

STATE OF NORTH CAROLINA NC Employment Security Commission	INVITATION FOR BID NO. 44-0022	
	Bids will be publicly opened: February 18, 2009	
	Contract Type: Brand Specific	
Refer <u>ALL</u> Inquiries to: Sherry M. Matthews Telephone No. 919-733-5675	Date Issued: February 5, 2009 Commodity: 208 Websense Software Maintenance Renewal	
E-Mail: sherry.matthews@ncmail.net	Using Agency Name: NC Employment Security Commission	
(See page 2 for mailing instructions.)	Agency Requisition No. 0060	

OFFER AND ACCEPTANCE

This solicitation advertises the State's needs for the software services and/or goods described herein. The State seeks proposals comprising competitive bids offering to sell the software services and/or goods described in this solicitation. The State's acceptance of any proposal must be demonstrated by execution of the acceptance found below and any subsequent Request for Best and Final Offer, if issued. Acceptance shall create a contract having an order of precedence among terms as follows:

Special Services Terms and Conditions and Instructions specific to this IFB, Specifications of the solicitation documents, except as amended, the State's Terms and Conditions, and the awarded Vendor's proposal, attachments to this solicitation and the Vendor's then current and relevant standard support agreement(s).

Provided, however, that no contract shall be binding on the State until an encumbrance of funds has been made for payment of the sums due under the contract.

EXECUTION

In compliance with this Invitation to Bid, and subject to all the conditions herein, the undersigned offers and agrees to furnish any or all services or goods upon which prices are bid, at the price(s) offered herein, within the time specified herein. By executing this bid, I certify that this bid is submitted competitively and without collusion.

Failure to execute/sign bid prior to submittal shall render bid invalid. Late bids are not acceptable.

VENDOR:	E-MAIL:	
STREET ADDRESS:	P.O. BOX:	ZIP:
CITY & STATE & ZIP:	TELEPHONE NUMBER:	TOLL FREE TEL. NO
TYPE OR PRINT NAME & TITLE OF PERSON SIGNING:	FAX NUMBER:	
AUTHORIZED SIGNATURE:	DATE:	

Offer valid for 45 days from date of bid opening unless otherwise stated here: ____ days

ACCEPTANCE OF BID

If any or all parts of this bid are accepted, an authorized representative of **NC Employment Security Commission** shall affix their signature hereto and this document and the provisions of the special terms and conditions specific to this Invitation for Bids, the specifications, and the ITS Terms and Conditions shall then constitute the written agreement between the parties. A copy of this acceptance will be forwarded to the successful vendor(s).

FOR NC EMPLOYMENT SECURITY COMMISSION USE ONLY

Offer accepted and contract awarded this ____ day of _____, 20____, as indicated on attached certification,

by _____ (Authorized representative of **NC Employment Security Commission**).

DELIVERY INSTRUCTIONS: **Sealed bids**, subject to the conditions made a part hereof, will be received at the address below, for furnishing and delivering the commodity as described herein.

Bids submitted via facsimile (FAX) machine in response to this Invitation for Bids will not be accepted. Bids are **subject to rejection unless submitted on this form**.

Deliver one (1) original executed quote document, one (1) copy, and one (1) electronic copies of its executed proposal on read-only CD/DVD(s). The files on the discs should not be password-protected and should be capable of being copied to other media.

unless otherwise instructed. Address envelope and insert quote number as shown below. It is the responsibility of the Vendor to have the quote in this office by the specified time and date of opening.

<u>DELIVERED BY US POSTAL SERVICE</u>	<u>DELIVERED BY ANY OTHER MEANS</u>
IFB NO. 44-0022 Employment Security Commission Post Office Box 25903 Raleigh, NC 27611 ATTN: Sherry Matthews, Purchasing Officer	IFB NO. 44-0022 Employment Security Commission 700 Wade Avenue Raleigh, NC 27605 ATTN: Sherry Matthews, Purchasing Officer

IFB SCHEDULE

Bid Questions

Due Date: February 10, 2009

Time: 2:00 p.m. Eastern Standard Time

Address: See page 2

Instructions: Written questions will be received at esc.purchasing@ncmail.net until date and time specified above. Please enter "Questions Bid 44-0022" as the subject for the email. The State will prepare responses to all written questions submitted, and post an addendum to the Interactive Purchasing System (IPS) <http://www.ips.state.nc.us/ips/pubmain.asp>. Oral answers are not binding on the State.

Vendor contact regarding this IFB with anyone other than Sherry Matthews, Purchasing Officer, may be grounds for rejection of said Vendor's offer. Agency contact regarding this IFB with any Vendor may be grounds for cancellation of this IFB.

