

TERMS AND CONDITIONS

1) DEFINITIONS

a) "Agency" means the Agency purchasing the goods or services.

b) "Software" is "Packaged Copyrighted Software Products" (unless otherwise identified) as used in 9 NCAC 06B.1301(a) and means Computer Software that is used regularly for other than governmental purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices, that is considered "shrink-wrap" or "clickwrap", that is or may be generally licensed by "shrink-wrap" or "clickwrap" licenses, or Computer Software that does not constitute Custom or Modified Software and is regularly sold, licensed or leased by the Vendor to governmental entities to meet governmental requirements.

c) "Computer" means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the Data.

d) "Computer Data Base" means a collection of data in a form capable of being processed and operated on a Computer.

e) "Computer Program" means a series of instructions or statements in a form acceptable to a Computer, processor or controller that is designed to cause the Computer, processor or controller to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs and maintenance/diagnostics programs, as well as applications programs such as payroll, inventory control and engineering analysis programs. Computer Programs may be either machine dependent or machine-independent, and may be general purpose in nature or be designed to satisfy the requirements of a particular user.

f) "Computer Software" or "Software" means Computer Programs and Data Bases.

g) "Computer Software Documentation" means technical data and information comprising Computer listings and printouts, in human readable form that:

i) Documents the design or details the Computer Software

ii) Explains the capabilities of the Software, or

iii) Provides operating instructions for using the Software to obtain desired results from a Computer.

h) "Custom or Modified Software" means Software that may be modified by the State, or by Vendor at the State's request or direction to perform in accordance with specifications.

i) "Data" means recorded information, regardless of form or method of recording.

j) "Hardware" includes Computers, printers, attached equipment or peripherals or other equipment utilized for the State's intended purposes as expressed in the solicitation documents.

k) "Products" includes Software, Hardware, equipment, options, documentation, accessories, supplies, spare parts.

l) "State" shall mean the State of North Carolina, the Office of Information Technology Services as an Agency, or in its capacity as the Award Authority.

m) "Support" includes Hardware maintenance and repair (outside any required by any applicable warranty), Software updates maintenance and support services, consulting, training and other support services provided by or through Vendor.

n) "Use", in the context of Computer Software execution and operation in Section 2 hereinbelow, means storing, loading, installing, executing or displaying Software on a Computer, processor or controller, or making a copy of Software for archival or backup purposes only.

2) SOFTWARE LICENSE

a) Vendor grants the State a personal non-transferable and non-exclusive right to use, in object code form only, all Software and related documentation furnished to the Agency under this Agreement. This license grant shall be limited to use with the Hardware (if any) or Products (if any) for which the Software was obtained, or on a temporary basis, on back-up equipment when the original Hardware or Product is inoperable. Use of Software on multiple processors is prohibited unless otherwise agreed in writing. If the License Grant and License Fees are based upon the number of Users, the number of Users may be increased at any time, subject to the restrictions on the maximum number of Users specified in the Vendor's standard agreement.

b) Software provided pursuant to this Solicitation may, in some circumstances, be accompanied by a clickwrap agreement. The term clickwrap agreement refers to an agreement that requires the end user to manifest his or her assent to terms and conditions by clicking an "ok" or "agree" button on a dialog box or pop-up window as part of the installation process for the Software. The sole purpose of any clickwrap agreement shall be to operate as the mechanism for the installation of the Software. All terms and conditions of any clickwrap agreement provided with any Software solicited herein shall have no force and effect and shall be non-binding on the State, its employees, agents, and other authorized users of the Software.

c) The State agrees to use its best efforts to see that its employees and users of all Software licensed hereunder comply with the terms and conditions set forth in this Agreement, and any Exhibits or Amendments hereto. The State also agrees to refrain from taking any steps, such as reverse engineering, reverse assembly or reverse compilation to derive a source code equivalent to the Software; or portion thereof.

d) The State shall have the right to copy the Software, in whole or in part, for use in conducting benchmark or acceptance tests, for business recovery and disaster recovery testing or operations, and consistent with the security, records retainage or other policy of the Agency for archival or emergency purposes, or to replace a worn copy; but not for use in preparing derivative works unless expressly allowed by the Agreement or subsequent Statements of Work. Any copy of the Software or documentation must contain the same copyright notice and proprietary markings that are on the original Software.

e) Use of Software on any Products other than that for which it was obtained, removal of Software from the United States or any other material breach shall automatically terminate this license.

