec. IV, Par. VIII; Ga. Const. Art. III, Sec. VI, Par. VI; 1980 Op. Att'y Gen. 80-67; 1974 Op. Att'y Gen. 74-115. Indemnification provisions have also been determined to be invalid as unauthorized attempts to contractually waive the State's sovereign immunity. 1980 Op. Att'y Gen. 80-67.

The first constitutional provision provides that the credit of the State shall not be pledged or loaned to any individual, company or association. Debt as used in the constitution is defined in terms of an annual budget cycle that relies on annual appropriations of the legislature. Under this definition, a "pledge" would include agreeing to obligations of funds beyond the current fiscal year. The second constitutional provision relates to the "gratuities clause" which prohibits state entities from granting any donation or gratuity (gift) to a third party or forgiving any debt or obligation owed to the public. The gratuities clause essentially requires that the state entity receive a substantial benefit for the grant or use of its assets (whether using property or personnel). Finally, by virtue of the doctrine of sovereign immunity, suit may not be maintained in the courts against a state entity without the express consent of the State.

2. Patent and Copyright Indemnification

The Attorney General has taken the position that it is the sole legal advisor for the state and state entities may not agree to be represented by third parties, even when the matter involves the third party defending its patent rights.

3. Warranty/Guarantee

Any provision that requires the City to unconditionally assure or promise a certain result or outcome. The Attorney General has advised that warranty provisions requiring State agencies to provide a warranty violate the prohibition against pledges of the State's credit and the prohibition against gratuities by the State. The reason is that resources may have to be expended to satisfy such warranty or guarantee.

4. Governing law of or venue in any state other than Georgia.

Contracts with state entities must be governed by the laws of the State of Georgia. State law provides that the Attorney General has exclusive authority and control over all matters of litigation or potential litigation involving State agencies. As a result, venue for any action or dispute arising in contract shall be proper is Superior Court Fulton County, Georgia. O.C.G.A. § 50-21-1(b). Furthermore, any contract with State entities shall be construed in accordance with the laws of the State of Georgia, without giving effect to the conflicts of law provisions.

5. Requirements that the City pay taxes, interest, liquidated damages, penalty fees or cancellation charges litigation costs, or attorney's fees.

- **ATTORNEY'S FEES/COSTS.** The City will not agree to pay attorney's fees or costs. The rationale is that such a payment would be a violation of the constitutional gratuities clause.
- **DAMAGES.** The inclusion of indirect or incidental as types of damages payable by the City is not acceptable. The UCC regards these as distinguishable from consequential damages because they are usually meant to include out of pocket expenses directly attributable to the breach (i.e., travel expenses).
- **INTEREST.** The City will not agree to pay interest. The Attorney General has advised that payment of interest would be prohibited by the gratuities clause of the constitution and that the City lacks statutory authority to agree to the payment of interest. Atty. Gen. Position Paper dated August 8, 1978; Bently v. State Board of Examiners, 152 Ga. 836 (1922).
- **LATE PAYMENT/CANCELLATION CHARGES.** The City does not agree to pay late payment charges. This policy stems from an opinion of the Attorney General that late payment charges are in the nature of penalty/gratuity which the State is constitutionally prohibited from paying.
- **TAXES.** The State is exempt from most taxes and generally will not agree to contract language which requires the payment of taxes. The City will not agree to reimburse the supplier for the payment of taxes. However, the City will agree to language that states "the City will pay taxes lawfully imposed upon it".

6. Binding arbitration

The City cannot agree to binding arbitration. Based on the State's sovereign immunity and the Attorney General's authority over civil litigation, the City is not authorized to agree to binding arbitration. The Attorney General has exclusive authority and control over all matters of litigation or potential litigation involving State agencies, and neither the 1983 Georgia Constitution nor any Act of the General Assembly authorizes the City to limit the type or scope of judicial action, or the result obtainable therefrom by the State. Provisions which effectively waive the right of the Attorney General to bring actions on behalf of the State are prohibited.

7. Any provision requiring the City to be bound by terms and conditions that are unknown at the time of signing the agreement.