Bid Submittal

Due Date: February 18, 2009

Time: 2:00 p.m. Eastern Standard Time

Mail Address: See page 2

Instructions: All bids must be sealed and are subject to the conditions of this IFB. Indicate firm name and IFB number on the front of the sealed envelope or package.

Include **one (1) original** executed bid and **one (1) copy and one (1) disc**. Each original bid must be signed and dated in ink, by an official authorized to bind the company. The Vendor, by making an offer, expressly represents that the specifications herein have been read and understood, and that the offer complies with all aspects. Any change that is received after the bid opening, and that is not specifically solicited by the State, shall be rejected.

Firm Bid: Prices and any other entry made hereon by the Vendor shall be considered firm and not subject to change.

INTENT: The purpose of this Invitation for Bid (IFB) is to obtain pricing for Websense Software Maintenance renewal for the NC Employment Security Commission. **The term of the contract for year one shall be from effective date through 2/5/2010, with the option to renew for two additional years at the State's option.** Products and Services will be provided in accordance with the terms of this IFB, and the attachments to this IFB

1. **VENDOR UTILIZATION OF WORKERS OUTSIDE U.S.:** In accordance with Executive Order #60, the Vendor must detail in the bid response, the manner in which it intends to utilize resources or workers located. The State of North Carolina will evaluate the additional risks, costs, and other factors associated with such utilization prior to making an award for any such Vendor's proposal. The Vendor shall provide the following for any proposal or actual utilization or contract performance:
 - a. The location of work performed under a state contract by the Vendor, any subcontractors, employees, or other persons performing the contract and whether any of this work will be performed outside the United States
 - b. The corporate structure and location of corporate employees and activities of the Vendors, its affiliates or any other subcontractors
 - c. Notice of the relocation of the Vendor, employees of the Vendor, subcontractors of the Vendor, or other persons performing services under a state contract outside of the United States
 - d. Any Vendor or subcontractor providing call or contact center services to the State of North Carolina shall disclose to inbound callers the location from which the call or contact center services are being provided

Will any work under this contract be performed outside the United States?	YES_____	NO_____
Where will services be performed: _____		

2. **DISTRIBUTORS AND RESELLERS:** "Resellers" as used herein, refers to businesses that routinely sell or distribute Vendor's Products, and may include "Distributors", "Value Added Resellers" (VARs), "Original Equipment Manufacturers" (OEMs), Channel Partners, or such other designations. These businesses must be approved by the State prior to placement of any orders. ***Unless otherwise provided, the State will establish a convenience contract with one or more resellers through a competitive bidding process.*** Any contract established will be subject to this solicitation and any resulting Agreement(s), and to the terms and conditions of the State's competitive bidding process

With the bid response, the Vendor must state that they are authorized by the Manufacturer to sell the maintenance listed in this IFB. Prior to award, the State may request a signed statement confirming authorization. Failure to provide the statement may result in rejection of proposal.

Vendor is authorized to sell Manufacturer's maintenance.

Yes No

3. **BID AWARD:** It is the general intent to award this contract to one Vendor. As provided by statute, award will be based on Best Value Analysis, (Lowest Price Technically Acceptable Source Selection Method in accordance with 09 NCAC 06B. 0302 Information Technology Procurement.)

The State, at its sole discretion, reserves the right to reject any offers that does not meet specifications.

4. **E-PROCUREMENT:** This is not an e-procurement solicitation. See paragraph #28 amended in Terms and Conditions for Goods and Related Services. The Terms and Conditions made part of this solicitation contain language necessary for the implementation of North Carolina's statewide e-procurement initiative. It is the vendor's responsibility to read these terms and conditions carefully and to consider them in preparing the offer. By signature vendor acknowledges acceptance of all terms and conditions including those related to e-procurement.

- a. General information on the e-procurement service can be found at <http://eprocurement.nc.gov/>
 - b. Within two days after notification of award of a contract, vendor must register in NC E-Procurement @ Your Service.
 - c. As of the IFB submittal date, the Vendor must be current on all e-Procurement fees. If the Vendor is not current on all e-Procurement fees, the State may disqualify the Vendor from participation in this IFB.
5. **SPECIAL SERVICES TERMS AND INSTRUCTIONS.** Except as otherwise agreed in writing, and subject to the other terms and conditions of this solicitation, the Services shall include, at a minimum, during the term(s) of this Agreement, the following **Maintenance/Support Services** for at least the current version and one previous version of any Software identified in this solicitation:
- a. **Basic Services.** The Vendor will provide normal and usual software support and maintenance services generally provided to customers in a similar program, position or setting consistent with and subject to the payment of the support and maintenance fees agreed upon in this contract.
 - b. **Error Correction.** Upon notice by State of a problem with the Software (which problem can be verified), Vendor shall use reasonable efforts to correct or provide a working solution for the problem. The State shall comply with all reasonable instructions or requests of Vendor in attempts to correct an error or defect in the Software. Vendor and the State shall act promptly and in a reasonably timely manner in communicating error or problem logs, other related information, proposed solutions or workarounds, and any action as may be necessary or proper to obtain or affect maintenance services under this Paragraph.