f) The State's license includes the right to upgrades, updates, maintenance releases or other enhancements or modifications made generally available to Vendor's licensees without a separate maintenance or support agreement. Vendor's right to a new license for new version releases of the Software shall not be abridged by the foregoing.

g) Software bundled with any other Product may be used only with the Product and with the configuration in which the Product is sold by Vendor or subsequently upgraded by Vendor.

h) The State's license neither transfers, vests nor infers any title or other ownership right in any intellectual property right of Vendor, or any third party. The State's license neither transfers, vests nor infers any title or other ownership right in any source code associated with the Software unless otherwise agreed by the parties, and will not be construed as a sale of any ownership rights in the Software, unless Custom or Modified Software is being developed as a Work For Hire in response to the State's solicitation documents.

i) The State may use the Software with the Computer for which or with which it was acquired, including use at any government installation to which the Computer may be transferred by the State. The State may use the Software with the backup Computer if the Computer for which or with which it was acquired is inoperative.

3) USE OF SOFTWARE AND INFORMATION

a) The State agrees that any Software or technical and business information owned by Vendor ("Information") or its suppliers or licensors and furnished to the State under this Agreement shall be and remain the property of the Vendor, or other party, respectively.

- b) All Software and information furnished to the State under this Agreement
 - i) Shall be used by the State only to install, operate or maintain the Product for which they were originally furnished;
 - ii) Shall not be reproduced or copied, in whole or in part, except as necessary for use as authorized under this agreement; and
 - iii) Shall, together with any copies except copies for the Agency's and State's archival purposes containing the State's business records, be returned or destroyed when no longer needed or permitted for use with the Product for which they were initially furnished; and
- c) All Software and information designated as "confidential" or "proprietary" shall be kept in confidence except as may be required by the North Carolina Public Records Act: NCGS § 132-1, et. seq.
- d) Transfer of Software or program license:
 - i) Software may be transferred within the United States to any location for the State's normal operations upon written notice to the Vendor without additional cost(s). Transfers for temporary uses arising as a result of a disaster or disaster recovery test may be effected without notice to the Vendor; provided, however, that the State will employ its best efforts to advise the Vendor of any disaster related transfer requiring more than ten (10) business days. All other transfers may be permitted only with Vendor's prior written consent, and such consent shall not be unreasonably withheld. Transfers requiring Vendor's consent may be subject to an additional license fee.
 - ii) The rights granted herein are restricted for use solely by the State. The State may not authorize or allow the use or marketing of the Software/Products by or to a third party, and may not assign or transfer the Software or Products to a third party without the prior written consent of Vendor. Any assignee or transferee must execute a separate agreement with Vendor. Any such assignment or transfer shall terminate the obligations of the State under this Agreement
- e) Custom or Modified Software, if solicited by the State, is being developed or modified exclusively for the State, and such Custom or Modified Software, all related data, all copyrights in the Custom or Modified Software and derivative works belong exclusively to the State and shall be transferred to the State upon creation.

4) WARRANTY

- a) Minimum warranties for Products shall include:
 - i) On the delivery date the Products and the associated Computer operating system Software will be in good working order (operating in conformance with Vendor's standard specifications and functions). Unless otherwise specified in the solicitation, the warranty for other suppliers' Software is included in the suppliers' Software package and is provided directly from the supplier.
 - ii) The warranty shall be as provided or specified in the state's solicitation documents and shall begin on the day of successful installation. If no warranty period is specified, the warranty period shall be Vendor's standard warranty period for the Products, commencing the day of successful installation.
 - iii) The state shall notify Vendor if any Product is not in good working order during the warranty period. Vendor shall, at its option, either repair or replace any Product reported as not in good working order during the warranty period without charge to the State. The repair or replacement Products must be new or equivalent to new in performance and fully warranted the same as new. All returned Products will become property of Vendor at the time the Product is either placed in shipment to Vendor, or picked up by Vendor.
 - iv) The service provided during the warranty period is dependent upon the acceptable warranty option selected by the State and indicated in the State's solicitation document. If

no warranty option is indicated, Vendor will provide their standard warranty service for the Product, unless otherwise agreed by the parties.

v) If the State requires warranty service other than under this Agreement, it shall be agreed to in writing by the parties at rates and terms set forth in such writing.

