



STATE OF VERMONT
OFFICE OF LEGISLATIVE INFORMATION
TECHNOLOGY

MEMORANDUM

To: Members, Joint Information Technology Oversight Committee;
Members, Joint Legislative Justice Oversight Committee

From: Kevin Moore, Director of Legislative Information Technology

Date: August 26, 2020

Subject: Act 120 (2020), Sec. A.18 Report; Software Vendor Contract and User Agreement Compliance with State Law

Pursuant to 2020 Acts and Resolves No. 120, Sec. A.18, the Office of Legislative Information Technology ("Legislative IT") is required to report to the Joint Information Technology Oversight Committee and the Joint Legislative Justice Oversight Committee by September 1, 2020 on the "status of how software vendors that the State currently engages for the provision of services are bringing contracts and user agreements into compliance with Vermont law so as not to contain presumptively unconscionable terms per 9 V.S.A. chapter 152."

Legislative IT Contracts with Software Vendors

Legislative IT enters into approximately 85 contracts each year on behalf of the Vermont General Assembly, of which approximately 37 contracts are with software vendors. Of the contracts with software vendors, approximately 15 utilize user agreements.

Legislative IT Contract Review Process

Any contract entered into by Legislative IT goes through a rigorous review process that includes a legal review by an attorney with the Office of Legislative Counsel to ensure compliance with the Office of Legislative Counsel's Information Technology Contracting Guidelines ("Guidelines"), effective January 1, 2017. As set forth in the Guidelines, while the General Assembly is not statutorily required to comply with the State of Vermont's (the "State") procurement process, these Guidelines are informed by several sources created by the State related to IT procurement, including the Secretary of State's Bulletin 3.5, Contracting and Procurement Procedures ("Bulletin 3.5"); the State's Standard State Provisions for Contracts and Grants ("Standard Provisions"); the State's Information Technology Procurement Guidelines; and applicable State law. As a result, the Legislative IT procurement process presented in the Guidelines largely follow the State's best practices for IT procurement.

Compliance with Restriction of Unconscionable Terms Under State Law

9 V.S.A. chapter 152 restricts the use of unconscionable terms in standard form contracts. The law establishes a rebuttable presumption that certain types of contractual terms are on their face unconscionable in standard form contracts to which only one of the parties to the contract is an individual, and that individual does not draft or have a meaningful opportunity to negotiate the contract. The presumptively unconscionable terms are as follows: (1) a requirement that legal claims take place in an inconvenient venue, (2) a waiver of the right to a jury trial or to bring a class action, (3) a waiver of the right to seek punitive damages, (4) a requirement that limits the time in which an individual can bring an action to less than the time allowed by the statute of limitations, and (5) a requirement that the individual pay fees and costs to bring a claim substantially higher than what the courts would require.

Pursuant to Bulletin 3.5, Legislative IT attaches the Standard State Provisions for Contracts and Grants to every contract, except under certain limited circumstances¹. These provisions address the use of unconscionable terms as set forth in 9 V.S.A. chapter 152 as follows:

- **Inconvenient venue:** The Standard Provisions require that the contract is governed by the laws of the State of Vermont and that any action is brought and enforced in the Superior Court of the State of Vermont, Civil Division, Washington Unit.
- **Waiver of right to jury trial or to bring a class action:** The Standard Provisions do not require the State to submit to binding arbitration or waive its right to jury trial and does not imply the party's waiver of any of these rights.
- **Waiver of the right to seek punitive damages:** The Standard Provisions do not require a waiver of the right to seek punitive damages.
- **Statute of limitations:** The Standard Provisions do not limit the amount of time allowed under the law to bring an action.
- **Fees and costs:** The Standard Provisions require a party to the contract to defend the State (and its officers and employees) against all third-party claims or suits arising in whole or in part from any act or omission of the party in connection with the performance of the contract. However, the party is not restricted from requesting recoupment of specific defense costs from the State.

Please let us know if you require any additional information on our IT contracting process.

¹ Where Legislative IT is not able to negotiate a contract to include the Standard Provisions, an addendum to the contract is typically negotiated that includes many of the terms addressed in the Standard Provisions and complies with the requirements of 9 V.S.A. chapter 152.