

To: City Solicitor Daniel D. Regan

From: Yvonne Schlosberg Hilton, Associate City Solicitor, and Kate DeSimone, Senior Counsel of Information Technology

Date: May 12, 2010

Re: List of Preliminary Questions/Concerns Regarding City's License/Use of Oracle Software

### **BACKGROUND**

The City of Pittsburgh wishes to upgrade its antiquated PeopleSoft payroll software. The County of Allegheny, a current licensee of several Oracle ERP software programs, wishes to upgrade its system to a new version of the same Oracle software.

Both City and County wish to license a current version of the Oracle ERP software, and are exploring the idea of sharing resources in order to accomplish this goal. In a proposal from the County to the City dated March 12, 2010, the County proposed that it should license the software from Oracle with the City as sublicense. The County would host the software at its data center, and apply its processes to perform City tasks on behalf of the City. In return, the City would pay license fees to Oracle, and service fees to the County.

In a counter proposal dated March 31, 2010, it appears that the situation is somewhat more fluid, with certain key determinations to be made by a third party consultant who will be paid by the City, and by a shared services organization.. It is noteworthy that to the extent that this project is dependent upon a license of intellectual property rights by Oracle, it is premature to speculate on any particulars of the City/County relationship before the parameters of that master software license are determined

Reservations have been expressed about some of the ideas advanced, due to inconsistencies with standard licensing processes, departures from industry standard in provision of services, and legal and liability concerns attendant on such a joint enterprise, but particularly with regard to potential liability of the City. This is a partial list of said reservations with regard to the County proposal, and the agreement generated by the law firm of Reed Smith at the behest of the Intergovernmental Cooperation Authority.

### **THRESHOLD CONCERNS**

1. Is the City-County cooperation model feasible and more cost-effective than individual licenses? What due diligence occurred with regard to this vendor selection by the City?
2. If we do a joint agreement, are we co-licensees or is the City or County the original licensee with the other being a sublicensee?
3. In any event, if one entity will perform services on behalf of the other, do we have a need for both to license the software?
4. If we (City) have problems with software, what is the City's recourse if we have no contractual privity with Oracle/DBL, particularly if the County does not experience the same problem?

5. Service level agreements may be inadequate if the City needs software modifications and/or other customized services that the County cannot or will not address. Again, without privity to Oracle, we may be limited to the County's solutions that may be inadequate for our needs.

6. What is the corporate status of the SSO, if any. How does it hold a license? Does Oracle allow transfer of a license to an SSO?

#### **DEPARTURES FROM INDUSTRY STANDARDS**

1. Typically, the licensee of a software product has custody of that product.
  - By relinquishing custody of the Oracle products, City may be sacrificing any other value that the software could have had for other City purposes
  - Without custody of software, is it fair for City to shoulder full legal responsibility under the license agreement?
  - If City is a licensee of software, is it fair for City to pay County for the services rendered using the licensed software?
2. Enterprise Resource Planning software customarily refers to a highly individualized blend of software and services supporting the needs and goals of one specific enterprise. To the extent that City's individual needs are presumed to be met by existing County practices, this ERP project may be of limited value to City.
3. Typically, the services to be provided by County to City using the Oracle software would be considered "service bureau" work. Several problems arise:
  - Master license agreements typically forbid service bureau work.
  - Service bureau is not among County's core competencies.
  - County may be unable to provide standard service bureau warranties

#### **PRAGMATIC CONCERNS**

1. Difficulty of "shared services" among two data centers
2. Possible abdication of choice of data center to County (under proposal) or to third party consultant (under counter proposal)
3. Choice of data center should rest on empirical professional standard such as staffing, security, capabilities of systems and servers.
4. Choice of data center AT MINIMUM should include characteristics such as air conditioning, fire suppression, and adequacy of hot site backup. Also, the hot site backups should be meaningfully compared, as the term hot site backup is open to various interpretations.

#### **ASSUMPTIONS REGARDING INFORMATION TECHNOOGY**

The success of this project is premised upon the following assumptions:

- County's data structures are the same as City's
- County processes and practices are readily transferrable to City without loss of integrity

- No issues with commonly encountered IT roadblocks such as data conversion, platform compatibility, installation, etc.etc.

If any of these assumptions proves to be unfounded, this could prove disastrous to the entire project.

#### PROPOSED AGREEMENT:

1. Format. Is the reference to Intergovernmental Cooperation Agreement meant to refer to the agreements authorized under state law, which require ordinances, formal prior approval by state, etc?
2. Exhibits need to be completed (license, hosting and service level requirements must be developed)
3. Will need to revise definitions. (E.g. "Documentation--have not seen any Oracle documentation yet.)
4. Section 2/Services: 2(a)(iv)—what is contemplated in terms of County access to City?
5. Section 2/Services: 2(b)(ii)—Is there going to be a dedicated "Help Desk" contact just for the City?
6. Section 2/Services: 2(b)(vii)—Is "equal priority basis" idea realistic?
7. Section 3/Services: Acceptance Testing: Need to ensure this timeframe syncs with County's rights under license if the County is sole licensee. Need to clarify that if the City terminates as permitted, we will have no further financial obligations.
8. Section 4/Services: ERP License. Regardless of which entity is the licensee, we will need to see a copy of the proposed license.
9. Section 5/Compensation: What part of the \$2 plus million is allocated to the license fee and what is the service fee for year 1?  
  
If we are NOT the licensee, do we have subsequent license fees or any license fees?  
  
All amounts after year 1 will need language indicating they are subject to annual appropriations by City Council. (Cannot accept contingent liability).
10. Section 6/Term and Termination: Need a five-year up front term. Only way for City to terminate would be material breach by County. Concern if we wanted to reduce service level payments (not a breach by County.)
11. Section 14/PHRC: Need to indicated that future amounts are subject to annual appropriations by City Council.
12. Section 15: May not be formal enough for our needs. If something goes "terribly wrong" will this format be enough? Ok as long as it is not mandatory. Information considered privileged needs to include something about "subject to applicable laws."
13. Section 16(E): Pass through...we better ensure that the license allows us to do this.

14. Section 16(F): Disclaimer: Should not be included in a service agreement (should be in master license).
15. Section 17: Does not appear application.
16. Section 18: Unlikely County will or can agree to this.
17. Section 19. Need an exception for public records as defined by applicable law.
18. Section 23: Not inclined to keep.
19. Section 32: Need to confirm if resolution or ordinance (if entering pursuant to state intergovernmental agreement law).

**CONCERNS SPECIFIC TO CITY'S RESPONSE TO COUNTY'S ERP PROPOSAL,  
DATED MARCH 31, 2010**

1. Lack of specificity, apparent lack of any legal analysis as to SSO
2. County to provide "knowledge leadership." What does this mean? To what extent has County IT been involved in this process?
3. Co-equal project managers: is this realistic?
4. "County resources will be compensated at a mutually agreeable rate for services rendered." In addition to what City pays for license and services??
5. Timeline: has this been crafted by City and County IT? If not, then probably not feasible.
6. Third party consultant to decide where services take place: many inevitable delays here, including mandatory requirements of City's ethics in contracting ordinance
7. In general, there are a lot of undetermined costs here, any of which could lead to funding problems with Council.

**MISCELLANEOUS:**

1. Are there data-privacy concerns?
2. Are there data-security concerns?
3. Governmental approvals?
4. Litigation cooperation issues.
5. Would the transfer of data to an outside vendor (County) trigger applicable provisions of Gramm-Leach Bliley Act? HIPAA?
6. May be additional laws we need to comply with because of the involvement of sensitive records.