



**Written Testimony of the IT Alliance for Public Sector
Before the Joint Commission on Technology and Science**

Richmond, Virginia

August 19, 2015

Chairmen and members of the Joint Commission on Technology and Science, the Information Technology Alliance for Public Sector (ITAPS) appreciates the opportunity to submit written testimony regarding House Bill 2336 (Peace) and Senate Bill 1420 (Reeves). ITAPS, a division of the Information Technology Industry Council¹ (ITI), is an alliance of leading technology companies offering the latest innovations and solutions to public sector markets. With a focus on the federal, state, and local levels of government, as well as on educational institutions, ITAPS advocates for improved procurement policies and practices in the public sector for the nation's leading innovation companies and represents more than 30 companies involved in information and communications technologies (ICT).

Vendor liability has been, and continues to be, a major concern for the information and technology sector in recent years. Higher limitations of vendor liability, or in some cases uncapped liability (including exceptions to liability limiting terms), result in higher costs for products and services not only for the purchasing agency, but also for state taxpayers. They can also skew the request for proposal (RFP) process by reducing the number of competitive bids by high performing vendors who are unwilling and unable to underwrite extraordinary risk. Recognizing the problem, a majority of states have adopted reasonable vendor limitations of liability terms in their IT contracts, based on the type of IT product or service being acquired. According to a 2010 study by the National Association of Chief Information Officers, 28 states have reported that they have policies in place that allow limits on liability in ICT contracts for vendors.² And those numbers increased in 2012, with 30 states having reported adopting limits.³

We support the approach of House Bill 2336 and Senate Bill 1420 because they propose to better balance the interests of the state and private industry. And while we recognize that some states like Virginia have made efforts to reduce their vendor limitations of liability, the exceptions to those liability limitations that exist in practice in Virginia can impede a strong competitive procurement process, just as much as a procurement with no limitation of liability. Specifically, if those exclusions are included in these draft bills, they will increase vendor exposure and deviate from a commercially insurable approach. Additionally, those exceptions will likely hinder the Commonwealth's efforts to engender competition among the top technology firms and will result in cost increases especially if the Commonwealth is forced to rebid a contract due to inadequate bids. Accordingly, we ask that you review and either eliminate or substantially narrow based on the various types of technology being acquired, the state's standard exceptions to vendor limitations of liability.

¹ The Information Technology Industry Council (ITI) is the global voice of the tech sector. As the premier advocacy and policy organization for the world's leading innovation [companies](#), ITI navigates the relationships between policymakers, companies, and non-governmental organizations, providing creative solutions that advance the development and use of technology around the world.

² NASCIO Research Brief, Gaining Traction on the Road to Win-Win: Limitations on Liability in State IT Contracting, p.3 (March 2010).

³ NASCIO Limitations of Liability in IT Procurement Infographic: <http://www.nascio.org/publications/documents/Limitations-on-Liability-Infographic.pdf> (2012).

Equally troublesome is part of Virginia's procurement approach which evaluates or discounts a vendor's bid based on the exceptions it raises to an agency's terms and conditions specified in an agency's request for proposal. This approach sometimes forces ICT companies to either undertake confiscatory risk or not bid on the project (and consider the enforceability of service/product terms of use). Such an approach also does not allow companies or the Commonwealth the opportunity to balance terms and conditions risk with pricing and delivery. It can also reinforce ambiguous provisions that lead to poor contracting results for the Commonwealth and does not provide the Commonwealth with the best value for taxpayers.

We urge the Commonwealth to continue to incorporate continuous improvement into its public procurement process that will advance technological innovation across the state enterprise and produce the best outcome for its customers and citizens. With that in mind, our additional recommendations for strengthening the Commonwealth's procurement processes are as follows:

1. **Specifically define the business problem to be solved during the pre-RFP process:** Without a well-defined and articulated problem and the outcome that is sought to be achieved, the procurement process is likely to go off-course. Communications with vendors regarding potential market solutions, best practices, and case studies will enhance state agency staff's understanding of the availability of options and how to better structure an RFP.
2. **Communication and Contract Planning:** Broad communication between the IT vendor community and public agencies can significantly reduce the risk of underperformance and is particularly essential at the outset of planning a project. Governmental entities should be committed to maximizing information sharing and greater communications in order to properly define an agency's business need, challenges, and desired outcome, identifying different types of solutions, and soliciting feedback and ideas. In addition to the pre-solicitation communication techniques, agency communications must include providing adequate response times to request for proposals to allow vendor feedback on requirements, incorporating bidders' questions and answers to respond to ambiguity and inconsistencies in RFPs, and competitive negotiations that offer a better understanding of measuring project risks.
3. **Leveraging IT Expertise in Acquisition:** Good IT governance is an essential ingredient to successful IT operations and project success. A unified or enterprise mindset can improve efficiency and effectiveness across the governing body and avoid fatal flaws in procurement. ITAPS supports the embedding of CIO staff expertise on cross-department acquisition project teams to improve IT planning, maximize technology solutions, develop solicitations, evaluate proposals, shorten the procurement process, mitigate project risk and cost overruns, monitor project success and challenges, and handle post-award issues.
4. **Procurement Staff Training:** Budget constraints for new skills training, pay inequity against the private sector, and an aging IT workforce compound the risk of successful IT projects across all levels of government. Governments should adequately fund strong, relevant and in-depth training and professional development of procurement and IT staff throughout their career tenure including continuing education of procurement officials in acquisition best practices, scoring of proposals, debriefing vendors, existing procurement law, negotiations, contract risk analysis, commercial marketplace research on technology trends, conflict resolution, and identifying best value to promote successful IT project completion.

In conclusion, we urge the Commonwealth of Virginia to support a knowledge-based sourcing strategy -- one that leverages the intelligence of leading technology companies in a fair, risk-balanced contract process that focuses on



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outcomes for customers and ensures taxpayer dollars are spent wisely. We welcome any questions that you may have on this important public policy issue. Please contact Trey Hodgkins, III, Senior Vice President at thodgkins@itic.org or 202.626.5758 if you have any comments or concerns.