b) Software warranties shall include the following:

i) Vendor warrants the media (comprising diskettes, tapes or other media) to be free of defects in materials or workmanship under normal use for ninety (90) days from the date of acceptance unless otherwise agreed. Vendor shall replace any media reported as not in good working order during the warranty period without charge to the State. If Vendor is unable to replace the Software, Vendor shall refund the full amount of the Software purchase paid by the State.

ii) In addition to the warranty exclusions stated in Section 5, Vendor does not warrant that the operation of the Software will be uninterrupted or error free, or that the Software functions will meet the State's requirements unless developed as Customized or Modified Software. The State assumes the risk of any damage or loss from its misuse or inability to use the Software.

iii) For any Customized or Modified Software provided pursuant to this Agreement, Vendor warrants that for a period of one (1) year after the State accepts said Software, it will operate and perform in accordance with the functions and specifications set forth in the solicitation and error free as the solution for the Agency. This express warranty applies only if the State specifically identifies the Hardware environment in which the Customized or Modified Software will be installed or operated, or if it is used in connection with Hardware acquired under this Agreement.

c) Unless otherwise required by the State: Vendor warrants that its support and customer service and assistance will be performed in accordance with generally accepted industry standards. This warranty shall be valid for ninety (90) days from the date support is provided or performance of the service. For a period of ninety (90) days after delivery or ninety (90) days after successful installation, Vendor or its suppliers shall provide telephone assistance to the State during the State's normal business hours.

d) Vendor warrants to the best of its knowledge that:

i) The licensed Software and associated materials do not infringe any intellectual property rights of any third party;

ii) There are no actual or threatened actions arising from, or alleged under, any intellectual property rights of any third party;

iii) The licensed Software and associated materials do not contain any surreptitious programming codes, viruses, Trojan Horses, "back doors" or other means to facilitate or allow unauthorized access to the State's information systems.

iv) The Software does not contain any timer, counter, lock or similar device (other than security features specifically approved by Customer in the Specifications) that inhibits or in any way limits the State's ability to use the Software for the term of this Agreement.

5) WARRANTY EXCLUSIONS

a) Except as stated in Paragraph 4, Vendor and its parent, subsidiaries and affiliates, subcontractors and suppliers make no warranties, express or implied, and specifically disclaim warranties of merchantability or fitness for a particular purpose as provided by N.C.G.S. §§25-2-316, 25-2-313 and 25-2-315; and as may be amended.

b) The warranty provided in Section 4 does not cover repair for damages, malfunctions or service failures caused by:

i) Actions of non-Vendor personnel;

ii) Failure to follow Vendor's installation, operation or maintenance instructions and/or services provided to the State;

- iii) Attachment to the Products of non-Vendor products or failure of Products not maintained by Vendor unless such installation or use is approved in writing by the Vendor; or
- iv) Force Majeure conditions set forth hereinbelow.

6) INDEMNITY

a) Vendor shall indemnify and hold harmless the State/Agency from any and all liability, claims, damages, costs, expenses, and actions, including reasonable attorney's fees, that are caused by or arise from, the negligent or wrongful acts or omissions of the Vendor under this Agreement and that cause death or injury or damage to property or that arise out of a failure to comply with any State or federal statute, law, regulation or act.

b) The Vendor, at its own expense, shall defend any action brought against the State to the extent that such action is based upon a claim that the Software or Products supplied by the Vendor, their use or operation infringes on a patent, copyright, trademark or violates a trade secret in the United States. The Vendor shall pay those costs and damages finally awarded or agreed in settlement against the State in any such action. Such defense and payment shall be conditioned on the following:

- i) That the Vendor shall be notified within a reasonable time in writing by the State of any such claim; and,
- ii) That the Vendor shall have the sole control of the defense of any action on such claim and all negotiations for its settlement or compromise provided, however, that the State shall have the option to participate in such action at its own expense.

