

ADMINISTRATIVE SERVICES DEPARTMENT[11]

Adopted and Filed

Pursuant to the authority of Iowa Code section 8A.311(21)“a,” the Department of Administrative Services hereby adopts new Chapter 108, “Contractual Limitation of Vendor Liability Provisions,” Iowa Administrative Code.

These rules allow the Director to authorize the procurement of certain goods and services when a contractual limitation of vendor liability is provided for and set forth in the documents initiating the procurement. The Iowa Department of Management[541] was also consulted, as required by the statute.

These rules implement provisions of 2007 Iowa Acts, House File 849, section 6 (Iowa Code section 8A.311(21)), which sets out instances where limitation of vendor liability may be acceptable, including the criteria for determining whether to permit a contractual limitation of vendor liability. The legislation also requires that factors such as whether authorizing the limitation is necessary to prevent harm to the state from a failure to obtain the goods or services sought or from obtaining the goods or services at a higher price if the state refuses to allow a contractual limitation of vendor liability be considered.

The rules were published under Notice of Intended Action in the Iowa Administrative Bulletin on June 4, 2008, as **ARC 6809B**. A public hearing was held on June 24, 2008, in the Hoover State Office Building from 9 to 10 a.m. No one appeared at the hearing to comment on the rules. Written comments were received during the public comment period and were posted on the DAS Web site.

These rules have been changed since the Notice of Intended Action. Revisions include:

- In paragraph 108.4(1)“a,” adding provisions that allow the Department to negotiate a limitation of liability if not doing so could result in procurement of a lower quality good or service;
- In subrule 108.5(1), changing the multiplier from two times to one times the amount of the contract;
- In paragraph 108.5(1)“a,” deleting “bad faith” and “unlawful acts” from the list of exceptions and adding “gross negligence” to the list;
- In paragraph 108.5(1)“b,” changing the term “personal injury” to “bodily injury”;
- In paragraph 108.5(1)“c,” deleting the terms “insurance,” “bonds” and “express representations and warranties” from the list pertaining to contractual obligations;
- In subrule 108.5(2), deleting paragraph “a” and combining the text of paragraph “b” with the introductory language of the subrule; and
- In subrule 108.5(3), revising the definition of “contract value” to include language regarding payments via a contract for a specific project.

These rules are intended to implement Iowa Code section 8A.311.

These rules will become effective February 18, 2009.

The following amendment is adopted.

Adopt the following **new** 11—Chapter 108:

CHAPTER 108

CONTRACTUAL LIMITATION OF VENDOR LIABILITY PROVISIONS

PREAMBLE

These rules define the process for the department to follow when contracting for information technology goods and services. The rules allow the department to enter into contractual agreements that, in certain instances, will limit the liability of the vendor.

11—108.1(8A) Authority and scope. Pursuant to Iowa Code section 8A.311(21), these rules provide for authorizing information technology procurements containing a contractual limitation of vendor liability as provided for and set forth in the documents initiating the procurement. The department of administrative services adopted these rules in cooperation with the department of management.

11—108.2(8A) Definitions.

“Agency” or “state agency” means a unit of state government, which is an authority, board, commission, committee, council, department, examining board, or independent agency as defined in Iowa Code section 7E.4, including but not limited to each principal central department enumerated in Iowa Code section 7E.5. However, “agency” or “state agency” does not include any of the following:

1. The office of the governor or the office of an elective constitutional or statutory officer.
2. The general assembly, or any office or unit under its administrative authority.
3. The judicial branch, as provided in Iowa Code section 602.1102.
4. A political subdivision of the state or its offices or units, including but not limited to a county, city, or community college.

“Agency head” means the director, commissioner, or other official in charge of a state agency.

“Competitive selection” means a formal or informal process engaged in by a state agency to compare provider qualifications, terms, conditions, and prices of equal or similar goods or services in order to meet the objective of purchasing goods or services based on quality, performance, price, or any combination thereof.

“Competitive selection documents” means documents prepared for a competitive selection by the department or an agency to purchase goods and services. Competitive selection documents may include requests for proposal, invitations to bid, or any other type of document the department or an agency is authorized to use that is designed to procure a good or service for state government. A competitive selection document may be an electronic document.

“Department” means the department of administrative services.

“Director” means the director of the department of administrative services.

“Information technology device” means equipment or associated software, including programs, languages, procedures, or associated documentation designed for the utilization or processing of information stored in an electronic format. “Information technology device” includes but is not limited to computer systems, computer networks, and equipment used for input, output, processing, storage, display, scanning, and printing.

“Information technology procurement” means a procurement for goods or services in which the predominant factor, thrust, and purpose of the procurement as reasonably stated is for the purchase of information technology devices or information technology services. Information technology procurements do not include procurements for goods or services in which the purchase of information technology devices or information technology services is an incidental, minor or limited part of the contract.

