

**STATE OF MICHIGAN**  
 DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET  
 PROCUREMENT

525 W. ALLEGAN STREET  
 LANSING, MI 48933

P.O. BOX 30026  
 LANSING, MI 48909

CHANGE NOTICE NO. 2  
 to  
 CONTRACT NO. 071B1300179  
 between  
 THE STATE OF MICHIGAN  
 and

NAME & ADDRESS OF CONTRACTOR	PRIMARY CONTACT	EMAIL
Ncs Pearson Inc 3075 W. Ray Road., Ste 200 Chandler AZ, 85226	Kevin Schultz	kevin.shultz@pearson.com
	PHONE	CONTRACTOR'S TAX ID NO. (LAST FOUR DIGITS ONLY)
	888-827-0772	*****0527

STATE CONTACTS	AGENCY	NAME	PHONE	EMAIL
PROGRAM MANAGER / CCI	DTMB	Dave Fox	517-373-0952	FoxD@michigan.gov
CONTRACT ADMINISTRATOR	DTMB	Jarrod Barron	(517) 284-7045	BarronJ1@michigan.gov

CONTRACT SUMMARY			
<b>DESCRIPTION:</b> Dhs Maint. & Support GradPoint Software			
INITIAL EFFECTIVE DATE	INITIAL EXPIRATION DATE	INITIAL AVAILABLE OPTIONS	EXPIRATION DATE BEFORE CHANGE(S) NOTED BELOW
January 1, 2011	December 31, 2015	5 - 1 Year	December 31, 2015
PAYMENT TERMS		DELIVERY TIMEFRAME	
N/A		N/A	
ALTERNATE PAYMENT OPTIONS			EXTENDED PURCHASING
<input type="checkbox"/> P-card <input type="checkbox"/> Direct Voucher (DV) <input type="checkbox"/> Other			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
MINIMUM DELIVERY REQUIREMENTS			
N/A			

DESCRIPTION OF CHANGE NOTICE				
EXERCISE OPTION?	LENGTH OF OPTION	EXERCISE EXTENSION?	LENGTH OF EXTENSION	REVISED EXP. DATE
<input type="checkbox"/>		<input type="checkbox"/>		12/31/18
CURRENT VALUE		VALUE OF CHANGE NOTICE	ESTIMATED AGGREGATE CONTRACT VALUE	
\$ 52,500.00		\$ 14,730.02	\$ 67,230.02	
<b>DESCRIPTION:</b> Effective January 1, 2016, the State exercises three option years to renew the existing subscriptions and to add a 1-day consulting session for a total price of \$14,730.02. See attached quote. All other terms, conditions, specifications and pricing remain the same. Per contractor, agency and DTMB Procurement agreement.				



Jessica VanWinkle

Bureau Juvenile Justice Training Center  
 235 S Grand Ave  
 Lansing, MI 48909  
 United States

Quote Number: 12767

Quote Creation Date: 12-09-2015

Quote Expiration Date: 02-07-2016

GradPoint Proposal 3 yr

Price Quote Detail

Solution	UOM	Term	List Price	Contract \$	Quantity	Base Amount	Total
<b>GradPoint</b>							
<b>License</b>							
6000562 - GradPoint Prepare National Concurrent	MO	36	\$387.00	\$258.00	12	\$3,096.00	\$3,096.00
6000568 - GradPoint Core 6-12 Concurrent	MO	36	\$1,017.00	\$678.00	11	\$7,458.00	\$7,458.00
GPCOREELECONC - GradPoint Core Elect Concurrent	MO	36	\$1,707.00	\$1,138.01	2	\$2,276.02	\$2,276.02
<b>License Subtotal</b>						<b>\$ 12,830.02</b>	<b>\$ 12,830.02</b>
<b>Training</b>							
GPCDONSITE - GradPoint Onsite Consulting Day	DAY	1	\$1,900.00	\$1,900.00	1	\$1,900.00	\$1,900.00
<b>Training Subtotal</b>						<b>\$ 1,900.00</b>	<b>\$ 1,900.00</b>
<b>Implementation</b>							
GPNEWLIC - GradPoint New License Implementation	EA	1	\$0.00	\$0.00	1	\$0.00	\$0.00
<b>Implementation Subtotal</b>						<b>\$ 0.00</b>	<b>\$ 0.00</b>
<b>GradPoint Subtotal</b>						<b>\$ 14,730.02</b>	<b>\$ 14,730.02</b>
						<b>Total</b>	<b>\$ 14,730.02</b>

Promotions - The below promo's have been applied to your proposal:

GradPoint : \* 3YR Pre-Paid -expires 3/31/2016- Buy 2 years and Get the 3rd year Free (33.333%)

STATE OF MICHIGAN  
 DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET  
 PURCHASING OPERATIONS  
 P.O. BOX 30026, LANSING, MI 48909  
 OR  
 530 W. ALLEGAN, LANSING, MI 48933

March 2, 2011

**CHANGE NOTICE NO. 1**  
**TO**  
**CONTRACT NO. 071B1300179**  
**between**  
**THE STATE OF MICHIGAN**  
**and**

NAME & ADDRESS OF CONTRACTOR <b>NCS Pearson, Inc.</b> <b>3075 W. Ray Rd., Ste 200</b> <b>Chandler, AZ 85226</b>		TELEPHONE 480-457-7679 <b>(888) 827-0772</b>
Kevin Schutz kevin.schutz@pearson.com		CONTRACTOR NUMBER/MAIL CODE
CONTRACT COMPLIANCE INSPECTOR: Barb Suska (517) 335-4067 <b>MAINTENANCE AND SUPPORT FOR NOVANET SOFTWARE</b>		BUYER/CA (517) 241-1638 <b>Reid Sisson</b>
CONTRACT PERIOD: 5 years with 5 one year options From: <b>January 1, 2011</b> To: <b>December 31, 2015</b>		
TERMS <b>N/A</b>	SHIPMENT <b>N/A</b>	
F.O.B. <b>N/A</b>	SHIPPED FROM <b>N/A</b>	
MINIMUM DELIVERY REQUIREMENTS <b>N/A</b>		

**NATURE OF CHANGE(S):**

Effective immediately, the vendor contact for this contract is corrected to show as Kevin Schutz. The contract compliance inspector is updated to show Barb Suska. The buyer for this contract is changed to Reid Sisson. The contract is also REDUCED by \$13,125.00 for YEAR 1 (1/1/11 to 12/31/11), See attached document for explanation.

**AUTHORITY/REASON(S):**

Per vendor request, agency agreement and the approval the Purchasing Operations.

**DECREASE: \$13,125.00**

**TOTAL REVISED ESTIMATED CONTRACT VALUE: \$52,500.00**

This contract is being REDUCED by \$13,125.00 for YEAR 1 (1/1/11 – 12/31/11) which was processed in error as two (2) delegated authority purchase orders 084N1300768 and 084N1301913. The table below replaces the original pricing tables.

**New Contract value: \$52,500.00.** All other terms and conditions of the contract apply.

	Period of Coverage	Total Number of Ports	Locations of Ports	Annual Cost	Comments
YEAR 1	1/1/11 – 12/31/11	25	Maxey Training – 10 ports Shawano Training – 8 ports Bay Pines Training – 7 ports	N/A	Purchase orders 084N1300768 for (\$12,600.00) and 084N1301913 for (\$525.00) = \$13125.00 were processed by State of Michigan as delegated authority and not processed against this contract.
YEAR 2	1/1/12 – 12/31/12	25	Maxey Training – 10 ports Shawano Training – 8 ports Bay Pines Training – 7 ports	\$13,125.00	
YEAR 3	1/1/13 – 12/31/13	25	Maxey Training – 10 ports Shawano Training – 8 ports Bay Pines Training – 7 ports	\$13,125.00	
YEAR 4	1/1/14 – 12/31/14	25	Maxey Training – 10 ports Shawano Training – 8 ports Bay Pines Training – 7 ports	\$13,125.00	
YEAR 5	1/1/15 – 12/31/15	25	Maxey Training – 10 ports Shawano Training – 8 ports Bay Pines Training – 7 ports	\$13,125.00	
			<b>TOTAL CONTRACT</b>	<b>\$52,500.00</b>	







**STATE OF MICHIGAN**  
**Department of Technology, Management and Budget**  
**Purchasing Operations**

Contract Number: 071B1300179  
**Maintenance and Support NovaNet Software**

Buyer Name: [Jacque Kuch](#)  
Telephone Number: [517-241-0239](#)  
E-Mail Address: [kuchj@michigan.gov](mailto:kuchj@michigan.gov)



**Table of Contents**

**Article 1 – Statement of Work (SOW) 10**

- 1.000 Project Identification/Scope 10**
- 1.100 Scope of Work and Deliverables 10**
- 1.200 State Roles and Responsibilities 11**
  - 1.201 Contract Compliance Inspector 11
  - 1.202 Project Manager 11
- 1.300 Compensation and Payment 11**
  - 1.301 Compensation And Payment 11
  - 1.302 Tax Excluded from Price 11

**Article 2, Terms and Conditions 12**

- 2.000 Contract Structure and Term 12**
  - 2.001 Contract Term 12
  - 2.002 Options to Renew 12
  - 2.003 Legal Effect 12
  - 2.004 Attachments & Exhibits 12
  - 2.005 Ordering 12
  - 2.006 Order of Precedence 12
  - 2.007 Headings 13
  - 2.008 Form, Function & Utility 13
  - 2.009 Reformation and Severability 13
- 2.010 Consents and Approvals 13**
  - 2.011 No Waiver of Default 13
  - 2.012 Survival 13
- 2.020 Contract Administration 13**
  - 2.021 Issuing Office 13
  - 2.022 Contract Compliance Inspector 13
  - 2.023 Project Manager 14
  - 2.024 Change Requests 14
  - 2.025 Notices 15
  - 2.026 Binding Commitments 15
  - 2.027 Relationship of the Parties 16
  - 2.028 Covenant of Good Faith 16
  - 2.029 Assignments 16
- 2.030 General Provisions 16**
  - 2.031 Media Releases 16
  - 2.032 Contract Distribution 16
  - 2.033 Permits 16
  - 2.034 Website Incorporation 16
  - 2.035 Future Bidding Preclusion 17
  - 2.036 Freedom of Information 17
  - 2.037 Disaster Recovery 17
- 2.040 Financial Provisions 17**
  - 2.041 Fixed Prices for Services/Deliverables 17
  - 2.042 Adjustments for Reductions in Scope of Services/Deliverables 17
  - 2.043 Services/Deliverables Covered 17
  - 2.044 Invoicing and Payment – In General 17
  - 2.045 Pro-ration 18
  - 2.046 Antitrust Assignment 18
  - 2.047 Final Payment 18
  - 2.048 Electronic Payment Requirement 18
- 2.050 Taxes 18**
  - 2.051 Employment Taxes 18
  - 2.052 Sales and Use Taxes 18
- 2.060 Contract Management 19**
  - 2.061 Contractor Personnel Qualifications 19