7) EXCLUSIVE REMEDIES AND LIMITATION OF LIABILITY

a) For purposes of the exclusive remedies and limitations of liability set forth in this Paragraph, Vendor shall be deemed to include the Vendor and its employees, agents, representatives, subcontractors, and suppliers and damages shall be deemed to refer collectively to all injuries, damages, losses, liabilities, expenses or costs incurred.

b) Vendor's entire liability and the State's exclusive remedies against Vendor for any damages caused by any Product defect or failure or arising from the performance or non-performance of any work, regardless of the form of action, whether in contract, tort, including negligence, strict liability, or otherwise, shall be:

- i) For infringement, the remedies set forth in Paragraph 6(b) above;
- ii) For warranty claims based upon failure of purchased or leased Products or Software, the remedies stated in Paragraph 4 herein. If Vendor is unable, despite reasonable efforts, to repair or replace the Product(s), the State shall have the right during the warranty period to return the Products for a refund of the purchase price; and
- iii) For delays in the delivery or successful Product or Software installation, whichever is applicable, Vendor shall have no liability unless the delivery or successful installation date is delayed by more than thirty (30) days by causes not attributable either to the State or to Force Majeure conditions, in which case the State shall have the right, as its remedies:

(1) To recover direct costs including replacement Products, if any, attributable to Vendor's delay; but specifically excluding incidental or consequential damages, and

(2) To cancel the order without incurring cancellation charges: and

iv) For proven damages to real or tangible personal property, excluding the State's other Software, data and data files, or for bodily injury or death to any person negligently caused by Vendor, and

v) For claims other than set forth in Paragraph 7b (i-iv), Vendor's liability shall be limited to direct damages, and such sums shall not exceed two (2) times the Agreement value.

c) Should any Product or Software supplied by Vendor become the subject of a claim of infringement of a patent, copyright, Trademark or a trade secret in the United States, the Vendor, shall at its option and expense, either to procure for the State the right to continue using the Product or software, or to replace or modify the same to become noninfringing. If neither of these options can reasonably be taken in Vendor's judgment, or if further use shall be prevented by injunction, the Vendor agrees to take back any affected Products or Software, and refund any sums the State has paid Vendor less any reasonable amount for use or damage and make every reasonable effort to assist the State in procuring substitute Products. If, in the sole opinion of the State, the return of such Products or Software makes the retention of other items acquired from the Vendor under this Agreement impractical, the State shall then have the option of terminating the Agreement, or applicable portions thereof, without penalty or termination charge; and Vendor agrees to refund any sums the State paid.

d) Vendor will not be required to defend or indemnify the State if any claim by a third party against the State for infringement or misappropriation results from the State's alteration of any Vendor-branded product or Product or Software, or from the continued use of the good(s) or Services and Products after receiving notice they infringe on a trade secret of a third party.

e) Except to the extent provided in subsection 7 b) above, and with the further exceptions of intellectual property rights infringement actions, the state's constitutional rights as a sovereign, and penalties imposed upon the state by any federal entity or expenditures of public funds required or resulting from an operational failure of the Products or Software provided hereunder, but notwithstanding any other term to the contrary contained in the Agreement, neither party shall, under any circumstances, be liable to the other party or its affiliates for:

- i) any claim based upon any third party claim,
- ii) any consequential, incidental or indirect damages of any nature whatsoever, including, without limitation, lost profits, lost savings or other consequential damages, whether resulting from delays, loss of data, interruption of service or otherwise, even if a party or its affiliates have been advised of the possibility of such damages, or
- iii) any punitive or exemplary damages of any nature whatsoever.

8) SUPPORT

a) Unless otherwise provided by Vendor's standard agreement for support, or except as specifically provided, an order for support will constitute the State's acceptance of the terms of the standard agreement for Support in effect on the date of the order; subject to the order of precedence set forth in the Solicitation.

b) To be eligible for support, Products or Software must be in good operating condition and at then current specified revision levels, having all enhancements, modifications, updates, or upgrades supplied by Vendor. Vendor may charge its standard rates in effect on the date support service is provided in addition to any other charges if the Product(s) or Software do not conform to the specified revision levels.

9) PROGRAM RETIREMENT

a) Unless otherwise provided in the Vendor's standard agreement, Vendor retains the right to retire a version of the Program and stop providing Maintenance, Updates or Services, upon providing one-hundred and eighty (180) days written notice to the State of its intent to do so. The decision to stop maintaining a version of the Program is the sole business discretion of Vendor and shall not be deemed a breach of contract. If Vendor retires the version of the Program provided to the State and if the State has paid all applicable annual Maintenance Fees subsequent to executing this Agreement, the State shall be entitled to receive, at no additional charge, a newer version of the Program that supports substantially the same functionality as the licensed version of the Program. Newer versions of the Program containing substantially increased functionality will be made available to the State for an additional fee.

b) Vendor may, at no additional charge, modify Products to improve operation and reliability or to meet legal requirements.

c) Relocation of Products is the State's responsibility and may result in additional support charges and modified service response times. Products moved to another State facility or Agency may continue to be serviced subject to availability of a Vendor authorized support provider.

