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TO: ALL DEPARTMENT AND AGENCY HEADS

FROM: Robert L. King

SUBJECT: Installment-Purchase and Lease-Purchase Financing of Consultant Services for Software Improvements

This Bulletin provides direction for agencies who are planning to finance the installment-purchase or lease-purchase of consultant services for software improvements through State Certificates of Participation (COPs) and **vendor financing including Statewide Lease Purchasing** and supersedes Bulletin H-1020, issued May 14, 1998. The following sample contract language must be used in the contract documents between a State agency and the consultants (vendor) making the software improvements. Using this contract language is essential for the financing to be considered tax-exempt with resulting lower interest costs to the State.

Agencies are referred to page 2 of Budget Policy and Reporting Manual Item H-101, Installment-Purchase Financing (revised October 10, 1997) stating that: "Consultant services for software improvements are only eligible for COPs financing if they are part of a hardware/software procurement package. Consultant services may not be financed through vendor financing."

In addition, revised State step-by-step procedures for agency use of COPs financing are available from the Office of General Services (OGS) and Division of the Budget (DOB). Agencies should continue to work with OGS and DOB, as well as the Office for Technology to advance COPs financing of consultant services for software improvements for Year 2000 compliance initiatives.

SAMPLE CONTRACT LANGUAGE

It is anticipated that Project Deliverables under this [Agreement] may include "existing" and/or "custom" materials. "Existing Materials" include, without limitation, such things as: programs, program listings, programming tools, documentation, reports, drawings, data, modules, components, utilities, interfaces, templates, subroutines, algorithms, formulas and technical information, existing prior to or independently developed by [Vendor] or another Third Party other than as a result of this [Agreement]. "Custom Materials" include, without limitation, such things as: programs, programming tools,

source codes, object codes, user or training manuals, programming, reports, drawings and any other materials, preliminary, final and otherwise, created, prepared, written or developed, whether jointly or individually, for the [Agency] under this [Agreement].

New York State shall have ownership and the perpetual rights to use, copy, modify, and prepare derivative works of the Custom Materials, developed in the course of the [Services] pursuant to this [Agreement], whether jointly or individually, subject to the terms of [specify any Articles or sections of Agreement related to confidentiality treatment of Existing Materials and Custom Materials]. All rights in the Custom Materials remain in the [Agency]. The parties will cooperate with each other and execute such other documents as may be appropriate to achieve the objectives of this [Article]. With respect to any third party software provided by the [Agency] to [Vendor] hereunder which [Vendor] modifies and/or enhances as provided for under this [Agreement], the [Agency] shall be responsible for obtaining from the third party licensors the necessary rights to such software, including the rights for [Vendor] to access, use and modify the software on behalf of the [Agency] and for the [Agency] to own such modifications and replacements thereto.

The [Agency] acknowledges that [Vendor] in performing hereunder may use any information, products and Existing Materials that are proprietary to the [Vendor]. The [Agency] will use reasonable efforts to preserve the proprietary character of Existing Materials. Other than those rights or interest in the Existing Materials specifically provided by this [Agreement], the [Agency] shall receive no rights or interest in such Existing Materials of the [Vendor] including any enhancements and improvements thereto which are not created as a result of this [Agreement], except pursuant to a separate written agreement. Furthermore, nothing herein shall preclude the [Vendor] from using the related or underlying general knowledge, skills and experience developed in the course of providing the deliverables and intellectual property under this [Agreement] in the course of [Vendor's] business.

The State retains the right to sell, or license on an exclusive or non-exclusive basis, the Custom Materials developed under this [Agreement]. The sale or licensure of such Custom Materials shall not occur until such Custom Materials are or become useable. The sale or licensure of such Custom Materials shall be at a fair market value. The fair market value of such Custom Materials shall be determined at the time of sale or licensure. In the event the [Vendor] wishes to purchase any Custom Materials developed under this [Agreement], such purchase shall be pursuant to a separate written agreement.

Questions concerning this Bulletin should be addressed to your Budget Examiner or to Darcie Ciejka at (518) 474-7319.

NOTE: This Bulletin supersedes H-1020 dated May 14, 1998.