2.062	Contractor Key Personnel	19
2.063	Re-assignment of Personnel at the State’s Request	19
2.064	Contractor Personnel Location	19
2.065	Contractor Identification	19
2.066	Cooperation with Third Parties	19
2.067	Contract Management Responsibilities	19
2.068	Contractor Return of State Equipment/Resources	20
<b>2.070</b>	<b>Subcontracting by Contractor</b>	<b>20</b>
2.071	Contractor full Responsibility	20
2.072	State Consent to delegation	20
2.073	Subcontractor bound to Contract	20
2.074	Flow Down	21
2.075	Competitive Selection	21
<b>2.080</b>	<b>State Responsibilities</b>	<b>21</b>
2.081	Equipment	21
2.082	Facilities	21
<b>2.090</b>	<b>Security</b>	<b>21</b>
2.091	Background Checks	21
2.092	Security Breach Notification	21
2.093	PCI DATA Security Requirements	22
<b>2.100</b>	<b>Confidentiality</b>	<b>22</b>
2.101	Confidentiality	22
2.102	Protection and Destruction of Confidential Information	22
2.103	Exclusions	23
2.104	No Implied Rights	23
2.105	Respective Obligations	23
<b>2.110</b>	<b>Records and Inspections</b>	<b>23</b>
2.111	Inspection of Work Performed	23
2.112	Examination of Records	23
2.113	Retention of Records	23
2.114	Audit Resolution	24
2.115	Errors	24
<b>2.120</b>	<b>Warranties</b>	<b>24</b>
2.121	Warranties and Representations -Reserved	24
2.122	Warranty of Merchantability-reserved	24
2.123	Warranty of Fitness for a Particular Purpose-reserved	24
2.124	Warranty of Title-reserved	24
2.125	Equipment Warranty-reserved	24
2.126	Equipment to be New-reserved	24
2.127	Prohibited Products-reserved	24
2.128	Consequences for Breach-reserved	24
<b>2.130</b>	<b>Insurance</b>	<b>24</b>
2.131	Liability Insurance	24
2.132	Subcontractor Insurance Coverage	25
2.133	Certificates of Insurance and Other Requirements	26
<b>2.140</b>	<b>Indemnification</b>	<b>26</b>
2.141	General Indemnification	26
2.142	Code Indemnification	26
2.143	Employee Indemnification	26
2.144	Patent/Copyright Infringement Indemnification	26
2.145	Continuation of Indemnification Obligations	27
2.146	Indemnification Procedures	27
<b>2.150</b>	<b>Termination/Cancellation</b>	<b>28</b>
2.151	Notice and Right to Cure	28
2.152	Termination for Cause	28
2.153	Termination for Convenience	28
2.154	Termination for Non-Appropriation	28
2.155	Termination for Criminal Conviction	29
2.156	Termination for Approvals Rescinded	29
2.157	Rights and Obligations upon Termination	29
2.158	Reservation of Rights	30



<b>2.160</b>	<b>Termination by Contractor</b>	<b>30</b>
2.161	Termination by Contractor	30
<b>2.170</b>	<b>Transition Responsibilities</b>	<b>30</b>
2.171	Contractor Transition Responsibilities-Reserved	30
2.172	Contractor Personnel Transition-Reserved	30
2.173	Contractor Information Transition-Reserved	30
2.174	Contractor Software Transition-reserved	30
2.175	Transition Payments-reserved	30
2.176	State Transition Responsibilities-reserved	30
<b>2.180</b>	<b>Stop Work</b>	<b>30</b>
2.181	Stop Work Orders	30
2.182	Cancellation or Expiration of Stop Work Order	30
2.183	Allowance of Contractor Costs	31
<b>2.190</b>	<b>Dispute Resolution</b>	<b>31</b>
2.191	In General	31
2.192	Informal Dispute Resolution	31
2.193	Injunctive Relief	31
2.194	Continued Performance	32
<b>2.200</b>	<b>Federal and State Contract Requirements</b>	<b>32</b>
2.201	Nondiscrimination	32
2.202	Unfair Labor Practices	32
2.203	Workplace Safety and Discriminatory Harassment	32
2.204	Prevailing Wage	32
<b>2.210</b>	<b>Governing Law</b>	<b>33</b>
2.211	Governing Law	33
2.212	Compliance with Laws	33
2.213	Jurisdiction	33
<b>2.220</b>	<b>Limitation of Liability</b>	<b>33</b>
2.221	Limitation of Liability	33
<b>2.230</b>	<b>Disclosure Responsibilities</b>	<b>33</b>
2.231	Disclosure of Litigation	33
2.232	Call Center Disclosure	34
2.233	Bankruptcy	34
<b>2.240</b>	<b>Performance</b>	<b>34</b>
2.241	Time of Performance	34
2.242	Service Level Agreement (SLA)-reserved	35
2.243	Liquidated Damages -reserved	35
2.244	Excusable Failure-reserved	35
<b>2.250</b>	<b>Approval of Deliverables</b>	<b>35</b>
2.251	Delivery of Deliverables	35
2.252	Contractor System Testing	35
2.253	Approval of Deliverables, In General	35
2.254	Process for Approval of Written Deliverables	35
2.255	Process for Approval of Custom Software Deliverables	35
2.256	Final Acceptance	35
<b>2.260</b>	<b>Ownership</b>	<b>35</b>
2.261	Ownership of Work Product by State	35
2.262	Vesting of Rights	35
2.263	Rights in Data	35
2.264	Ownership of Materials	35
<b>2.270</b>	<b>State Standards</b>	<b>35</b>
2.271	Existing Technology Standards	35
2.272	Acceptable Use Policy	35
2.273	Systems Changes	36
<b>2.280</b>	<b>Extended Purchasing</b>	<b>36</b>
2.281	MiDEAL (Michigan Delivery Extended Agreements Locally -reserved	36
2.282	State Employee Purchases	36
<b>2.290</b>	<b>Environmental Provision</b>	<b>36</b>



2.291	Environmental Provision	36
<b>2.300</b>	<b>Deliverables</b>	<b>36</b>
2.301	Software	36
2.302	Hardware	36
<b>2.310</b>	<b>Software Warranties</b>	<b>36</b>
2.311	Performance Warranty-reserved	36
2.312	No Surreptitious Code Warranty-reserved	36
2.313	Calendar Warranty-reserved	36
2.314	Third-party Software Warranty-reserved	36
2.315	Physical Media Warranty-reserved	36
<b>2.320</b>	<b>Software Licensing</b>	<b>36</b>
2.321	Cross-License, Deliverables Only, License to Contractor	36
2.322	Cross-License, Deliverables and Derivative Work, License to Contractor	36
2.323	License Back to the State	36
2.324	License Retained by Contractor	36
2.325	Pre-existing Materials for Custom Software Deliverables	36
<b>2.330</b>	<b>Source Code Escrow</b>	<b>37</b>
2.331	Definition	37
2.332	Delivery of Source Code into Escrow	37
2.333	Delivery of New Source Code into Escrow	37
2.334	Verification	37
2.335	Escrow Fees	37
2.336	Release Events	37
2.337	Release Event Procedures	37
2.338	License	37
2.339	Derivative Works	37
<b>ATTACHMENT A – COST TABLE</b>		<b>38</b>



## **ARTICLE 1 – STATEMENT OF WORK (SOW)**

### **1.000 Project Identification/Scope**

This Contract is for software maintenance and support for the NovaNET Software.

### **1.100 Scope of Work and Deliverables**

Contractor shall provide maintenance for 25 subscription licenses of NovaNET for 60 months (5 years). Each subscription license enables a Department of Human Services-Bureau of Juvenile Justice (DHS-BJJ) Facility a computer work station to access the NovaNET self-paced high school educational programming. The license is dedicated to a workstation, not an individual student; thus, more than one student can receive the educational training at each work station. DHS-BJJ Facility currently has 25 subscription licenses in effect at its three training schools and the software is completely compatible with State of Michigan computer hardware, software, and security parameters. No changes to existing State of Michigan computer hardware and software will be necessitated as a result of the awarding of this contract.

Training DHS-BJJ Facility educational and administrative staff on the features, requirements, and outcomes from running NovaNET will be the responsibility of the vendor and are to be included in the bid price for the contract.

### **Covered Software**

NovaNet licenses must include access to current and future courseware and features, all support, and all upgrades and enhancements.

Contractor must provide software maintenance and support services defined in this Section to the State for the Covered Software while the annual maintenance fee for the Current Release of the particular Covered Software is in effect and paid in full.

In the event of discontinuance of the version of NovaNet used by the State, The State would either need to move to NovaNet Courseware or the contract would be terminated with no further fiscal obligation on the part of the State. Contractor must provide at least one year's notice of any product discontinuance.

### **Software Maintenance**

Contractor must provide software maintenance for the installed version and on all future software updates and system enhancements applicable to system modules licensed to the State.

Contractor shall provide Upgrades to the standard version of the Covered Software at no additional cost to the State. Upgrades shall mean updated, upgraded, or revised versions of the Covered Software which may include error corrections and other enhancements that Contractor makes available to its customers at no additional charge. Upgrades shall not include any new releases which contain substantially new or different functionality.

Contractor shall use reasonable efforts to correct any failure in the Covered Software identified by the State in writing. The Contractor must notify the State of any material errors or defects in the products licensed to the State, or made known to Contractor from any source during the Contract term that could cause the production of inaccurate, or otherwise materially incorrect, results and shall initiate actions as may be commercially necessary or proper to effect corrections of any such errors or defects.

### **Software Support Services**

Contractor must provide software support services for the Covered Software as described in this Section.

Contractor must provide a support telephone number to call help on the Covered Software. The support number shall be in operation during State business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding State and Contractor holidays.



Contractor must provide technical support from 8 a.m. to 5 p.m. EST; Monday through Friday with a minimum response time of 4 hours via a Contractor provided toll-free phone number. Internet support and e-mail to authorized state staff is also acceptable.

**Call Center Disclosure** - Contractor and/or all subcontractors involved in the performance of this Contract providing call or contact center services to the State must disclose the location of its call or contact center services to inbound callers. Failure to disclose this information is a material breach of this Contract.

**1.200 State Roles and Responsibilities**

**1.201 CONTRACT COMPLIANCE INSPECTOR**

The Contract Compliance Inspector is responsible to monitor Contract activities on a daily basis.

Name	Agency/Division	Title
Patty Bogard	DTMB Purchasing Operations – Contract Unit	

**1.202 PROJECT MANAGER**

The Project Manager will oversee the project:

Name	Agency/Division	Title
Joyce Humbarger	Central Office/Bureau of Juvenile Justice	

**1.300 Compensation and Payment**

**1.301 COMPENSATION AND PAYMENT**

The maintenance and support costs will be invoiced as a Firm Fixed Price. Contractor will submit properly itemized invoices to “Bill To” Address on the Purchase Order. Incorrect or incomplete invoices will be returned to Contractor.

**Payment will be made on annual basis according to Attachment A, Pricing Table.**

**Exception:** The State will not pay for any travel expenses, including hotel, mileage, meals, parking, etc. and travel time. Contractor must obtain advanced written approval for reimbursement of any expenses.

**1.302 TAX EXCLUDED FROM PRICE**

**Sales Tax:** The State is exempt from sales tax for direct purchases. The Bidder's prices must not include sales tax. Purchasing Operations will furnish exemption certificates for sales tax upon request.

**Federal Excise Tax:** The State may be exempt from Federal Excise Tax, or the taxes may be reimbursable, if articles purchased under any resulting Contract are used for the State’s exclusive use. Certificates showing exclusive use for the purposes of substantiating a tax-free or tax-reimbursable sale will be sent upon request. If a sale is tax exempt or tax reimbursable under the Internal Revenue Code, prices must not include the Federal Excise Tax.



## **ARTICLE 2, TERMS AND CONDITIONS**

### **2.000 Contract Structure and Term**

#### **2.001 CONTRACT TERM**

This Contract is for a period of five years beginning January 1, 2011 through December 31, 2015. All outstanding Purchase Orders must also expire upon the termination for any of the reasons listed in **Section 2.150** of the Contract, unless otherwise extended under the Contract. Absent an early termination for any reason, Purchase Orders issued but not expired, by the end of the Contract's stated term, shall remain in effect for the balance of the fiscal year for which they were issued.

#### **2.002 OPTIONS TO RENEW**

This Contract may be renewed in writing by mutual agreement of the parties not less than 30 days before its expiration. The Contract may be renewed for up to five additional one year periods.