Vendor is not required to provide support for non-qualified Products, nor Products not supplied under this Agreement. "Non-Qualified Products" are Hardware and Software not supplied or approved by Vendor, and Products for which the State does not allow Vendor to incorporate modifications. The State is responsible for removing non-qualified Products to allow Vendor to perform Support services.

d) Support does not cover any damage or failure cause by:

i) Media and supplies or use of items not designed or designated for use with Products; or

ii) Site conditions that do not conform to Vendor's previously established site specifications; or

iii) Neglect, improper use, fire or water damage, electrical disturbance, transportation by the State, work or modification by persons other than Vendor personnel, or other authorized parties.

10) The State is responsible for the security of its proprietary or confidential information, for its data, and for maintaining a procedure and process to reconstruct lost or altered files, data or programs.

11) TRANSPORTATION Transportation charges for software shall be FOB Destination unless delivered by internet or file-transfer as agreed by the State, or otherwise specified in the solicitation document or purchase order.

12) TRAVEL EXPENSES Vendor may be reimbursed for travel expenses arising under the performance of this Agreement at the out-of-state rates set forth in GS §138-6; as amended from time to time. Vendor agrees to use the lowest available airfare not requiring a weekend stay and to use the lowest available rate for rental vehicles. All Vendor incurred travel expenses shall be billed on a monthly basis, shall be supported by receipt and shall be paid by the State within thirty (30) days after invoice approval. Travel expenses exceeding the foregoing rates shall not be paid by the State. The State will reimburse travel allowances only for days on which the Vendor is required to be in North Carolina performing services under this Agreement.

13) PROHIBITION AGAINST CONTINGENT FEES AND GRATUITIES Vendor warrants that it has not paid, and agrees not to pay, any bonus, commission, fee, or gratuity to any employee or official of the State for the purpose of obtaining any contract or award issued by the State.

Subsequent discovery by the State of non-compliance with these provisions shall constitute sufficient cause for immediate termination of all outstanding Agreements. Violations of this provision may result in debarment of the vendor(s) or Vendor(s) as permitted by 9 NCAC 06B.1030, or other provision of law.

14) AVAILABILITY OF FUNDS Any and all payments by the State are expressly contingent upon and subject to the appropriation, allocation and availability of funds to the Agency for the purposes set forth in this Agreement. If this Agreement or any Purchase Order issued hereunder is funded in whole or in part by federal funds, the Agency's performance and payment shall be subject to and contingent upon the continuing availability of said federal funds for the purposes of the Agreement or Purchase Order. If the term of this Agreement extends into fiscal years subsequent to that in which it is approved such continuation of the Agreement *is expressly contingent upon* the appropriation, allocation, and availability of funds by the N.C. Legislature for the purposes set forth in the Agreement. If funds to effect payment are not available, the Agency will provide written notification to Vendor. If the Agreement is terminated

under this paragraph, Vendor agrees to take back any affected Products and software not yet delivered under this Agreement, terminate any services supplied to the Agency under this Agreement, and relieve the Agency of any further obligation thereof. The State shall remit payment for Products and services accepted prior to the date of the aforesaid notice in conformance with the payment terms.

15) PAYMENT TERMS The total License Fee and the Support Service or Maintenance Fee (provided the State subscribes or purchases such services) for the first year shall be invoiced upon delivery of the Software. The Support Service or Maintenance Fee for subsequent contract years, if any, will be invoiced annually sixty (60) days prior to the anniversary date beginning each subsequent year. Increases in pricing for Support Services or Maintenance shall not exceed five percent (5%) per year following the first Contract year. Payment terms for software are Net 30 days after receipt of correct invoice or acceptance of software, whichever is later. Payment terms for services are due and payable the month following the month for which charges accrue, or in accordance with the contract payment schedule. No additional charges to the Agency will be permitted based upon, or arising from, the Agency's use of a Business Procurement Card.

16) ACCEPTANCE CRITERIA Acceptance testing is required for all Vendor supplied software unless provided otherwise in the solicitation documents or a Statement of Work. The State may define such processes and procedures as may be necessary or proper, in its opinion and discretion, to ensure compliance with the State's specifications and Vendor's technical representations. Acceptance of software or services may be controlled by amendment hereto, or additional terms as agreed by the parties. In the event acceptance of software or services is not described in additional contract documents, the State shall have the obligation to notify Vendor, in writing and within ten (10) days following installation of any software deliverable described in the contract if it is not acceptable. The notice shall specify in reasonable detail the reason(s) a deliverable is unacceptable. Acceptance by the State shall not be unreasonably withheld; but may be conditioned or delayed as required for installation and/or testing of software.