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 practical matter, entering into contracts that call for an unspecified sum of money to change hands make it extremely difficult to budget. Such provisions in a contract would be void as a matter of law and should be avoided at the time the contract is entered.

8. Best efforts provisions that require the expenditure of any funds or efforts necessary to meet the obligations of a contract, even if such efforts exceed the dollar amount of the contract.

Best efforts provisions have been held to be warranties and/or guarantees. Such provisions violate the prohibition against pledging the State's credit. (Refer to discussion of warranties above for more information).

9. Contractual provisions that require the City to waive potential claims against a third party or otherwise limit the liability of such party

The City does not have the authority to prejudice the rights of the State to sue or otherwise enforce a contract by agreeing to a limit on or a waiver of liability. (Refer to discussion of arbitration above for more information).

10. Contractual provisions which require the City to accept the risk of loss of items or goods during delivery.

As a rule, the City does not accept risk of loss until receipt of the items or goods.

11. If the agreement is a result of an RFQ or an RFP, the City does not allow vendors to disclaim warranties.

The rationale is that a purchase resulting from a competitive process should provide for specific products or services to be provided to the City to fit a particular need/purpose. To allow a supplier to disclaim a warranty of fitness in such a case would defeat the competitive process.

12. Contractual clauses that require the City to purchase insurance policies or provide coverage for third parties.

State law provides for the Department of Administrative Services to procure insurance for State entities. The City is covered by the Tort Claims Act and the State of Georgia Broad Form Insurance that is administered by the Department of Administrative Services.

13. No Automatic renewals for agreements obligating State appropriated funds.

Contracts may not allow for automatic renewals when State funds are/would be obligated in subsequent fiscal years. 1974 Atty. Gen. Op. 74-115. Contracts may be renewed at the sole discretion of the City. The Attorney General has taken the position that a contract may be renewed prior to the end of the fiscal year if all of the funds are available and are unencumbered during that same fiscal year. 1980 Atty. Gen. Op. 80-163.

14. No upfront payments for goods/services

The City is not authorized to make payment prior to receipt of goods/services. (Pursuant to the State of Georgia Accounting Procedures Manual, payables for normal operating expenditures should be recognized when the goods and services have been received. Accounting Manual Reference: Section: Vendor Management; Subsection: Payment Method).

15. Drug Free Workplace

Pursuant to O.C.G.A. § 50-24-3 and § 50-24-4, the City must include specific certifications regarding the provision of a drug free workplace and prohibition against engaging in certain activities relating to unlawful drug-related activities. This language is non-negotiable.

16. Confidentiality

Any confidentiality provisions in a contract must be subject to the Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq., as the City is a public agency of the State of Georgia. Additionally, the City generally considers pricing information to be subject to public disclosure. See State Rd. & Tollway Auth. V. Elec. Transaction Consultants Corp., 306 Ga. App. 487 (2010).

17. Joint Ownership of Intellectual Property

The State is constitutionally prohibited from becoming a joint owner or stockholder in or with any individual, company, association, or corporation. Therefore, the City is prohibited from agreeing to joint ownership of intellectual property. (Ga. Const. Art. VII § IV, Para. VIII).

18. Contract clauses that impose obligations on the City by reference

The City should not agree to contract provisions that incorporate additional obligations by reference, including but not limited to, references to policies located at a specific web address. Any and all terms of the contract which are modified or amended shall be binding upon either Party so long as such changes are agreed to in writing by the Parties and executed by the designated individuals authorized to amend or modify the contract.

19. E-Verify

Pursuant to O.C.G.A. § 13-10-91, a public employer shall not enter into a contract for the performance of services unless the contractor registers and participates in the federal work authorization program. If a supplier is providing services under a contract with a total compensation amount of \$2,500 or greater, (even if such services will be performed outside of the State of Georgia), A notarized affidavit from the supplier is always required attesting to the following:

(A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;

(B) The user identification number and date of authorization for the affiant;

(C) The affiant will continue to use the federal work authorization program throughout the contract period; and

(D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

Additional information regarding the State's E-Verify requirements can be found at:
<http://www.audits.ga.gov/NALGAD/IllegalImmigrationReformandEnforcementAct.html>

Additional Local Law Requirements: In addition to state requirements, the City of Atlanta Code of Ordinances ("Code") imposes requirements on city contracts. Unless otherwise stated in a particular Code section, the list of Code sections below apply to all city contracts, regardless of form or purpose:

1. Contracting procedures.

Sec. 6-401: This Charter section requires that all city contracts be approved as to form by the city attorney; signed by the mayor or his/her designee as authorized by ordinance; and the municipal clerk shall authenticate all contracts. The original of all contracts shall be maintained on file in the office of the chief financial officer.