#### **2.003 LEGAL EFFECT**

Contractor accepts this Contract by signing two copies of the Contract and returning them to the Purchasing Operations. The Contractor shall not proceed with the performance of the work to be done under the Contract, including the purchase of necessary materials, until both parties have signed the Contract to show acceptance of its terms, and the Contractor receives a contract release/purchase order that authorizes and defines specific performance requirements.

Except as otherwise agreed in writing by the parties, the State shall not be liable for costs incurred by Contractor or payment under this Contract, until Contractor is notified in writing that this Contract or Change Order has been approved by the State Administrative Board (if required), signed by all the parties and a Purchase Order against the Contract has been issued.

#### **2.004 ATTACHMENTS & EXHIBITS**

All Attachments and Exhibits affixed to any and all Statement(s) of Work, or appended to or referencing this Contract, are incorporated in their entirety and form part of this Contract.

#### **2.005 ORDERING**

The State must issue an approved written Purchase Order, Blanket Purchase Order, Direct Voucher or Procurement Card Order to order any Services/Deliverables under this Contract. All orders are subject to the terms and conditions of this Contract. No additional terms and conditions contained on either a Purchase Order or Blanket Purchase Order apply unless they are specifically contained in that Purchase Order or Blanket Purchase Order's accompanying Statement of Work. Exact quantities to be purchased are unknown; however, the Contractor will be required to furnish all such materials and services as may be ordered during the Contract period. Quantities specified, if any, are estimates based on prior purchases, and the State is not obligated to purchase in these or any other quantities.

#### **2.006 ORDER OF PRECEDENCE**

The Contract, including any Statements of Work and Exhibits, to the extent not contrary to the Contract, each of which is incorporated for all purposes, constitutes the entire agreement between the parties with respect to the subject matter and supersedes all prior agreements, whether written or oral, with respect to the subject matter and as additional terms and conditions on the purchase order must apply as limited by **Section 2.005**.

In the event of any inconsistency between the terms of the Contract and a Statement of Work, the terms of the Statement of Work shall take precedence (as to that Statement of Work only); provided, however, that a Statement of Work may not modify or amend the terms of the Contract. The Contract may be modified or amended only by a formal Contract amendment.



## **2.007 HEADINGS**

Captions and headings used in the Contract are for information and organization purposes. Captions and headings, including inaccurate references, do not, in any way, define or limit the requirements or terms and conditions of the Contract.

## **2.008 FORM, FUNCTION & UTILITY**

If the Contract is for use of more than one State agency and if the Deliverable/Service does not meet the form, function, and utility required by that State agency, that agency may, subject to State purchasing policies, procure the Deliverable/Service from another source.

## **2.009 REFORMATION AND SEVERABILITY**

Each provision of the Contract is severable from all other provisions of the Contract and, if one or more of the provisions of the Contract is declared invalid, the remaining provisions of the Contract remain in full force and effect.

### **2.010 Consents and Approvals**

Except as expressly provided otherwise in the Contract, if either party requires the consent or approval of the other party for the taking of any action under the Contract, the consent or approval must be in writing and must not be unreasonably withheld or delayed.

## **2.011 NO WAIVER OF DEFAULT**

If a party fails to insist upon strict adherence to any term of the Contract then the party has not waived the right to later insist upon strict adherence to that term, or any other term, of the Contract.

## **2.012 SURVIVAL**

Any provisions of the Contract that impose continuing obligations on the parties, including without limitation the parties' respective warranty, indemnity and confidentiality obligations, survive the expiration or termination of the Contract for any reason. Specific references to survival in the Contract are solely for identification purposes and not meant to limit or prevent the survival of any other section

### **2.020 Contract Administration**

## **2.021 ISSUING OFFICE**

This Contract is issued by the Department of Technology, Management and Budget, Purchasing Operations and the Department of Human Services, Bureau of Juvenile Justice (collectively, including all other relevant State of Michigan departments and agencies, the "State"). Purchasing Operations is the sole point of contact in the State with regard to all procurement and contractual matters relating to the Contract. The Purchasing Operations Contract Administrator for this Contract is:

Jacque Kuch, Buyer  
Purchasing Operations  
Department of Technology, Management and Budget  
Mason Bldg, 2nd Floor  
PO Box 30026  
Lansing, MI 48909  
kuchj@michigan.gov  
517-241-0239

## **2.022 CONTRACT COMPLIANCE INSPECTOR**

The Director of Purchasing Operations directs the person named below, or his or her designee, to monitor and coordinate the activities for the Contract on a day-to-day basis during its term. **Monitoring Contract activities does not imply the authority to change, modify, clarify, amend, or otherwise alter the prices, terms, conditions and specifications of the Contract. Purchasing Operations is the only State office authorized to change, modify, amend, alter or clarify the prices, specifications, terms and conditions of this Contract.** The Contract Compliance Inspector for this Contract is:



Patty Bogard, Contract Administrator  
Michigan Department of Technology, Management & Budget (DTMB)  
Purchasing Operations - Contract Administrator Unit  
Mason Bldg, 2nd floor  
530 W. Allegan St.  
Lansing, Michigan 48933  
ph: 517-335-4051  
e-mail: [BogardP@michigan.gov](mailto:BogardP@michigan.gov)

### **2.023 PROJECT MANAGER**

The following individual will oversee the project:

Joyce Humbarger  
Central Office/Bureau of Juvenile Justice  
[humbargerj@michigan.gov](mailto:humbargerj@michigan.gov)  
517-241-7135

### **2.024 CHANGE REQUESTS**

The State reserves the right to request from time to time any changes to the requirements and specifications of the Contract and the work to be performed by the Contractor under the Contract. During the course of ordinary business, it may become necessary for the State to discontinue certain business practices or create Additional Services/Deliverables. At a minimum, to the extent applicable, Contractor shall provide a detailed outline of all work to be done, including tasks necessary to accomplish the Additional Services/Deliverables, timeframes, listing of key personnel assigned, estimated hours for each individual per task, and a complete and detailed cost justification.

If the State requests or directs the Contractor to perform any Services/Deliverables that are outside the scope of the Contractor's responsibilities under the Contract ("New Work"), the Contractor must notify the State promptly before commencing performance of the requested activities it believes are New Work. If the Contractor fails to notify the State before commencing performance of the requested activities, any such activities performed before the Contractor gives notice shall be conclusively considered to be in-scope Services/Deliverables and not New Work.

If the State requests or directs the Contractor to perform any services or provide deliverables that are consistent with and similar to the Services/Deliverables being provided by the Contractor under the Contract, but which the Contractor reasonably and in good faith believes are not included within the Statements of Work, then before performing such Services or providing such Deliverables, the Contractor shall notify the State in writing that it considers the Services or Deliverables to be an Additional Service/Deliverable for which the Contractor should receive additional compensation. If the Contractor does not so notify the State, the Contractor shall have no right to claim thereafter that it is entitled to additional compensation for performing that Service or providing that Deliverable. If the Contractor does so notify the State, then such a Service or Deliverable shall be governed by the Change Request procedure in this Section.

In the event prices or service levels are not acceptable to the State, the Additional Services or New Work shall be subject to competitive bidding based upon the specifications.

#### **(1) Change Request at State Request**

If the State requires Contractor to perform New Work, Additional Services or make changes to the Services that would affect the Contract completion schedule or the amount of compensation due Contractor (a "Change"), the State shall submit a written request for Contractor to furnish a proposal for carrying out the requested Change (a "Change Request").

#### **(2) Contractor Recommendation for Change Requests:**

Contractor shall be entitled to propose a Change to the State, on its own initiative, should Contractor believe the proposed Change would benefit the Contract.



- (3) Upon receipt of a Change Request or on its own initiative, Contractor shall examine the implications of the requested Change on the technical specifications, Contract schedule and price of the Deliverables and Services and shall submit to the State without undue delay a written proposal for carrying out the Change. Contractor's proposal shall include any associated changes in the technical specifications, Contract schedule and price and method of pricing of the Services. If the Change is to be performed on a time and materials basis, the Amendment Labor Rates shall apply to the provision of such Services. If Contractor provides a written proposal and should Contractor be of the opinion that a requested Change is not to be recommended, it shall communicate its opinion to the State but shall nevertheless carry out the Change as specified in the written proposal if the State directs it to do so.
- (4) By giving Contractor written notice within a reasonable time, the State shall be entitled to accept a Contractor proposal for Change, to reject it, or to reach another agreement with Contractor. Should the parties agree on carrying out a Change, a written Contract Change Notice must be prepared and issued under this Contract, describing the Change and its effects on the Services and any affected components of this Contract (a "Contract Change Notice").
- (5) No proposed Change shall be performed until the proposed Change has been specified in a duly executed Contract Change Notice issued by the Department of Technology, Management and Budget, Purchasing Operations.
- (6) If the State requests or directs the Contractor to perform any activities that Contractor believes constitute a Change, the Contractor must notify the State that it believes the requested activities are a Change before beginning to work on the requested activities. If the Contractor fails to notify the State before beginning to work on the requested activities, then the Contractor waives any right to assert any claim for additional compensation or time for performing the requested activities. If the Contractor commences performing work outside the scope of this Contract and then ceases performing that work, the Contractor must, at the request of the State, retract any out-of-scope work that would adversely affect the Contract.

## 2.025 NOTICES

Any notice given to a party under the Contract must be deemed effective, if addressed to the party as addressed below, upon: (i) delivery, if hand delivered; (ii) receipt of a confirmed transmission by facsimile if a copy of the notice is sent by another means specified in this Section; (iii) the third Business Day after being sent by U.S. mail, postage pre-paid, return receipt requested; or (iv) the next Business Day after being sent by a nationally recognized overnight express courier with a reliable tracking system.

State:

State of Michigan  
Purchasing Operations  
Attention: Jacque Kuch  
PO Box 30026  
530 West Allegan  
Lansing, Michigan 48909

Contractor:

Name: NCS Pearson Inc.  
Address: 3075 W. Ray R., Ste 200  
Chandler, AZ 85226  
Attn: Sheryl Morris  
(313) 378-9573

Either party may change its address where notices are to be sent by giving notice according to this Section.

## 2.026 BINDING COMMITMENTS

Representatives of Contractor must have the authority to make binding commitments on Contractor's behalf within the bounds set forth in the Contract. Contractor may change the representatives from time to time upon giving written notice.



## **2.027 RELATIONSHIP OF THE PARTIES**

The relationship between the State and Contractor is that of client and independent contractor. No agent, employee, or servant of Contractor or any of its Subcontractors shall be deemed to be an employee, agent or servant of the State for any reason. Contractor shall be solely and entirely responsible for its acts and the acts of its agents, employees, servants and Subcontractors during the performance of the Contract.

## **2.028 COVENANT OF GOOD FAITH**

Each party shall act reasonably and in good faith. Unless stated otherwise in the Contract, the parties shall not unreasonably delay, condition or withhold the giving of any consent, decision or approval that is either requested or reasonably required of them in order for the other party to perform its responsibilities under the Contract.

## **2.029 ASSIGNMENTS**

Neither party may assign the Contract, or assign or delegate any of its duties or obligations under the Contract, to any other party (whether by operation of law or otherwise), without the prior written consent of the other party; provided, however, that the State may assign the Contract to any other State agency, department, division or department without the prior consent of Contractor and Contractor may assign the Contract to an affiliate so long as the affiliate is adequately capitalized and can provide adequate assurances that the affiliate can perform the Contract. The State may withhold consent from proposed assignments, subcontracts, or novations when the transfer of responsibility would operate to decrease the State's likelihood of receiving performance on the Contract or the State's ability to recover damages.

Contractor may not, without the prior written approval of the State, assign its right to receive payments due under the Contract. If the State permits an assignment, the Contractor is not relieved of its responsibility to perform any of its contractual duties and the requirement under the Contract that all payments must be made to one entity continues.