17) CONFIDENTIALITY The State may maintain the confidentiality of certain types of information described in N.C. Gen. Stat. §132-1 et. seq. Such information may include trade secrets defined by N.C. Gen. Stat. §66-152 and other information exempted from the Public Records Act pursuant to N.C. Gen. Stat. §132-1.2. Vendor may designate information, Products, software or appropriate portions of its response as confidential, consistent with and to the extent permitted under the Statutes and Rules set forth above, by marking the top and bottom of pages containing confidential information with a legend in boldface type "**CONFIDENTIAL.**" By so marking any page, the Vendor warrants that it has formed a good faith opinion, having received such necessary or proper review by counsel and other knowledgeable advisors that the portions marked confidential meet the requirements of the Rules and Statutes set forth above. **However, under no circumstances shall price information be designated as confidential.** The State agrees to promptly notify the Vendor in writing of any action seeking to compel the disclosure of Vendor's confidential information. If an action is brought pursuant to N.C. Gen. Stat. §132-9 to compel the State to disclose information marked confidential, the Vendor agrees that it will intervene in the action through its counsel and participate in defending the State, including any public official(s) or public employee(s). The Vendor agrees that it shall hold the State and any official(s) and individual(s) harmless from any and all damages, costs, and attorneys' fees awarded against the State in the action. The State shall have the right, at its option and expense, to participate in the defense of the action through its counsel. The State shall have no liability to Vendor with respect to the disclosure of Vendor's confidential information ordered by a court of competent jurisdiction pursuant to N.C. Gen. Stat. §132-9 or other applicable law.

18) ACCESS TO PERSONS AND RECORDS Pursuant to N.C. General Statute 147-64.7, the Agency, the State Auditor, appropriate federal officials, and their respective authorized employees or agents are authorized to examine all books, records, and accounts of the Vendor insofar as they relate to transactions with any department, board, officer, commission, institution, or other agency of the State of North Carolina pursuant to the performance of this Agreement or to costs charged to this Agreement. The Vendor shall retain any such books, records, and accounts for a minimum of three (3) years after the completion of this Agreement. Additional audit or reporting requirements may be required by any Agency, if in the Agency's opinion, such requirement is imposed by federal or state law or regulation.

19) ASSIGNMENT Vendor may not assign this Agreement or its obligations hereunder except as permitted by 09 NCAC 06B.1003 and this Paragraph. Vendor shall provide reasonable notice of not less than thirty (30) days prior to any consolidation, acquisition, or merger. Any assignee shall affirm this Agreement attorning to the terms and conditions agreed, and that Vendor shall affirm that the assignee is fully capable of performing all obligations of Vendor under this Agreement. An assignment may be made, if at all, in writing by the Vendor, Assignee and the State setting forth the foregoing obligation of Vendor and Assignee.

20) NOTICES Any notices required under this Agreement should be delivered to the Contract Administrator for each party. Unless otherwise specified in the Solicitation Documents, any notices shall be delivered in writing by U.S. Mail, Commercial Courier, facsimile or by hand.

21) TITLES AND HEADINGS Titles and Headings in this Agreement are used for convenience only and do not define, limit or proscribe the language of terms identified by such Titles and Headings.

22) AMENDMENT This Agreement may not be amended orally or by performance. Any amendment must be made in written form and signed by duly authorized representatives of the State and Vendor.

23) TAXES The State of North Carolina is exempt from Federal excise taxes and no payment will be made for any personal property taxes levied on the Vendor or for any taxes levied on employee wages. Agencies of the State may have additional exemptions or exclusions for federal or state taxes. Evidence of such additional exemptions or exclusions may be provided to Vendor by Agencies, as applicable, during the term of this Agreement. Applicable State or local sales taxes shall be invoiced as a separate item.