2. Good faith actions.

Sec. 2-1107: This article requires all parties involved in the negotiation, performance or administration of city contracts to act in good faith. The term "good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

3. Signing contracts on behalf of mayor.

Sec. 2-1140: The chief procurement officer has the authority to sign contracts on behalf of the mayor, pursuant to section 6-401 of the Charter, including contracts for services, construction, professional and consultant services, grant agreements and intergovernmental agreements, when a duly enacted appropriation is passed by the city council which authorizes the expenditure of moneys for such purpose and the purchase amount does not exceed \$100,000.00 individually or in the aggregate.

4. Competitive sourcing.

Sec 2-1187: Unless otherwise authorized by law, all city contracts, except for the purchase, sale and disposition of real estate, shall be awarded by competitive sealed bidding, pursuant to section 2-1188, except when using an alternative sourcing method allowable under the Code.

5. Cancellation due to unavailability of funds in succeeding fiscal periods.

Sec. 2-1205: All multi-term contracts shall contain a clause stating that when funds are not appropriated to support continuation of performance in a subsequent contract period, the contract shall be canceled.

6. City's right to inspect plant, place of business or work site.

Sec. 2-1208: Under this article, the city may, at reasonable times, inspect the part of the plant, place of business or work site of a contractor or subcontractor that is pertinent to the performance of any contract awarded or to be awarded by the city.

7. Audit rights

Sec. 2-1209: The city is entitled to audit the books and records under any negotiated contract or subcontract, other than a firm fixed-price contract, to the extent that such books, documents, papers and records relate to the performance of such contract or subcontract.

8. Clause for ensuring payment.

Sec. 2-1211: Every city contract, purchase order or solicitation must set out the requirement that before final payment to a contractor is made by the city, the contractor shall certify to the city in writing, in a form satisfactory to the city, that all subcontractors, materialmen suppliers and similar firms or persons involved in the city contract have been paid in full at the time of final payment to the contractor by the city or will be paid in full utilizing the monies constituting final payment to the contractor.

9. Responsibilities and rights of parties to contract.

Sec. 2-1291: Each city contract for goods or services shall include provisions necessary to define the responsibilities and rights of the parties to the contract. The section enumerates minimum provisions that such contracts should include. Pursuant to this section, the chief procurement officer, after consultation with the city attorney, has issued appropriate contract clauses concerning minimum contractual requirements via the city's standard contract templates, as well as the city's purchase order terms and conditions, which have been uploaded to Oracle and also are located on the department of law intranet site.

10. Copyrights and rights in data.

Sec. 2-1295: Under this article, if a contract is being funded by the city, the contract shall include a provision giving the contractor notice that the city shall have the right to any plans, drawings, specifications, computer programs, technical reports, operating manuals and similar work products developed and paid for under the contract.

11. Equal employment opportunity clause.

Sec. 2-1414: This section requires an express equal employment opportunity (EEO) clause be included in all city contracts.

12. Liability of city officers and employees for unauthorized contracts.

Sec. 2-1483: Officers and employees of the city create actual legal and financial liability for themselves for knowingly allowing or continuing an unauthorized contract.

13. Gratuities and kickbacks.

Sec. 2-1484: The prohibition against gratuities and kickbacks prescribed in this section shall be conspicuously set forth in every contract and solicitation.

14. Contingent fees.

Sec. 2-1485: Every city contract or purchase order shall contain the clause prohibiting contingent fees set forth in this section.

15. Contractual transfer of risk.

Sec. 2-1748: The risk manager shall review and approve insurance provisions and requirements to hold the city harmless in city contracts prior to execution of the contracts, monitor insurance requirements in city contracts and establish and modify procedures to ensure compliance with those requirements.