If the Contractor intends to assign the contract or any of the Contractor's rights or duties under the Contract, the Contractor must notify the State in writing at least 90 days before the assignment. The Contractor also must provide the State with adequate information about the assignee within a reasonable amount of time before the assignment for the State to determine whether to approve the assignment.

## **2.030 General Provisions**

### **2.031 MEDIA RELEASES**

News releases (including promotional literature and commercial advertisements) pertaining to the RFP and Contract or project to which it relates shall not be made without prior written State approval, and then only in accordance with the explicit written instructions from the State. No results of the activities associated with the RFP and Contract are to be released without prior written approval of the State and then only to persons designated.

### **2.032 CONTRACT DISTRIBUTION**

Purchasing Operations retains the sole right of Contract distribution to all State agencies and local units of government unless other arrangements are authorized by Purchasing Operations.

### **2.033 PERMITS**

Contractor must obtain and pay any associated costs for all required governmental permits, licenses and approvals for the delivery, installation and performance of the Services. The State shall pay for all costs and expenses incurred in obtaining and maintaining any necessary easements or right of way.

### **2.034 WEBSITE INCORPORATION**

The State is not bound by any content on the Contractor's website, even if the Contractor's documentation specifically referenced that content and attempts to incorporate it into any other communication, unless the State has actual knowledge of the content and has expressly agreed to be bound by it in a writing that has been manually signed by an authorized representative of the State.



### **2.035 FUTURE BIDDING PRECLUSION**

Contractor acknowledges that, to the extent this Contract involves the creation, research, investigation or generation of a future RFP; it may be precluded from bidding on the subsequent RFP. The State reserves the right to disqualify any bidder if the State determines that the bidder has used its position (whether as an incumbent Contractor, or as a Contractor hired to assist with the RFP development, or as a Vendor offering free assistance) to gain a competitive advantage on the RFP

### **2.036 FREEDOM OF INFORMATION**

All information in any proposal submitted to the State by Contractor and this Contract is subject to the provisions of the Michigan Freedom of Information Act, 1976 Public Act No. 442, as amended, MCL 15.231, et seq (the "FOIA").

### **2.037 DISASTER RECOVERY**

Contractor and the State recognize that the State provides essential services in times of natural or man-made disasters. Therefore, except as so mandated by Federal disaster response requirements, Contractor personnel dedicated to providing Services/Deliverables under this Contract shall provide the State with priority service for repair and work around in the event of a natural or man-made disaster.

## **2.040 Financial Provisions**

### **2.041 FIXED PRICES FOR SERVICES/DELIVERABLES**

Each Statement of Work or Purchase Order issued under this Contract shall specify (or indicate by reference to the appropriate Contract Exhibit) the firm, fixed prices for all Services/Deliverables, and the associated payment milestones and payment amounts. The State may make progress payments to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts approved by the Contract Administrator, after negotiation. Contractor shall show verification of measurable progress at the time of requesting progress payments.

### **2.042 ADJUSTMENTS FOR REDUCTIONS IN SCOPE OF SERVICES/DELIVERABLES**

If the scope of the Services/Deliverables under any Statement of Work issued under this Contract is subsequently reduced by the State, the parties shall negotiate an equitable reduction in Contractor's charges under such Statement of Work commensurate with the reduction in scope.

### **2.043 SERVICES/DELIVERABLES COVERED**

The State shall not be obligated to pay any amounts in addition to the charges specified in this Contract for all Services/Deliverables to be provided by Contractor and its Subcontractors, if any, under this Contract.

### **2.044 INVOICING AND PAYMENT – IN GENERAL**

- (a) Each Statement of Work issued under this Contract shall list (or indicate by reference to the appropriate Contract Exhibit) the prices for all Services/Deliverables, equipment and commodities to be provided, and the associated payment milestones and payment amounts.
- (b) Each Contractor invoice shall show details as to charges by Service/Deliverable component and location at a level of detail reasonably necessary to satisfy the State's accounting and charge-back requirements. Invoices for Services performed on a time and materials basis shall show, for each individual, the number of hours of Services performed during the billing period, the billable skill/labor category for such person and the applicable hourly billing rate. Prompt payment by the State is contingent on the Contractor's invoices showing the amount owed by the State minus any holdback amount to be retained by the State in accordance with **Section 1.600**.
- (c) Correct invoices shall be due and payable by the State, in accordance with the State's standard payment procedure as specified in 1984 Public Act No. 279, MCL 17.51 et seq., within 45 days after receipt, provided the State determines that the invoice was properly rendered.
- (d1) All invoices should reflect actual work done. Specific details of invoices and payments shall be agreed upon between the Contract Administrator and the Contractor after the proposed Contract Agreement has been signed and accepted by both the Contractor and the Director of Purchasing Operations, Department



of Management & Budget. This activity shall occur only upon the specific written direction from Purchasing Operations.

The specific payment schedule for any Contract(s) entered into, as the State and the Contractor(s) shall mutually agree upon. The schedule should show payment amount and should reflect actual work done by the payment dates, less any penalty cost charges accrued by those dates. As a general policy statements shall be forwarded to the designated representative by the 15th day of the following month.

The Government may make progress payments to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts approved by the Contract Administrator, after negotiation. Contractor must show verification of measurable progress at the time of requesting progress payments.

#### **2.045 PRO-RATION**

To the extent there are Services that are to be paid for on a monthly basis, the cost of such Services shall be pro-rated for any partial month.

#### **2.046 ANTITRUST ASSIGNMENT**

The Contractor assigns to the State any claim for overcharges resulting from antitrust violations to the extent that those violations concern materials or services supplied by third parties to the Contractor, toward fulfillment of this Contract.

#### **2.047 FINAL PAYMENT**

The making of final payment by the State to Contractor does not constitute a waiver by either party of any rights or other claims as to the other party's continuing obligations under the Contract, nor shall it constitute a waiver of any claims by one party against the other arising from unsettled claims or failure by a party to comply with this Contract, including claims for Services and Deliverables not reasonably known until after acceptance to be defective or substandard. Contractor's acceptance of final payment by the State under this Contract shall constitute a waiver of all claims by Contractor against the State for payment under this Contract, other than those claims previously filed in writing on a timely basis and still unsettled.

#### **2.048 ELECTRONIC PAYMENT REQUIREMENT**

Electronic transfer of funds is required for payments on State Contracts. Contractors are required to register with the State electronically at <http://www.cpexpress.state.mi.us>. As stated in Public Act 431 of 1984, all contracts that the State enters into for the purchase of goods and services shall provide that payment shall be made by electronic fund transfer (EFT).

#### **2.050 Taxes**

##### **2.051 EMPLOYMENT TAXES**

Contractor shall collect and pay all applicable federal, state, and local employment taxes, including the taxes.

##### **2.052 SALES AND USE TAXES**

Contractor shall register and remit sales and use taxes on taxable sales of tangible personal property or services delivered into the State. Contractors that lack sufficient presence in Michigan to be required to register and pay tax must do so as a volunteer. This requirement extends to: (1) all members of any controlled group as defined in § 1563(a) of the Internal Revenue Code and applicable regulations of which the company is a member, and (2) all organizations under common control as defined in § 414(c) of the Internal Revenue Code and applicable regulations of which the company is a member that make sales at retail for delivery into the State are registered with the State for the collection and remittance of sales and use taxes. In applying treasury regulations defining "two or more trades or businesses under common control" the term "organization" means sole proprietorship, a partnership (as defined in § 701(a) (2) of the Internal Revenue Code), a trust, an estate, a corporation, or a limited liability company.



## **2.060 Contract Management**

### **2.061 CONTRACTOR PERSONNEL QUALIFICATIONS**

All persons assigned by Contractor to the performance of Services under this Contract must be employees of Contractor or its majority-owned (directly or indirectly, at any tier) subsidiaries (or a State-approved Subcontractor) and must be fully qualified to perform the work assigned to them. Contractor must include a similar provision in any subcontract entered into with a Subcontractor. For the purposes of this Contract, independent contractors engaged by Contractor solely in a staff augmentation role must be treated by the State as if they were employees of Contractor for this Contract only; however, the State understands that the relationship between Contractor and Subcontractor is an independent contractor relationship.

### **2.062 CONTRACTOR KEY PERSONNEL**

Reserved

The Contractor must notify the Contract Compliance Inspector and the Contract Administrator at least 10 business days before redeploying non-Key Personnel, who are dedicated to primarily to the Project, to other projects. If the State does not object to the redeployment by its scheduled date, the Contractor may then redeploy the non-Key Personnel.

### **2.063 RE-ASSIGNMENT OF PERSONNEL AT THE STATE'S REQUEST**

The State reserves the right to require the removal from the Project of Contractor personnel found, in the judgment of the State, to be unacceptable. The State's request must be written with reasonable detail outlining the reasons for the removal request. Additionally, the State's request must be based on legitimate, good faith reasons. Replacement personnel for the removed person must be fully qualified for the position. If the State exercises this right, and the Contractor cannot immediately replace the removed personnel, the State agrees to an equitable adjustment in schedule or other terms that may be affected by the State's required removal. If any incident with removed personnel results in delay not reasonably anticipatable under the circumstances and which is attributable to the State, the applicable SLAs for the affected Service shall not be counted for a time as agreed to by the parties.

### **2.064 CONTRACTOR PERSONNEL LOCATION**

All staff assigned by Contractor to work on the Contract shall perform their duties either primarily at Contractor's offices and facilities or at State facilities. Without limiting the generality of the foregoing, Key Personnel shall, at a minimum, spend at least the amount of time on-site at State facilities as indicated in the applicable Statement of Work. Subject to availability, selected Contractor personnel may be assigned office space to be shared with State personnel.

### **2.065 CONTRACTOR IDENTIFICATION**

Contractor employees must be clearly identifiable while on State property by wearing a State-issued badge, as required. Contractor employees are required to clearly identify themselves and the company they work for whenever making contact with State personnel by telephone or other means.

### **2.066 COOPERATION WITH THIRD PARTIES**

Contractor agrees to cause its personnel and the personnel of any Subcontractors to cooperate with the State and its agents and other contractors including the State's Quality Assurance personnel. As reasonably requested by the State in writing, the Contractor shall provide to the State's agents and other contractors reasonable access to Contractor's Project personnel, systems and facilities to the extent the access relates to activities specifically associated with this Contract and shall not interfere or jeopardize the safety or operation of the systems or facilities. The State acknowledges that Contractor's time schedule for the Contract is very specific and agrees not to unnecessarily or unreasonably interfere with, delay or otherwise impeded Contractor's performance under this Contract with the requests for access.

### **2.067 CONTRACT MANAGEMENT RESPONSIBILITIES**

Contractor shall be responsible for all acts and omissions of its employees, as well as the acts and omissions of any other personnel furnished by Contractor to perform the Services. Contractor shall have overall



responsibility for managing and successfully performing and completing the Services/Deliverables, subject to the overall direction and supervision of the State and with the participation and support of the State as specified in this Contract. Contractor's duties shall include monitoring and reporting the State's performance of its participation and support responsibilities (as well as Contractor's own responsibilities) and providing timely notice to the State in Contractor's reasonable opinion if the State's failure to perform its responsibilities in accordance with the Project Plan is likely to delay the timely achievement of any Contract tasks.

The Contractor shall provide the Services/Deliverables directly or through its affiliates, subsidiaries, subcontractors or resellers. Regardless of the entity providing the Service/Deliverable, the Contractor shall act as a single point of contact coordinating these entities to meet the State's need for Services/Deliverables. Nothing in this Contract, however, shall be construed to authorize or require any party to violate any applicable law or regulation in its performance of this Contract.