24) GOVERNING LAWS, JURISDICTION, AND VENUE

a) This Agreement is made under and shall be governed and construed in accordance with the laws of the State of North Carolina. The place of this Agreement or purchase order, its situs and forum, shall be Wake County, North Carolina, where all matters, whether sounding in contract or in tort, relating to its validity, construction, interpretation and enforcement shall be determined. Vendor agrees and submits, solely for matters relating to this Agreement, to the jurisdiction of the courts of the State of North Carolina, and stipulates that Wake County shall be the proper venue for all matters.

b) Except to the extent the provisions of the Agreement are clearly inconsistent therewith, the applicable provisions of the Uniform Commercial Code as modified and adopted in North Carolina shall govern this Agreement. To the extent the Agreement entails both the supply of "goods" and "services," such shall be deemed "goods" within the meaning of the Uniform Commercial Code, except when deeming such services as "goods" would result in a clearly unreasonable interpretation.

25) DEFAULT In the event any Deliverable furnished by the Vendor fails to conform to any material requirement of the specifications, notice of the failure is provided by the State and the failure is not cured within ten (10) days, or Vendor fails to meet the State's acceptance requirements, the State may cancel and procure the articles or services from other sources; holding Vendor liable for any excess costs occasioned thereby, subject only to the limitations provided in Paragraph 7) and the obligation to informally resolve disputes as provided in

Paragraph 29) of these Terms and Conditions. Default may be cause for debarment as provided in 09 NCAC 06B.1030. The State reserves the right to require performance guaranties pursuant to 09 NCAC 06B.1031 from the Vendor without expense to the State. The rights and remedies of the State provided above shall not be exclusive and are in addition to any other rights and remedies provided by law or under the Contract.

a) If Vendor fails to deliver Deliverables within the time required by this Contract, the State may provide written notice of said failure to Vendor, and by such notice require payment of a penalty.

b) Should the State fail to perform any of its obligations upon which Vendor's performance is conditioned, Vendor shall not be in default for any delay, cost increase or other consequences due to the State's failure. Vendor will use reasonable efforts to mitigate delays, costs or expenses arising from assumptions in the Vendor's bid documents that prove erroneous or are otherwise invalid. Any deadline that is affected by any such failure in assumptions or performance by the State shall be extended by an amount of time reasonably necessary to compensate for the effect of such failure.

26) FORCE MAJEURE Neither party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations as a result of events beyond its reasonable control, including without limitation, fire, power failures, any act of war, hostile foreign action, nuclear explosion, riot, strikes or failures or refusals to perform under subcontracts, civil insurrection, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.

27) COMPLIANCE WITH LAWS The Vendor shall comply with all laws, ordinances, codes, rules, regulations, and licensing requirements that are applicable to the conduct of its business, including those of federal, state, and local agencies having jurisdiction and/or authority.

28) TERMINATION Any notice or termination made under this Contract shall be transmitted via US Mail, Certified Return Receipt Requested. The period of notice for termination shall begin on the day the return receipt is signed and dated.

a) The parties may mutually terminate this Contract by written agreement at any time.

b) The State may terminate this Contract, in whole or in part, pursuant to Paragraph 25), or pursuant to the Special Terms and Conditions in the Solicitation Documents, if any, or for any of the following

i) Termination for Cause: In the event any goods, software, or service furnished by the Vendor during performance fails to conform to any material specification or requirement of the Contract, and the failure is not cured within the specified time after providing written notice thereof to Vendor, the State may cancel and procure the articles or services from other sources; holding Vendor liable for any excess costs occasioned thereby, subject only to the limitations provided in Paragraph 7). The rights and remedies of the State provided above shall not be exclusive and are in addition to any other rights and remedies provided by law or under the Contract. Vendor shall not be relieved of liability to the State for damages sustained by the State arising from Vendor's breach of this Contract; and the State may, in its discretion, withhold any payment due as a setoff until such time as the damages are finally determined or as agreed by the parties. Voluntary or involuntary Bankruptcy or receivership by Vendor shall be cause for termination.

ii) Termination For Convenience Without Cause: The State may terminate service and indefinite quantity contracts, in whole or in part by giving thirty (30) days prior notice in writing to the Vendor. Vendor shall be entitled to sums due as compensation for Deliverables provided and services performed in conformance with the Contract. In the event the Contract is terminated for the convenience of the State the Agency will pay for all work performed and products delivered in conformance with the Contract up to the date of termination.

29) DISPUTE RESOLUTION The parties agree that it is in their mutual interest to resolve disputes informally. A claim by the State shall be submitted in writing to the Vendor's Contract Administrator for decision. The Parties shall negotiate in good faith and use all reasonable efforts to resolve such dispute(s). During the time the Parties are attempting to resolve any dispute, each shall proceed diligently to perform their respective duties and responsibilities under this Contract. If a dispute cannot be resolved between the Parties within thirty (30) days after delivery of notice, either Party may elect to exercise any other remedies available under this Contract, or at law. This term shall not constitute an agreement by either party to mediate or arbitrate any dispute.