“Information technology services” means services designed to do any of the following:

1. Provide functions, maintenance, and support of information technology devices.
2. Provide services for any of the following:
 - Computer systems application development and maintenance.
 - Systems integration and interoperability.
 - Operating systems maintenance and design.
 - Computer systems programming.
 - Computer systems software support.
 - Planning and security related to information technology devices.
 - Data management consultation.
 - Information technology education and consulting.
 - Information technology planning and standards.
 - Establishment of local area network and workstation management standards.

11—108.3(8A) Applicability. This chapter applies to information technology procurements conducted by the department, including information technology procurements the department conducts on behalf of another state agency. When the department is conducting an information technology procurement on behalf of another state agency and the procurement exposes the state to risks for which the contractual limitation of vendor liability outlined in rule 108.5(8A) is not appropriate, the agency head of the other

state agency shall make the decisions regarding contractual limitation of vendor liability outlined in subrule 108.4(2). This chapter does not apply to procurements conducted by another state agency on its own behalf.

11—108.4(8A) Authorization of limitation of vendor liability and criteria.

108.4(1) *General approach.* The director, in consultation with the department of management, may authorize the procurement of information technology devices and services in which a contractual limitation of vendor liability is provided for. Criteria for determining whether to permit a contractual limitation of vendor liability include all of the following:

a. Whether authorizing a contractual limitation of vendor liability is necessary to prevent harm to the state from a failure to obtain the goods or services sought, from obtaining the goods or services at a higher price if the state refuses to allow a contractual limitation of vendor liability, or when the result could be a lower quality good or service.

b. Whether the contractual limitation of vendor liability is commercially reasonable when taking into account any risk to the state created by the goods or services to be procured and the purpose for which they will be used.

108.4(2) *Special circumstances.* Certain information technology procurements of information technology devices and services expose the state to risks for which the contractual limitation of vendor liability outlined in rule 108.5(8A) is not appropriate. The department or applicable agency for which the department is conducting the procurement shall review the risks presented by the particular information technology procurement before initiating the procurement. When either the department or the applicable agency believes a particular information technology procurement may expose the state to risks for which the contractual limitation of vendor liability outlined in rule 108.5(8A) is not appropriate, the department or applicable agency shall identify the risks and identify the steps the department or applicable agency believes may help to mitigate the risks. The director or the applicable agency head shall consult with the department of management to determine whether a higher limit of the vendor's contractual liability is appropriate. This determination shall occur before the department issues the competitive selection documents, and the competitive selection documents issued in the procurement shall include the higher limitation on the vendor's contractual liability that the director or the applicable agency head and the department of management have determined to be appropriate for the procurement under consideration.

108.4(3) *Applicability.* These rules do not apply to procurements for devices or services procured under a federal tariff or using federal funds, if the federal agency providing the funds imposes any requirements regarding limitation of liability provisions in the resulting contract.

11—108.5(8A) Prohibited limitation of vendor liability provisions.

108.5(1) For information technology procurements, the director authorizes the competitive selection documents and the resulting contract to include a contractual limitation of vendor liability clause that limits the vendor's liability to one times the contract value, as defined in subrule 108.5(3), provided that the foregoing limitation shall not apply to:

a. Intentional torts, criminal acts, fraudulent conduct, intentional or willful misconduct, or gross negligence.

b. Claims related to death, bodily injury, or damage to real or personal property.

c. Any contractual obligations of the vendor pertaining to indemnification, intellectual property, liquidated damages, compliance with applicable laws, or confidential information.

d. Claims arising under provisions of the contract calling for indemnification of the state for third-party claims against the state for bodily injury to persons or for damage to real or tangible personal property caused by the vendor's negligence or willful conduct.

108.5(2) For information technology procurements, the director authorizes the competitive selection documents and the resulting contract to include a contractual limitation of vendor liability clause that limits the vendor's liability for consequential, incidental, indirect, special, or punitive damages to the

extent the vendor's liability for such damages arises out of the items identified in paragraphs 108.5(1) "a" to "d."

108.5(3) For the purpose of this rule, "contract value" means the aggregate total compensation pertaining to a specific project paid by the state to the vendor under the entire term of the contract, including all renewals and extensions.

11—108.6(8A) Negotiation of limitation of vendor liability provisions.

108.6(1) *After completion of competitive selection process.* In a competitive selection process, the department or the state agency upon whose behalf the department conducts the information technology procurement may either award the contract to the apparent successful vendor without further negotiation or negotiate contract terms, including limitation of vendor liability provisions, if the department or state agency, in its sole discretion, determines that the best interest of the state would be served by entering into negotiations. Any negotiations of vendor limitation of liability contractual provisions shall be done in accordance with the provisions of rules 108.4(8A) and 108.5(8A).

108.6(2) *Sole source or emergency procurement.* In a justifiable sole source or emergency procurement, the department or state agency may negotiate a contractual limitation of vendor liability provision in accordance with the provisions of rules 108.4(8A) and 108.5(8A).

11—108.7(8A) Additional requirement. Any contract containing a provision limiting the vendor's liability shall also contain provisions limiting the state's liability and preserving the state's sovereign immunity.

These rules are intended to implement Iowa Code section 8A.311(21).

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EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/14/09.