## **2.068 CONTRACTOR RETURN OF STATE EQUIPMENT/RESOURCES**

The Contractor shall return to the State any State-furnished equipment, facilities and other resources when no longer required for the Contract in the same condition as when provided by the State, reasonable wear and tear excepted.

### **2.070 Subcontracting by Contractor**

## **2.071 CONTRACTOR FULL RESPONSIBILITY**

Contractor shall have full responsibility for the successful performance and completion of all of the Services and Deliverables. The State shall consider Contractor to be the sole point of contact with regard to all contractual matters under this Contract, including payment of any and all charges for Services and Deliverables.

## **2.072 STATE CONSENT TO DELEGATION**

Contractor shall not delegate any duties under this Contract to a Subcontractor unless the Department of Technology, Management and Budget, Purchasing Operations has given written consent to such delegation. The State shall have the right of prior written approval of all Subcontractors and to require Contractor to replace any Subcontractors found, in the reasonable judgment of the State, to be unacceptable. The State's request shall be written with reasonable detail outlining the reasons for the removal request. Additionally, the State's request shall be based on legitimate, good faith reasons. Replacement Subcontractor(s) for the removed Subcontractor shall be fully qualified for the position. If the State exercises this right, and the Contractor cannot immediately replace the removed Subcontractor, the State shall agree to an equitable adjustment in schedule or other terms that may be affected by the State's required removal. If any such incident with a removed Subcontractor results in delay not reasonable anticipatable under the circumstances and which is attributable to the State, the applicable SLA for the affected Work shall not be counted for a time agreed upon by the parties.

## **2.073 SUBCONTRACTOR BOUND TO CONTRACT**

In any subcontracts entered into by Contractor for the performance of the Services, Contractor shall require the Subcontractor, to the extent of the Services to be performed by the Subcontractor, to be bound to Contractor by the terms of this Contract and to assume toward Contractor all of the obligations and responsibilities that Contractor, by this Contract, assumes toward the State. The State reserves the right to receive copies of and review all subcontracts, although Contractor may delete or mask any proprietary information, including pricing, contained in such contracts before providing them to the State. The management of any Subcontractor shall be the responsibility of Contractor, and Contractor shall remain responsible for the performance of its Subcontractors to the same extent as if Contractor had not subcontracted such performance. Contractor shall make all payments to Subcontractors or suppliers of Contractor. Except as otherwise agreed in writing by the State and Contractor, the State shall not be obligated to direct payments for the Services other than to Contractor. The State's written approval of any Subcontractor engaged by Contractor to perform any obligation under this Contract shall not relieve Contractor of any obligations or performance required under this Contract. A list of the Subcontractors, if any, approved by the State as of the execution of this Contract, together with a copy of the applicable subcontract is attached.



## **2.074 FLOW DOWN**

Except where specifically approved in writing by the State on a case-by-case basis, Contractor shall flow down the obligations in **Sections 2.031, 2.060, 2.100, 2.110, 2.120, 2.130, and 2.200** in all of its agreements with any Subcontractors.

## **2.075 COMPETITIVE SELECTION**

The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the Contract.

### **2.080 State Responsibilities**

#### **2.081 EQUIPMENT**

The State shall provide only the equipment and resources identified in the Statement of Work and other Contract Exhibits.

#### **2.082 FACILITIES**

The State must designate space as long as it is available and as provided in the Statement of Work, to house the Contractor's personnel whom the parties agree will perform the Services/Deliverables at State facilities (collectively, the "State Facilities"). The Contractor shall have reasonable access to, and unless agreed otherwise by the parties in writing must observe and comply with all rules and regulations relating to each of the State Facilities (including hours of operation) used by the Contractor in the course of providing the Services. Contractor agrees that it shall not, without the prior written consent of the State, use any State Facilities or access any State information systems provided for the Contractor's use, or to which the Contractor otherwise gains access in the course of performing the Services, for any purpose other than providing the Services to the State.

### **2.090 Security**

#### **2.091 BACKGROUND CHECKS**

On a case-by-case basis, the State may investigate the Contractor's personnel before they may have access to State facilities and systems. The scope of the background check is at the discretion of the State and the results shall be used to determine Contractor personnel eligibility for working within State facilities and systems. The investigations shall include Michigan State Police Background checks (ICHAT) and may include the National Crime Information Center (NCIC) Finger Prints. Proposed Contractor personnel may be required to complete and submit an RI-8 Fingerprint Card for the NCIC Finger Print Check. Any request for background checks shall be initiated by the State and shall be reasonably related to the type of work requested.

All Contractor personnel shall also be expected to comply with the State's security and acceptable use policies for State IT equipment and resources. See <http://www.michigan.gov/dit>. Furthermore, Contractor personnel shall be expected to agree to the State's security and acceptable use policies before the Contractor personnel shall be accepted as a resource to perform work for the State. It is expected the Contractor shall present these documents to the prospective employee before the Contractor presents the individual to the State as a proposed resource. Contractor staff shall be expected to comply with all Physical Security procedures in place within the facilities where they are working.

#### **2.092 SECURITY BREACH NOTIFICATION**

If the Contractor breaches this Section, the Contractor must (i) promptly cure any deficiencies and (ii) comply with any applicable federal and state laws and regulations pertaining to unauthorized disclosures. Contractor and the State shall cooperate to mitigate, to the extent practicable, the effects of any breach, intrusion, or unauthorized use or disclosure. Contractor must report to the State in writing any use or disclosure of Confidential Information, whether suspected or actual, other than as provided for by the Contract within 10 days of becoming aware of the use or disclosure or the shorter time period as is reasonable under the circumstances.



## **2.093 PCI DATA SECURITY REQUIREMENTS**

Contractors with access to credit/debit card cardholder data must adhere to the Payment Card Industry (PCI) Data Security requirements. Contractor agrees that they are responsible for security of cardholder data in their possession. Contractor agrees that data can ONLY be used for assisting the State in completing a transaction, supporting a loyalty program, supporting the State, providing fraud control services, or for other uses specifically required by law.

Contractor agrees to provide business continuity in the event of a major disruption, disaster or failure.

The Contractor shall contact the Department of Technology, Management and Budget, Financial Services immediately to advise them of any breaches in security where card data has been compromised. In the event of a security intrusion, the Contractor agrees the Payment Card Industry representative, or a Payment Card Industry approved third party, shall be provided with full cooperation and access to conduct a thorough security review. The review will validate compliance with the Payment Card Industry Data Security Standard for protecting cardholder data.

Contractor agrees to properly dispose sensitive cardholder data when no longer needed. The Contractor shall continue to treat cardholder data as confidential upon contract termination.

The Contractor shall provide the Department of Technology, Management and Budget, Financial Services documentation showing PCI Data Security certification has been achieved. The Contractor shall advise the Department of Technology, Management and Budget, Financial Services of all failures to comply with the PCI Data Security Requirements. Failures include, but are not limited to system scans and self-assessment questionnaires. The Contractor shall provide a time line for corrective action.

### **2.100 Confidentiality**

#### **2.101 CONFIDENTIALITY**

Contractor and the State each acknowledge that the other possesses and shall continue to possess confidential information that has been developed or received by it. As used in this Section, "Confidential Information" of Contractor must mean all non-public proprietary information of Contractor (other than Confidential Information of the State as defined below), which is marked confidential, restricted, proprietary, or with a similar designation. "Confidential Information" of the State must mean any information which is retained in confidence by the State (or otherwise required to be held in confidence by the State under applicable federal, state and local laws and regulations) or which, in the case of tangible materials provided to Contractor by the State under its performance under this Contract, is marked as confidential, proprietary or with a similar designation by the State. "Confidential Information" excludes any information (including this Contract) that is publicly available under the Michigan FOIA.

#### **2.102 PROTECTION AND DESTRUCTION OF CONFIDENTIAL INFORMATION**

The State and Contractor shall each use at least the same degree of care to prevent disclosing to third parties the Confidential Information of the other as it employs to avoid unauthorized disclosure, publication or dissemination of its own confidential information of like character, but in no event less than reasonable care. Neither Contractor nor the State shall (i) make any use of the Confidential Information of the other except as contemplated by this Contract, (ii) acquire any right in or assert any lien against the Confidential Information of the other, or (iii) if requested to do so, refuse for any reason to promptly return the other party's Confidential Information to the other party. Each party shall limit disclosure of the other party's Confidential Information to employees and Subcontractors who must have access to fulfill the purposes of this Contract. Disclosure to, and use by, a Subcontractor is permissible where (A) use of a Subcontractor is authorized under this Contract, (B) the disclosure is necessary or otherwise naturally occurs in connection with work that is within the Subcontractor's scope of responsibility, and (C) Contractor obligates the Subcontractor in a written Contract to maintain the State's Confidential Information in confidence. At the State's request, any employee of Contractor and of any Subcontractor having access or continued access to the State's Confidential Information may be required to execute an acknowledgment that the employee has been advised of Contractor's and the Subcontractor's obligations under this Section and of the employee's obligation to Contractor or Subcontractor, as the case may be, to protect the Confidential Information from unauthorized use or disclosure.



Promptly upon termination or cancellation of the Contract for any reason, Contractor must certify to the State that Contractor has destroyed all State Confidential Information.

### **2.103 EXCLUSIONS**

Notwithstanding the foregoing, the provisions in this Section shall not apply to any particular information which the State or Contractor can demonstrate (i) was, at the time of disclosure to it, in the public domain; (ii) after disclosure to it, is published or otherwise becomes part of the public domain through no fault of the receiving party; (iii) was in the possession of the receiving party at the time of disclosure to it without an obligation of confidentiality; (iv) was received after disclosure to it from a third party who had a lawful right to disclose the information to it without any obligation to restrict its further disclosure; or (v) was independently developed by the receiving party without reference to Confidential Information of the furnishing party. Further, the provisions of this Section shall not apply to any particular Confidential Information to the extent the receiving party is required by law to disclose the Confidential Information, provided that the receiving party (i) promptly provides the furnishing party with notice of the legal request, and (ii) assists the furnishing party in resisting or limiting the scope of the disclosure as reasonably requested by the furnishing party.

### **2.104 NO IMPLIED RIGHTS**

Nothing contained in this Section must be construed as obligating a party to disclose any particular Confidential Information to the other party, or as granting to or conferring on a party, expressly or impliedly, any right or license to the Confidential Information of the other party.

### **2.105 RESPECTIVE OBLIGATIONS**

The parties' respective obligations under this Section must survive the termination or expiration of this Contract for any reason.

#### **2.110 Records and Inspections**

### **2.111 INSPECTION OF WORK PERFORMED**

The State's authorized representatives shall at all reasonable times and with 10 days prior written request, have the right to enter Contractor's premises, or any other places, where the Services are being performed, and shall have access, upon reasonable request, to interim drafts of Deliverables or work-in-progress. Upon 10 Days prior written notice and at all reasonable times, the State's representatives shall be allowed to inspect, monitor, or otherwise evaluate the work being performed and to the extent that the access will not reasonably interfere or jeopardize the safety or operation of the systems or facilities. Contractor shall provide all reasonable facilities and assistance for the State's representatives.

### **2.112 EXAMINATION OF RECORDS**

For seven years after the Contractor provides any work under this Contract (the "Audit Period"), the State may examine and copy any of Contractor's books, records, documents and papers pertinent to establishing Contractor's compliance with the Contract and with applicable laws and rules. The State shall notify the Contractor 20 days before examining the Contractor's books and records. The State does not have the right to review any information deemed confidential by the Contractor to the extent access would require the confidential information to become publicly available. This provision also applies to the books, records, accounts, documents and papers, in print or electronic form, of any parent, affiliated or subsidiary organization of Contractor, or any Subcontractor of Contractor performing services in connection with the Contract.