(Rev. 12/08)

- c. **Notification of Errors.** Vendor shall notify the State of any material errors or defects in the Software known, or made known to Vendor from any source during the term of this Agreement that could cause the production of inaccurate or otherwise materially incorrect, results. Vendor shall initiate actions as may be commercially reasonable or proper to effect corrections of any such errors or defects.
- d. **Implementation of Updates.** Vendor shall provide to the State, at no additional charge, implementation or application of all new releases and bug fixes (collectively referred to as “Changes”) for any Software developed or published by the Licensor and made generally available to its other customers.
- e. **Telephone Assistance.** Vendor shall provide the State with telephone and Internet access to technical support engineers for assistance in the proper installation and use of the Software, and to report and resolve Software problems, during normal business hours, **8:00 AM - 5:00 PM Eastern Time**, Monday-Friday. Vendor shall respond to the telephone requests for Software maintenance service within four hours, for calls made at any time.
- f. **Vendor’s Standard Support or Maintenance Agreements.** The terms and conditions of Vendor’s standard support or maintenance agreement(s) applicable to Software may apply to the extent such terms or conditions do not conflict with or materially change the terms or conditions of this Agreement. In the event of any conflict between the terms or conditions of this Agreement and the Vendor’s standard support or maintenance agreement(s), the terms or conditions of this Agreement relating to audit and records, jurisdiction, choice of law, indemnity, the remedy for intellectual property infringement and the exclusive remedies and limitation of liability herein shall apply in all cases and supersede any provisions contained in Vendor’s support and maintenance agreement.
- g. **Custom Fixes.** In the event Vendor provides Custom fixes or patches to remedy an error, such fixes will become a part of the Licensor’s licensed code if the Licensor’s License with the State so provides. Otherwise such custom programming will become the property of the State, with a perpetual and unlimited license of the fix back to the Vendor for its use.
- h. **Security.** The provision of onsite support or maintenance is subject to the standard security procedures of the facility or agency within which the onsite Services are to be provided.
- i. **Online Services.** If the Services involve one or more online elements (Online Services), the Vendor agrees:
 - i. To maintain the confidentiality of any State Data this is or may be stored in the Vendor’s online storage devices.
 - ii. To prevent any malware or other harmful code from being transmitted to the State.
 - iii. To provide the Online Services in a consistently available and commercially reasonable manner.
- j. **Staff.** Vendor shall maintain a trained support staff capable of rendering the Services provided for in this contract.

- k. Training.** If this solicitation so provides, the agency(ies) covered by this solicitation may enroll its users in any relevant training classes which may be offered by the Vendor at the fees which are mutually agreed upon by the State and Vendor.
 - l. Fees.** Should this contract be terminated for cause or for convenience, the fees paid for the current term of support or maintenance for the remaining portion of the term shall be rebated pro rata.
- 6. **BRAND SPECIFIC (WEBSense):** Manufacturer's name and product description used in this solicitation are brand and product specific. The products offered in response to this solicitation must be of the manufacturer and type specified.

No substitutions will be accepted.

7. **FURNISH AND DELIVER:**

Year 1

ITEM	QTY.	UOM	DESCRIPTION	UNIT COST	TOTAL EXTENDED COST
1.	1	Each	Websense Maintenance Renewal, PN SSPCP1R for 1900 Seats From effective date through 2/5/2010		
			TOTAL BID COST		\$

Year 2 (Optional)

ITEM	QTY.	UOM	DESCRIPTION	UNIT COST	TOTAL EXTENDED COST
1.	1	Each	Websense Maintenance, PN SSPCP1R for 1900 Seats		
			TOTAL BID COST		\$

Year 3 (Optional)

ITEM	QTY.	UOM	DESCRIPTION	UNIT COST	TOTAL EXTENDED COST
1.	1	Each	Websense Maintenance, PN SSPCP1R for 1900 Seats		
			TOTAL BID COST		\$

TERMS AND CONDITIONS

1) DEFINITIONS:

- a) “Agency” means the Agency purchasing the goods or services.
- b) “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.
- c) “Products” includes Software, Hardware, equipment, options, documentation, accessories, supplies, spare parts.
- d) “Services” means the tasks and duties associated with the provision of support and maintenance of the Software.
- e) “Software” means in the context of this IFB the software application(s) for which support and maintenance Services are sought, including any modifications, patches, additions or other programming done to such software applications by the Vendor as part of the Support Services.
- f) “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.
- g) “Support” includes Software 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.

