

SITE Program

Liability and Indemnification Options

Instructions: To complete this liability section of the solicitation, agencies may select one of two options:

- 1) Agencies may select **one** of the versions of indemnity/liability language below and make it a requirement of the solicitation. If Version 3 or 4 is selected, the draft solicitation submitted to the Office of MN.IT Services for review must be accompanied by a memo addressing why the use of this more limited liability protection is justified under the circumstances. Explanations may include how the use of the language is intended to promote broader competition or is otherwise appropriate due to the minimal risks involved in the performance of the services requested. Further, if selecting Versions 3 or 4, the memo must also explain how the monetary cap was determined and how this amount corresponds with potential risks associated with performance of the work.
- 2) Agencies may select **two** or more of the versions of indemnity/liability language below and require those responding to the solicitation to select the version they are willing to abide by as a term of the work order. The agency will then score the responses based on the level of indemnity/liability coverage they are willing to provide. In the event version 3 or 4 is selected as one of the options to be presented, a memo must be submitted to the Office of MN.IT Services along with the draft solicitation explaining how the monetary cap was determined and how this amount corresponds with potential risks associated with performance of the work. As a general rule, the minimum amount of the cap should never be less than twice the estimated value of the work order and in most cases should be more. If an agency chooses to utilize this option and score liability coverage, this must account for a minimum of 20% of the total points available unless the Office of MN.IT Services has provided prior approval of a lesser amount. Contractors may be given the opportunity to agree to more than one of the options and specify the cost differential between the varying levels of coverage. The agency (in consultation with their legal representatives) would then be in a position to select which option is in the State's best interest.

VERSION 1 (Standard)

Indemnification

In the performance of this contract by Contractor, or Contractor's agents or employees, the contractor must indemnify, save, and hold harmless the State, its agents, and employees, from any claims or causes of action, including attorney's fees incurred by the state, to the extent caused by Contractor's:

- 1) Intentional, willful, or negligent acts or omissions; or
- 2) Actions that give rise to strict liability; or
- 3) Breach of contract or warranty.

The indemnification obligations of this section do not apply in the event the claim or cause of action is the result of the State's sole negligence. This clause will not be construed to bar any legal remedies the Contractor may have for the State's failure to fulfill its obligation under this contract.

VERSION 2 (Standard compromise)

Liability

Each party will be responsible for its own acts and behavior and the results thereof. The Minnesota Torts Claims Act, Minn. Stat. § 3.736 and other applicable laws govern the State's liability.

VERSION 3 (Indemnity with notice and cooperation and capped.

Liability and Limitation of Damages

The Contractor must indemnify, save, and hold the State, its agents, and employees harmless from any claims or causes of action, including reasonable attorney's fees incurred by the State for damages directly and proximately caused by the negligence of the Contractor while engaged in the performance of services under this contract. As a condition to the foregoing indemnity obligations, the State shall provide the Contractor with prompt notice of any claim for which indemnification shall be sought hereunder and shall cooperate in all reasonable respects with the Contractor in connection with any such claim. In accordance with Minnesota Statutes, Section 8.06, the State's Attorney General's Office must provide consent and approval with respect to Contractor's ability and right to control the handling of any such claim and to defend or settle any such claim with counsel of its own choosing.

The State agrees that Contractor, its principals, members and employees shall not be liable to the State for any actions, damages, claims, liabilities, costs, expenses, or losses in any way arising out of or relating to the services performed hereunder for an aggregate amount in excess of \$_____.
[Amount to be determined with advice from legal counsel. If you do not have legal counsel, you may contact the Attorney General's office. See instructions above for use of this version.]

VERSION 4 (Indemnity with notice and cooperation, capped and some types of damages waived)

Liability and Limitation of Damages

The Contractor must indemnify, save, and hold the State, its agents, and employees harmless from any claims or causes of action, including reasonable attorney's fees incurred by the State for damages directly and proximately caused by the negligence of the Contractor while engaged in the performance of services under this contract. As a condition to the foregoing indemnity obligations, the State shall provide the Contractor with prompt notice of any claim for which indemnification shall be sought hereunder and shall cooperate in all reasonable respects with the Contractor in connection with any such claim. In accordance with Minnesota Statutes, Section 8.06, the State's Attorney General's Office must provide consent and approval with respect to Contractor's ability and right to control the handling of any such claim and to defend or settle any such claim with counsel of its own choosing.

The State agrees that Contractor, its principals, members and employees shall not be liable to the State for any actions, damages, claims, liabilities, costs, expenses, or losses in any way arising out of or relating to the services performed hereunder for an aggregate amount in excess of \$_____.
[Amount to be determined with advice from legal counsel. If you do not have legal counsel, you may contact the Attorney General's office. See instructions above for use of this version.]

In no event shall Contractor, its principals, members, or employees be liable for consequential, special, indirect, incidental, punitive, or exemplary damages, costs, expenses, or losses (including, without limitation, lost profits and opportunity costs.)

EXAMPLE:

Contractor must select from the following list of Indemnity/Liability provisions. Responses to this solicitation must clearly identify the version the contractor selects. Responses to this solicitation are being assessed based on a 100-point scale with this section accounting for a possible 20 points. The amount of points or percentage of points to be received for each of the options is listed below. Contractor may elect to agree to more than one of the options, specifying cost differentials for the varying levels of liability coverage. In that event, the State will make a determination as to which option would present the best value to the State.

OPTION 1: (20 points)

Indemnification

In the performance of this contract by Contractor, or Contractor's agents or employees, the contractor must indemnify, save, and hold harmless the State, its agents, and employees, from any claims or causes of action, including attorney's fees incurred by the state, to the extent caused by Contractor's:

- 1) Intentional, willful, or negligent acts or omissions; or
- 2) Actions that give rise to strict liability; or
- 3) Breach of contract or warranty.

The indemnification obligations of this section do not apply in the event the claim or cause of action is the result of the State's sole negligence. This clause will not be construed to bar any legal remedies the Contractor may have for the State's failure to fulfill its obligation under this contract.

OPTION 2: (15 points)

Liability

Each party will be responsible for its own acts and behavior and the results thereof. The Minnesota Torts Claims Act, Minn. Stat. § 3.736 and other applicable laws govern the State's liability.

OPTION 3: (amount of points would be driven by the dollar value of the cap below)

Liability and Limitation of Damages

The Contractor must indemnify, save, and hold the State, its agents, and employees harmless from any claims or causes of action, including reasonable attorney's fees incurred by the State for damages directly and proximately caused by the negligence of the Contractor while engaged in the performance of services under this contract. As a condition to the foregoing indemnity obligations, the State shall provide the Contractor with prompt notice of any claim for which indemnification shall be sought hereunder and shall cooperate in all reasonable respects with the Contractor in connection with any such claim. In accordance with Minnesota Statutes, Section 8.06, the State's Attorney General's Office must provide consent and approval with respect to Contractor's ability and right to control the handling of any such claim and to defend or settle any such claim with counsel of its own choosing.

The State agrees that Contractor, its principals, members and employees shall not be liable to the State for any actions, damages, claims, liabilities, costs, expenses, or losses in any way arising out of or relating to the services performed hereunder for an aggregate amount in excess of \$_____. **[Amount to be determined with advice from legal counsel. If you do not have legal counsel, you may contact the Attorney General's office. See instructions above for use of this version.]**

In no event shall Contractor, its principals, members, or employees be liable for consequential, special, indirect, incidental, punitive, or exemplary damages, costs, expenses, or losses (including, without limitation, lost profits and opportunity costs.)