### **2.113 RETENTION OF RECORDS**

Contractor shall maintain at least until the end of the Audit Period all pertinent financial and accounting records (including time sheets and payroll records, and information pertaining to the Contract and to the Services, equipment, and commodities provided under the Contract) pertaining to the Contract according to generally accepted accounting principles and other procedures specified in this Section. Financial and accounting records shall be made available, upon request, to the State at any time during the Audit Period. If an audit, litigation, or other action involving Contractor's records is initiated before the end of the Audit Period, the records shall be retained until all issues arising out of the audit, litigation, or other action are resolved or until the end of the Audit Period, whichever is later.



## **2.114 AUDIT RESOLUTION**

If necessary, the Contractor and the State shall meet to review each audit report promptly after issuance. The Contractor shall respond to each audit report in writing within 30 days from receipt of the report, unless a shorter response time is specified in the report. The Contractor and the State shall develop, agree upon and monitor an action plan to promptly address and resolve any deficiencies, concerns, and/or recommendations in the audit report.

## **2.115 ERRORS**

If the audit demonstrates any errors in the documents provided to the State, then the amount in error shall be reflected as a credit or debit on the next invoice and in subsequent invoices until the amount is paid or refunded in full. However, a credit or debit may not be carried for more than four invoices. If a balance remains after four invoices, then the remaining amount shall be due as a payment or refund within 45 days of the last quarterly invoice that the balance appeared on or termination of the contract, whichever is earlier.

In addition to other available remedies, the difference between the payment received and the correct payment amount is greater than 10%, then the Contractor shall pay all of the reasonable costs of the audit.

### **2.120 Warranties**

#### **2.121 WARRANTIES AND REPRESENTATIONS -RESERVED**

#### **2.122 WARRANTY OF MERCHANTABILITY-RESERVED**

#### **2.123 WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE-RESERVED**

#### **2.124 WARRANTY OF TITLE-RESERVED**

#### **2.125 EQUIPMENT WARRANTY-RESERVED**

#### **2.126 EQUIPMENT TO BE NEW-RESERVED**

#### **2.127 PROHIBITED PRODUCTS-RESERVED**

#### **CONSEQUENCES FOR BREACH-RESERVED**

### **2.130 Insurance**

#### **2.131 LIABILITY INSURANCE**

The Contractor must provide proof of the minimum levels of insurance coverage as indicated below. The insurance must protect the State from claims that may arise out of or result from the Contractor's performance of services under the terms of this Contract, whether the services are performed by the Contractor, or by any subcontractor, or by anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable.

The Contractor waives all rights against the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents for recovery of damages to the extent these damages are covered by the insurance policies the Contractor is required to maintain under this Contract.

All insurance coverage provided relative to this Contract/Purchase Order is PRIMARY and NON-CONTRIBUTING to any comparable liability insurance (including self-insurances) carried by the State.

The insurance must be written for not less than any minimum coverage specified in this Contract or required by law, whichever is greater.



The insurers selected by Contractor must have an A.M. Best rating of A or better, or as otherwise approved in writing by the State, or if the ratings are no longer available, with a comparable rating from a recognized insurance rating agency. All policies of insurance required in this Contract must be issued by companies that have been approved to do business in the State.

See [www.michigan.gov/dleg](http://www.michigan.gov/dleg).

Where specific limits are shown, they are the minimum acceptable limits. If Contractor's policy contains higher limits, the State must be entitled to coverage to the extent of the higher limits.

The Contractor is required to pay for and provide the type and amount of insurance checked  below:

- 1. Commercial General Liability with the following minimum coverage:
  - \$2,000,000 General Aggregate Limit other than Products/Completed Operations
  - \$2,000,000 Products/Completed Operations Aggregate Limit
  - \$1,000,000 Personal & Advertising Injury Limit
  - \$1,000,000 Each Occurrence Limit

The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents as ADDITIONAL INSUREDS on the Commercial General Liability certificate. The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company.

- 2. If a motor vehicle is used to provide services or products under this Contract, the Contractor must have vehicle liability insurance on any auto including owned, hired and non-owned vehicles used in Contractor's business for bodily injury and property damage as required by law.

The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents as ADDITIONAL INSUREDS on the vehicle liability certificate. The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company.

- 3. Workers' compensation coverage must be provided according to applicable laws governing the employees and employers work activities in the state of the Contractor's domicile. If a self-insurer provides the applicable coverage, proof must be provided of approved self-insured authority by the jurisdiction of domicile. For employees working outside of the state of qualification, Contractor must provide appropriate certificates of insurance proving mandated coverage levels for the jurisdictions where the employees' activities occur.

The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company. This provision must not be applicable where prohibited or limited by the laws of the jurisdiction in which the work is to be performed.

- 4. Employers liability insurance with the following minimum limits:
  - \$100,000 each accident
  - \$100,000 each employee by disease
  - \$500,000 aggregate disease

**2.132 SUBCONTRACTOR INSURANCE COVERAGE**

Except where the State has approved in writing a Contractor subcontract with other insurance provisions, Contractor must require all of its Subcontractors under this Contract to purchase and maintain the insurance coverage as described in this Section for the Contractor in connection with the performance of work by those Subcontractors. Alternatively, Contractor may include any Subcontractors under Contractor's insurance on the coverage required in this Section. Subcontractor(s) must fully comply with the insurance coverage required in this Section. Failure of Subcontractor(s) to comply with insurance requirements does not limit Contractor's liability or responsibility.



## **2.133 CERTIFICATES OF INSURANCE AND OTHER REQUIREMENTS**

Contractor must furnish to DTMB Purchasing Operations, certificate(s) of insurance verifying insurance coverage or providing satisfactory evidence of self-insurance as required in this Section (the "Certificates"). The Certificate must be on the standard "accord" form or equivalent. **The Contract Number or the Purchase Order Number must be shown on the Certificate Of Insurance To Assure Correct Filing.** All Certificate(s) are to be prepared and submitted by the Insurance Provider or Producer. Before the Contract is signed and as soon as reasonably practicable following the renewal of such insurance every year thereafter, the Contractor must provide evidence that the State and its agents, officers and employees are listed as additional insured under each commercial general liability and commercial automobile liability policy. In the event the State approves the representation of the State by the insurer's attorney, the attorney may be required to be designated as a Special Assistant Attorney General by the Attorney General of the State of Michigan.

The Contractor must maintain all required insurance coverage throughout the term of the Contract and any extensions and, in the case of claims-made Commercial General Liability policies, must secure tail coverage for at least three years following the expiration or termination for any reason of this Contract. The minimum limits of coverage specified above are not intended, and must not be construed; to limit any liability or indemnity of Contractor under this Contract to any indemnified party or other persons. Contractor is responsible for all deductibles with regard to the insurance. If the Contractor fails to pay any premium for required insurance as specified in this Contract, or if any insurer cancels or significantly reduces any required insurance as specified in this Contract without the State's written consent, then the State may, after the State has given the Contractor at least 30 days written notice, pay the premium or procure similar insurance coverage from another company or companies. The State may deduct any part of the cost from any payment due the Contractor, or the Contractor must pay that cost upon demand by the State.

### **2.140 Indemnification**

#### **2.141 GENERAL INDEMNIFICATION**

To the extent permitted by law, the Contractor must indemnify, defend and hold harmless the State from liability, including all claims and losses, and all related costs and expenses (including reasonable attorneys' fees and costs of investigation, litigation, settlement, judgments, interest and penalties), accruing or resulting to any person, firm or corporation that may be injured or damaged by the Contractor in the performance of this Contract and that are attributable to the negligence or tortious acts of the Contractor or any of its subcontractors, or by anyone else for whose acts any of them may be liable.

#### **2.142 CODE INDEMNIFICATION**

To the extent permitted by law, the Contractor shall indemnify, defend and hold harmless the State from any claim, loss, or expense arising from Contractor's breach of the No Surreptitious Code Warranty.

#### **2.143 EMPLOYEE INDEMNIFICATION**

In any claims against the State of Michigan, its departments, divisions, agencies, sections, commissions, officers, employees and agents, by any employee of the Contractor or any of its subcontractors, the indemnification obligation under the Contract must not be limited in any way by the amount or type of damages, compensation or benefits payable by or for the Contractor or any of its subcontractors under worker's disability compensation acts, disability benefit acts or other employee benefit acts. This indemnification clause is intended to be comprehensive. Any overlap in provisions, or the fact that greater specificity is provided as to some categories of risk, is not intended to limit the scope of indemnification under any other provisions.

#### **2.144 PATENT/COPYRIGHT INFRINGEMENT INDEMNIFICATION**

To the extent permitted by law, the Contractor must indemnify, defend and hold harmless the State from and against all losses, liabilities, damages (including taxes), and all related costs and expenses (including reasonable attorneys' fees and costs of investigation, litigation, settlement, judgments, interest and penalties) incurred in connection with any action or proceeding threatened or brought against the State to the extent that the action or proceeding is based on a claim that any piece of equipment, software, commodity or service supplied by the Contractor or its subcontractors, or the operation of the equipment, software, commodity or



service, or the use or reproduction of any documentation provided with the equipment, software, commodity or service infringes any United States patent, copyright, trademark or trade secret of any person or entity, which is enforceable under the laws of the United States.

In addition, should the equipment, software, commodity, or service, or its operation, become or in the State's or Contractor's opinion be likely to become the subject of a claim of infringement, the Contractor must at the Contractor's sole expense (i) procure for the State the right to continue using the equipment, software, commodity or service or, if the option is not reasonably available to the Contractor, (ii) replace or modify to the State's satisfaction the same with equipment, software, commodity or service of equivalent function and performance so that it becomes non-infringing, or, if the option is not reasonably available to Contractor, (iii) accept its return by the State with appropriate credits to the State against the Contractor's charges and reimburse the State for any losses or costs incurred as a consequence of the State ceasing its use and returning it.

Notwithstanding the foregoing, the Contractor has no obligation to indemnify or defend the State for, or to pay any costs, damages or attorneys' fees related to, any claim based upon (i) equipment developed based on written specifications of the State; (ii) use of the equipment in a configuration other than implemented or approved in writing by the Contractor, including, but not limited to, any modification of the equipment by the State; or (iii) the combination, operation, or use of the equipment with equipment or software not supplied by the Contractor under this Contract.

#### **2.145 CONTINUATION OF INDEMNIFICATION OBLIGATIONS**

The Contractor's duty to indemnify under this Section continues in full force and effect, notwithstanding the expiration or early cancellation of the Contract, with respect to any claims based on facts or conditions that occurred before expiration or cancellation.

#### **2.146 INDEMNIFICATION PROCEDURES**

The procedures set forth below must apply to all indemnity obligations under this Contract.

- (a) After the State receives notice of the action or proceeding involving a claim for which it shall seek indemnification, the State must promptly notify Contractor of the claim in writing and take or assist Contractor in taking, as the case may be, any reasonable action to avoid the imposition of a default judgment against Contractor. No failure to notify the Contractor relieves the Contractor of its indemnification obligations except to the extent that the Contractor can prove damages attributable to the failure. Within 10 days following receipt of written notice from the State relating to any claim, the Contractor must notify the State in writing whether Contractor agrees to assume control of the defense and settlement of that claim (a "Notice of Election"). After notifying Contractor of a claim and before the State receiving Contractor's Notice of Election, the State is entitled to defend against the claim, at the Contractor's expense, and the Contractor will be responsible for any reasonable costs incurred by the State in defending against the claim during that period.
- (b) If Contractor delivers a Notice of Election relating to any claim: (i) the State is entitled to participate in the defense of the claim and to employ counsel at its own expense to assist in the handling of the claim and to monitor and advise the State about the status and progress of the defense; (ii) the Contractor must, at the request of the State, demonstrate to the reasonable satisfaction of the State, the Contractor's financial ability to carry out its defense and indemnity obligations under this Contract; (iii) the Contractor must periodically advise the State about the status and progress of the defense and must obtain the prior written approval of the State before entering into any settlement of the claim or ceasing to defend against the claim and (iv) to the extent that any principles of Michigan governmental or public law may be involved or challenged, the State has the right, at its own expense, to control the defense of that portion of the claim involving the principles of Michigan governmental or public law. But the State may retain control of the defense and settlement of a claim by notifying the Contractor in writing within 10 days after the State's receipt of Contractor's information requested by the State under clause (ii) of this paragraph if the State determines that the Contractor has failed to demonstrate to the reasonable satisfaction of the State the Contractor's financial ability to carry out its defense and indemnity obligations under this Section. Any litigation activity on behalf of the State, or any of its subdivisions under this Section, must be coordinated with the Department of Attorney General. In the event the insurer's attorney represents the State under



this Section, the insurer's attorney may be required to be designated as a Special Assistant Attorney General by the Attorney General of the State of Michigan.