30) SEVERABILITY In the event that a court of competent jurisdiction holds that a provision or requirement of this Agreement violates any applicable law, each such provision or requirement shall be enforced only to the extent it is not in violation of law or is not otherwise unenforceable and all other provisions and requirements of this Agreement shall remain in full force and effect. All promises, requirement, terms, conditions, provisions, representations, guarantees and warranties contained herein shall survive the expiration or termination date unless specifically provided otherwise herein, or unless superseded by applicable federal or State statute, including statutes of repose or limitation.

31) FEDERAL INTELLECTUAL PROPERTY BANKRUPTCY PROTECTION ACT The Parties agree that the Agency shall be entitled to all rights and benefits of the Federal Intellectual Property Bankruptcy Protection Act, Public Law 100-506, codified at 11 U.S.C. 365(n), and any amendments thereto.

32) ELECTRONIC PROCUREMENT (**Applies to all contracts that include E-Procurement and are identified as such in the body of the solicitation document**): Purchasing shall be conducted through the Statewide E-Procurement Service. The State's third party agent shall serve as the Supplier Manager for this E-Procurement Service. The Vendor shall register for the Statewide E-Procurement Service within two (2) business days of notification of award in order to receive an electronic purchase order resulting from award of this contract.

a) **The successful vendor(s) shall pay a transaction fee of 1.75% (.0175) on the total dollar amount (excluding sales taxes) of each purchase order issued through the Statewide E-Procurement Service.** This applies to all purchase orders, regardless of the quantity or dollar amount of the purchase order. The transaction fee shall neither be charged to nor paid by the State, or by any State approved users of the contract. The transaction fee shall not be stated or included as a separate item in the proposed contract or invoice. There are no additional fees or charges to the Vendor for the services rendered by the Supplier Manager under this contract. Vendor will receive a credit for transaction fees they paid for the purchase of any item(s) if an item(s) is returned through no fault of the Vendor. Transaction fees are non-refundable when an item is rejected and returned, or declined, due to the Vendor's failure to perform or comply with specifications or requirements of the contract.

b) Vendor, or its authorized Reseller, as applicable, will be invoiced monthly for the State's transaction fee by the Supplier Manager. The transaction fee shall be based on purchase orders issued for the prior month. Unless Supplier Manager receives written notice from the Vendor identifying with specificity any errors in an invoice within thirty (30) days of the receipt of invoice, such invoice shall be deemed to be correct and Vendor shall have waived its right to later dispute the accuracy and completeness of the invoice. Payment of the transaction fee by the Vendor is due to the account designated by the State within thirty (30) days after receipt of the correct invoice for the transaction fee, which includes payment of all portions of an invoice not in dispute. Within thirty (30) days of the receipt of invoice, Vendor may request in writing an extension of the invoice payment due date for that portion of the transaction fee invoice for which payment of the related goods by the governmental purchasing entity has not been received by the Vendor. If payment of the transaction fee

invoice is not received by the State within this payment period, it shall be considered a material breach of contract. The Supplier Manager shall provide, whenever reasonably requested by the Vendor in writing (including electronic documents), supporting documentation from the E-Procurement Service that accounts for the amount of the invoice.

c) The Supplier Manager will capture the order from the State approved user, including the shipping and payment information, and submit the order in accordance with the E-Procurement Service. Subsequently, the Supplier Manager will send those orders to the appropriate Vendor on State Contract. The State or State approved user, not the Supplier Manager, shall be responsible for the solicitation, bids received, evaluation of bids received, award of contract, and the payment for goods delivered.

d) Vendor agrees at all times to maintain the confidentiality of its user name and password for the Statewide E-Procurement Services. If a Vendor is a corporation, partnership or other legal entity, then the Vendor may authorize its employees to use its password. Vendor shall be responsible for all activity and all charges for such employees. Vendor agrees not to permit a third party to use the Statewide E-Procurement Services through its account. If there is a breach of security through the Vendor's account, Vendor shall immediately change its password and notify the Supplier Manager of the security breach by e-mail. Vendor shall cooperate with the state and the Supplier Manager to mitigate and correct any security breach.