2) 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 Services or material 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.

3) EXCLUSIVE REMEDIES AND LIMITATION OF LIABILITY;

a) For purposes of the exclusive remedies and limitations of liability set forth herein, 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 failure or arising from the performance or non-performance of any work under this contract, 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 Section 2(b) above. In addition, should any modifications to the Software applied 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 procure for the State the right to continue using the 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 Software modifications, and refund any sums the State has paid Vendor for Services and the State shall then have the option of terminating the Agreement, or applicable portions thereof, without penalty or termination charge.

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 Software, or from the continued use of the good(s) or Services after receiving notice they infringe on a trade secret of a third party.

ii) For default in the performance of the Services (per Paragraph 21, below), and failure to cure after 10 days written notice, in which case the State shall have the right, as its remedies:

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

(2) To terminate the contract under the termination provisions herein;

Vendor shall have no liability unless the default in delivery of Services is occasioned by causes not attributable either to the State or to Force Majeure conditions

iii) 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

iv) For claims other than set forth above, Vendor's liability shall be limited to direct damages, and such sums shall not exceed the fees paid to Vendor by the State during the most recent (12) months.

c) Except to the extent provided herein, 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 Software Services 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.

4) SUPPORT:

a) Except as provided in the Special Services Terms and Instructions, or except as specifically provided in an attachment hereto, and unless otherwise provided by Vendor's standard agreement for support, 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, Software must be in good operating condition and at then current specified revision levels, having all current 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 Software does not conform to the specified revision levels.

5) SOFTWARE RETIREMENT:

a) Unless otherwise provided in the Vendor's standard agreement, Vendor retains the right to retire support for a version of the Software and stop providing, for such version, Maintenance, Updates, or Services, upon providing 180 day written notice to the State of its intent to do so. The decision to stop maintaining a version of the Software is the sole business discretion of Vendor and shall not be deemed a breach of contract. If Vendor retires the version of the Software 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 Software that supports substantially the same functionality as the licensed version of the Software. Newer versions of the Software containing substantially increased functionality will be made available to the State for an additional fee.

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

c) Relocation of Software is the State's responsibility and may result in additional support charges and modified service response times as agreed. Software 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 Software, or Software not identified in this Agreement. "Non-Qualified Products" are Software not supplied or approved by Vendor, and Software for which the State does not allow Vendor to incorporate modifications. The State

is responsible, upon request of the Vendor, for removing non-qualified Software to allow Vendor to perform Software Support Services.

d) Support does not cover any damage or failure caused 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.

6) CONFIDENTIALITY OF DATA.: The State is responsible, as to data under the State's control, 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.

7) 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.

8) 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.

9) 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.1102(f), 06B.1030, or other provision of law.

10) 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 Services accepted prior to the date of the aforesaid notice in conformance with the payment terms.

11) **PAYMENT TERMS:** The total Software Support Services or Maintenance Fee (provided the State subscribes or purchases such services) for the first year shall be invoiced upon execution of this contract. The Software Support Service or Maintenance Fee for subsequent contract renewal years, if any, will be invoiced annually 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 services are due and payable the month following the month for which charges accrue, or in accordance with the contract payment schedule.

12) **ACCEPTANCE CRITERIA FOR SOFTWARE MODIFICATIONS:** Acceptance testing is required for all Vendor supplied patches or modifications to the 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 such Services may be controlled by amendment hereto, or additional terms as agreed by the parties. In the event acceptance of such modifications to Software or the accompanying 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 delivery of any such modifications or Software Services if such modifications or Services are unacceptable. Acceptance by the State shall not be unreasonably withheld; but may be conditioned or delayed as required for installation and/or testing of modifications to Software.

13) **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.

14) **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.

15) 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 accepting the terms and conditions and duties as previously 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.

16) 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.

17) 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.

18) 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.

19) 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.

20) GOVERNING LAWS, JURISDICTION AND VENUE: 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.

21) DEFAULT: In the event Services 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, the State may cancel and procure the Services from other sources; holding Vendor liable for any excess costs occasioned thereby, subject only to the limitations provided in Paragraph 3) and the obligation to informally resolve disputes as provided in Paragraph 25) 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 any Services 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.

22) **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.

23) **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.

24) **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 21), or pursuant to the Special Services Terms and Conditions and Instructions in the Solicitation Documents, or pursuant to 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 3). 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 contracts, in whole or in part by giving 30 days prior notice in writing to the Vendor. Vendor shall be entitled to sums due as compensation for 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 Services delivered in conformance with the Contract up to the date of termination.

25) **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.

26) 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.

27) 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.

28) ELECTRONIC PROCUREMENT: 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) Reserved.

b) Reserved.

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.