- (c) If Contractor does not deliver a Notice of Election relating to any claim of which it is notified by the State as provided above, the State may defend the claim in the manner as it may deem appropriate, at the cost and expense of Contractor. If it is determined that the claim was one against which Contractor was required to indemnify the State, upon request of the State, Contractor must promptly reimburse the State for all the reasonable costs and expenses.

### **2.150 Termination/Cancellation**

#### **2.151 NOTICE AND RIGHT TO CURE**

If the Contractor breaches the contract, and the State in its sole discretion determines that the breach is curable, then the State shall provide the Contractor with written notice of the breach and a time period (not less than 30 days) to cure the Breach. The notice of breach and opportunity to cure is inapplicable for successive or repeated breaches or if the State determines in its sole discretion that the breach poses a serious and imminent threat to the health or safety of any person or the imminent loss, damage, or destruction of any real or tangible personal property.

#### **2.152 TERMINATION FOR CAUSE**

- (a) The State may terminate this contract, for cause, by notifying the Contractor in writing, if the Contractor (i) breaches any of its material duties or obligations under this Contract (including a Chronic Failure to meet any particular SLA), or (ii) fails to cure a breach within the time period specified in the written notice of breach provided by the State
- (b) Reserved
- (c) If the State chooses to partially terminate this Contract for cause, charges payable under this Contract shall be equitably adjusted to reflect those Services/Deliverables that are terminated and the State must pay for all Services/Deliverables for which Final Acceptance has been granted provided up to the termination date. Services and related provisions of this Contract that are terminated for cause must cease on the effective date of the termination.
- (d) If the State terminates this Contract for cause under this Section, and it is determined, for any reason, that Contractor was not in breach of contract under the provisions of this section, that termination for cause must be deemed to have been a termination for convenience, effective as of the same date, and the rights and obligations of the parties must be limited to that otherwise provided in this Contract for a termination for convenience.

#### **2.153 TERMINATION FOR CONVENIENCE**

The State may terminate this Contract for its convenience, in whole or part, if the State determines that a termination is in the State's best interest. Reasons for the termination must be left to the sole discretion of the State and may include, but not necessarily be limited to (a) the State no longer needs the Services or products specified in the Contract, (b) relocation of office, program changes, changes in laws, rules, or regulations make implementation of the Services no longer practical or feasible, (c) unacceptable prices for Additional Services or New Work requested by the State, or (d) falsification or misrepresentation, by inclusion or non-inclusion, of information material to a response to any RFP issued by the State. The State may terminate this Contract for its convenience, in whole or in part, by giving Contractor written notice at least 30 days before the date of termination. If the State chooses to terminate this Contract in part, the charges payable under this Contract must be equitably adjusted to reflect those Services/Deliverables that are terminated. Services and related provisions of this Contract that are terminated for convenience must cease on the effective date of the termination.

#### **2.154 TERMINATION FOR NON-APPROPRIATION**

- (a) Contractor acknowledges that, if this Contract extends for several fiscal years, continuation of this Contract is subject to appropriation or availability of funds for this Contract. If funds to enable the State to effect continued payment under this Contract are not appropriated or otherwise made available, the State must terminate this Contract and all affected Statements of Work, in whole or in part, at the end of the last period for which funds have been appropriated or otherwise made available by giving written notice of



termination to Contractor. The State must give Contractor at least 30 days advance written notice of termination for non-appropriation or unavailability (or the time as is available if the State receives notice of the final decision less than 30 days before the funding cutoff).

- (b) If funding for the Contract is reduced by law, or funds to pay Contractor for the agreed-to level of the Services or production of Deliverables to be provided by Contractor are not appropriated or otherwise unavailable, the State may, upon 30 days written notice to Contractor, reduce the level of the Services or change the production of Deliverables in the manner and for the periods of time as the State may elect. The charges payable under this Contract shall be equitably adjusted to reflect any equipment, services or commodities not provided by reason of the reduction.
- (c) If the State terminates this Contract, eliminates certain Deliverables, or reduces the level of Services to be provided by Contractor under this Section, the State must pay Contractor for all Work-in-Process performed through the effective date of the termination or reduction in level, as the case may be and as determined by the State, to the extent funds are available. This Section shall not preclude Contractor from reducing or stopping Services/Deliverables or raising against the State in a court of competent jurisdiction, any claim for a shortfall in payment for Services performed or Deliverables finally accepted before the effective date of termination.

### **2.155 TERMINATION FOR CRIMINAL CONVICTION**

The State may terminate this Contract immediately and without further liability or penalty in the event Contractor, an officer of Contractor, or an owner of a 25% or greater share of Contractor is convicted of a criminal offense related to a State, public or private Contract or subcontract.

### **2.156 TERMINATION FOR APPROVALS RESCINDED**

The State may terminate this Contract if any final administrative or judicial decision or adjudication disapproves a previously approved request for purchase of personal services under Constitution 1963, Article 11, § 5, and Civil Service Rule 7-1. In that case, the State shall pay the Contractor for only the work completed to that point under the Contract. Termination may be in whole or in part and may be immediate as of the date of the written notice to Contractor or may be effective as of the date stated in the written notice.

### **2.157 RIGHTS AND OBLIGATIONS UPON TERMINATION**

- (a) If the State terminates this Contract for any reason, the Contractor must (a) stop all work as specified in the notice of termination, (b) take any action that may be necessary, or that the State may direct, for preservation and protection of Deliverables or other property derived or resulting from this Contract that may be in Contractor's possession, (c) return all materials and property provided directly or indirectly to Contractor by any entity, agent or employee of the State, (d) transfer title in, and deliver to, the State, unless otherwise directed, all Deliverables intended to be transferred to the State at the termination of the Contract and which are resulting from the Contract (which must be provided to the State on an "As-Is" basis except to the extent the amounts paid by the State in respect of the items included compensation to Contractor for the provision of warranty services in respect of the materials), and (e) take any action to mitigate and limit any potential damages, or requests for Contractor adjustment or termination settlement costs, to the maximum practical extent, including terminating or limiting as otherwise applicable those subcontracts and outstanding orders for material and supplies resulting from the terminated Contract.
- (b) If the State terminates this Contract before its expiration for its own convenience, the State must pay Contractor for all charges due for Services provided before the date of termination and, if applicable, as a separate item of payment under this Contract, for Work In Process, on a percentage of completion basis at the level of completion determined by the State. All completed or partially completed Deliverables prepared by Contractor under this Contract, at the option of the State, becomes the State's property, and Contractor is entitled to receive equitable fair compensation for the Deliverables. Regardless of the basis for the termination, the State is not obligated to pay, or otherwise compensate, Contractor for any lost expected future profits, costs or expenses incurred with respect to Services not actually performed for the State.
- (c) Upon a good faith termination, the State may assume, at its option, any subcontracts and agreements for services and deliverables provided under this Contract, and may further pursue completion of the Services/Deliverables under this Contract by replacement contract or otherwise as the State may in its sole judgment deem expedient.



## **2.158 RESERVATION OF RIGHTS**

Any termination of this Contract or any Statement of Work issued under it by a party must be with full reservation of, and without prejudice to, any rights or remedies otherwise available to the party with respect to any claims arising before or as a result of the termination.

### **2.160 Termination by Contractor**

#### **2.161 TERMINATION BY CONTRACTOR**

If the State breaches the Contract, and the Contractor in its sole discretion determines that the breach is curable, then the Contractor will provide the State with written notice of the breach and a time period (not less than 30 days) to cure the breach. The Notice of Breach and opportunity to cure is inapplicable for successive and repeated breaches.

The Contractor may terminate this Contract if the State (i) materially breaches its obligation to pay the Contractor undisputed amounts due and owing under this Contract, (ii) breaches its other obligations under this Contract to an extent that makes it impossible or commercially impractical for the Contractor to perform the Services, or (iii) does not cure the breach within the time period specified in a written notice of breach. But the Contractor must discharge its obligations under **Section 2.160** before it terminates the Contract.

### **2.170 Transition Responsibilities**

#### **2.171 CONTRACTOR TRANSITION RESPONSIBILITIES-RESERVED**

#### **2.172 CONTRACTOR PERSONNEL TRANSITION-RESERVED**

#### **2.173 CONTRACTOR INFORMATION TRANSITION-RESERVED**

#### **2.174 CONTRACTOR SOFTWARE TRANSITION-RESERVED**

#### **2.175 TRANSITION PAYMENTS-RESERVED**

#### **2.176 STATE TRANSITION RESPONSIBILITIES-RESERVED**

### **2.180 Stop Work**

#### **2.181 STOP WORK ORDERS**

The State may, at any time, by written Stop Work Order to Contractor, require that Contractor stop all, or any part, of the work called for by the Contract for a period of up to 90 calendar days after the Stop Work Order is delivered to Contractor, and for any further period to which the parties may agree. The Stop Work Order must be identified as a Stop Work Order and must indicate that it is issued under this **Section**. Upon receipt of the stop work order, Contractor must immediately comply with its terms and take all reasonable steps to minimize incurring costs allocable to the work covered by the Stop Work Order during the period of work stoppage. Within the period of the stop work order, the State must either: (a) cancel the stop work order; or (b) terminate the work covered by the Stop Work Order as provided in **Section 2.182**.

#### **2.182 CANCELLATION OR EXPIRATION OF STOP WORK ORDER**

The Contractor shall resume work if the State cancels a Stop Work Order or if it expires. The parties shall agree upon an equitable adjustment in the delivery schedule, the Contract price, or both, and the Contract shall be modified, in writing, accordingly, if: (a) the Stop Work Order results in an increase in the time required for, or in Contractor's costs properly allocable to, the performance of any part of the Contract; and (b) Contractor asserts its right to an equitable adjustment within 30 calendar days after the end of the period of work stoppage; provided that, if the State decides the facts justify the action, the State may receive and act upon a Contractor proposal submitted at any time before final payment under the Contract. Any adjustment will conform to the requirements of **Section 2.024**.



## **2.183 ALLOWANCE OF CONTRACTOR COSTS**

If the Stop Work Order is not canceled and the work covered by the Stop Work Order is terminated for reasons other than material breach, the termination shall be deemed to be a termination for convenience under **Section 2.153**, and the State shall pay reasonable costs resulting from the Stop Work Order in arriving at the termination settlement. For the avoidance of doubt, the State shall not be liable to Contractor for loss of profits because of a Stop Work Order issued under this Section.

### **2.190 Dispute Resolution**

#### **2.191 IN GENERAL**

Any claim, counterclaim, or dispute between the State and Contractor arising out of or relating to the Contract or any Statement of Work must be resolved as follows. For all Contractor claims seeking an increase in the amounts payable to Contractor under the Contract, or the time for Contractor's performance, Contractor must submit a letter, together with all data supporting the claims, executed by Contractor's Contract Administrator or the Contract Administrator's designee certifying that (a) the claim is made in good faith, (b) the amount claimed accurately reflects the adjustments in the amounts payable to Contractor or the time for Contractor's performance for which Contractor believes the State is liable and covers all costs of every type to which Contractor is entitled from the occurrence of the claimed event, and (c) the claim and the supporting data are current and complete to Contractor's best knowledge and belief.

#### **2.192 INFORMAL DISPUTE RESOLUTION**

(a) All disputes between the parties shall be resolved under the Contract Management procedures in this Contract. If the parties are unable to resolve any dispute after compliance with the processes, the parties must meet with the Director of Purchasing Operations, DMB, or designee, to resolve the dispute without the need for formal legal proceedings, as follows:

- (1) The representatives of Contractor and the State must meet as often as the parties reasonably deem necessary to gather and furnish to each other all information with respect to the matter at issue which the parties believe to be appropriate and germane in connection with its resolution. The representatives shall discuss the problem and negotiate in good faith in an effort to resolve the dispute without the necessity of any formal proceeding.
- (2) During the course of negotiations, all reasonable requests made by one party to another for non-privileged information reasonably related to the Contract shall be honored in order that each of the parties may be fully advised of the other's position.
- (3) The specific format for the discussions shall be left to the discretion of the designated State and Contractor representatives, but may include the preparation of agreed upon statements of fact or written statements of position.
- (4) Following the completion of this process within 60 calendar days, the Director of Purchasing Operations, DMB, or designee, shall issue a written opinion regarding the issue(s) in dispute within 30 calendar days. The opinion regarding the dispute must be considered the State's final action and the exhaustion of administrative remedies.

(b) This Section shall not be construed to prevent either party from instituting, and a party is authorized to institute, formal proceedings earlier to avoid the expiration of any applicable limitations period, to preserve a superior position with respect to other creditors, or under Section 2.193.

(c) The State shall not mediate disputes between the Contractor and any other entity, except state agencies, concerning responsibility for performance of work under the Contract.

#### **2.193 INJUNCTIVE RELIEF**

The only circumstance in which disputes between the State and Contractor shall not be subject to the provisions of **Section 2.192** is where a party makes a good faith determination that a breach of the terms of the Contract by the other party is that the damages to the party resulting from the breach shall be so immediate, so large or severe and so incapable of adequate redress after the fact that a temporary restraining order or other immediate injunctive relief is the only adequate remedy.



## **2.194 CONTINUED PERFORMANCE**

Each party agrees to continue performing its obligations under the Contract while a dispute is being resolved except to the extent the issue in dispute precludes performance (dispute over payment must not be deemed to preclude performance) and without limiting either party's right to terminate the Contract as provided in **Section 2.150**, as the case may be.

### **2.200 Federal and State Contract Requirements**

#### **2.201 NONDISCRIMINATION**

In the performance of the Contract, Contractor agrees not to discriminate against any employee or applicant for employment, with respect to his or her hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex, height, weight, and marital status, physical or mental disability. Contractor further agrees that every subcontract entered into for the performance of this Contract or any purchase order resulting from this Contract will contain a provision requiring non-discrimination in employment, as specified here, binding upon each Subcontractor. This covenant is required under the Elliot Larsen Civil Rights Act, 1976 PA 453, MCL 37.2101, et seq., and the Persons with Disabilities Civil Rights Act, 1976 PA 220, MCL 37.1101, et seq., and any breach of this provision may be regarded as a material breach of the Contract.

#### **2.202 UNFAIR LABOR PRACTICES**

Under 1980 PA 278, MCL 423.321, et seq., the State shall not award a Contract or subcontract to an employer whose name appears in the current register of employers failing to correct an unfair labor practice compiled under section 2 of the Act. This information is compiled by the United States National Labor Relations Board. A Contractor of the State, in relation to the Contract, shall not enter into a contract with a Subcontractor, manufacturer, or supplier whose name appears in this register. Under section 4 of 1980 PA 278, MCL 423.324, the State may void any Contract if, after award of the Contract, the name of Contractor as an employer or the name of the Subcontractor, manufacturer or supplier of Contractor appears in the register.

#### **2.203 WORKPLACE SAFETY AND DISCRIMINATORY HARASSMENT**

In performing Services for the State, the Contractor shall comply with the Department of Civil Services Rule 2-20 regarding Workplace Safety and Rule 1-8.3 regarding Discriminatory Harassment. In addition, the Contractor shall comply with Civil Service regulations and any applicable agency rules provided to the Contractor. For Civil Service Rules, see <http://www.mi.gov/mdcs/0,1607,7-147-6877---,00.html>.

#### **2.204 PREVAILING WAGE**

Wages rates and fringe benefits to be paid each class of individuals employed by the Contractor, its subcontractors, their subcontractors, and all persons involved with the performance of this Contract in privity of contract with the Contractor shall not be less than the wage rates and fringe benefits established by the Michigan Department of Labor and Economic Development, Wage and Hour Bureau, schedule of occupational classification and wage rates and fringe benefits for the local where the work is to be performed. The term Contractor shall include all general contractors, prime contractors, project managers, trade contractors, and all of their contractors or subcontractors and persons in privity of contract with them.

The Contractor, its subcontractors, their subcontractors and all persons involved with the performance of this contract in privity of contract with the Contractor shall keep posted on the work site, in a conspicuous place, a copy of all wage rates and fringe benefits as prescribed in the Contract. Contractor shall also post, in a conspicuous place, the address and telephone number of the Michigan Department of Labor and Economic Development, the agency responsible for enforcement of the wage rates and fringe benefits. Contractor shall keep an accurate record showing the name and occupation of the actual wage and benefits paid to each individual employed in connection with this contract. This record shall be available to the State upon request for reasonable inspection.

If any trade is omitted from the list of wage rates and fringe benefits to be paid to each class of individuals by the Contractor, it is understood that the trades omitted shall also be paid not less than the wage rate and fringe benefits prevailing in the local where the work is to be performed.



## **2.210 Governing Law**

### **2.211 GOVERNING LAW**

The Contract shall in all respects be governed by, and construed according to, the substantive laws of the State of Michigan without regard to any Michigan choice of law rules that would apply the substantive law of any other jurisdiction to the extent not inconsistent with, or pre-empted by federal law.

### **2.212 COMPLIANCE WITH LAWS**

Contractor shall comply with all applicable state, federal and local laws and ordinances in providing the Services/Deliverables.

### **2.213 JURISDICTION**

Any dispute arising from the Contract shall be resolved in the State of Michigan. With respect to any claim between the parties, Contractor consents to venue in Ingham County, Michigan, and irrevocably waives any objections it may have to the jurisdiction on the grounds of lack of personal jurisdiction of the court or the laying of venue of the court or on the basis of forum non conveniens or otherwise. Contractor agrees to appoint agents in the State of Michigan to receive service of process.

## **2.220 Limitation of Liability**

### **2.221 LIMITATION OF LIABILITY**

Neither the Contractor nor the State shall be liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages. This limitation of liability does not apply to claims for infringement of United States patent, copyright, trademark or trade secrets; to claims for personal injury or damage to property caused by the gross negligence or willful misconduct of the Contractor; to claims covered by other specific provisions of this Contract calling for liquidated damages; or to court costs or attorney's fees awarded by a court in addition to damages after litigation based on this Contract.

The Contractor's liability for damages to the State is limited to two times the value of the Contract or \$500,000 which ever is higher. The foregoing limitation of liability does not apply to claims for infringement of United States patent, copyright, trademarks or trade secrets; to claims for personal injury or damage to property caused by the gross negligence or willful misconduct of the Contractor; to claims covered by other specific provisions of this Contract calling for liquidated damages; or to court costs or attorney's fees awarded by a court in addition to damages after litigation based on this Contract.

The State's liability for damages to the Contractor is limited to the value of the Contract.

## **2.230 Disclosure Responsibilities**

### **2.231 DISCLOSURE OF LITIGATION**

Contractor shall disclose any material criminal litigation, investigations or proceedings involving the Contractor (and each Subcontractor) or any of its officers or directors or any litigation, investigations or proceedings under the Sarbanes-Oxley Act. In addition, each Contractor (and each Subcontractor) shall notify the State of any material civil litigation, arbitration or proceeding which arises during the term of the Contract and extensions, to which Contractor (or, to the extent Contractor is aware, any Subcontractor) is a party, and which involves: (i) disputes that might reasonably be expected to adversely affect the viability or financial stability of Contractor or any Subcontractor; or (ii) a claim or written allegation of fraud against Contractor or, to the extent Contractor is aware, any Subcontractor by a governmental or public entity arising out of their business dealings with governmental or public entities. The Contractor shall disclose in writing to the Contract Administrator any litigation, investigation, arbitration or other proceeding (collectively, "Proceeding") within 30 days of its occurrence. Details of settlements that are prevented from disclosure by the terms of the settlement may be annotated. Information provided to the State from Contractor's publicly filed documents referencing its material litigation shall be deemed to satisfy the requirements of this Section.



If any Proceeding disclosed to the State under this Section, or of which the State otherwise becomes aware, during the term of this Contract would cause a reasonable party to be concerned about:

- (a) the ability of Contractor (or a Subcontractor) to continue to perform this Contract according to its terms and conditions, or
- (b) whether Contractor (or a Subcontractor) in performing Services for the State is engaged in conduct which is similar in nature to conduct alleged in the Proceeding, which conduct would constitute a breach of this Contract or a violation of Michigan law, regulations or public policy, then the Contractor must provide the State all reasonable assurances requested by the State to demonstrate that:
  - (1) Contractor and its Subcontractors will be able to continue to perform this Contract and any Statements of Work according to its terms and conditions, and
  - (2) Contractor and its Subcontractors have not and will not engage in conduct in performing the Services which is similar in nature to the conduct alleged in the Proceeding.
- (c) Contractor shall make the following notifications in writing:
  - (1) Within 30 days of Contractor becoming aware that a change in its ownership or officers has occurred, or is certain to occur, or a change that could result in changes in the valuation of its capitalized assets in the accounting records, Contractor must notify MDTMB Purchasing Operations.
  - (2) Contractor shall also notify MDTMB Purchasing Operations within 30 days whenever changes to asset valuations or any other cost changes have occurred or are certain to occur as a result of a change in ownership or officers.
  - (3) Contractor shall also notify MDTMB Purchase Operations within 30 days whenever changes to company affiliations occur.

### **2.232 CALL CENTER DISCLOSURE**

Contractor and/or all subcontractors involved in the performance of this Contract providing call or contact center services to the State shall disclose the location of its call or contact center services to inbound callers. Failure to disclose this information is a material breach of this Contract.

### **2.233 BANKRUPTCY**

The State may, without prejudice to any other right or remedy, terminate this Contract, in whole or in part, and, at its option, may take possession of the "Work in Process" and finish the Works in Process by whatever appropriate method the State may deem expedient if:

- (a) the Contractor files for protection under the bankruptcy laws;
- (b) an involuntary petition is filed against the Contractor and not removed within 30 days;
- (c) the Contractor becomes insolvent or if a receiver is appointed due to the Contractor's insolvency;
- (d) the Contractor makes a general assignment for the benefit of creditors; or
- (e) the Contractor or its affiliates are unable to provide reasonable assurances that the Contractor or its affiliates can deliver the services under this Contract.

Contractor will fix appropriate notices or labels on the Work in Process to indicate ownership by the State. To the extent reasonably possible, materials and Work in Process shall be stored separately from other stock and marked conspicuously with labels indicating ownership by the State.

### **2.240 Performance**

#### **2.241 TIME OF PERFORMANCE**

- (a) Contractor shall use commercially reasonable efforts to provide the resources necessary to complete all Services and Deliverables according to the time schedules contained in the Statements of Work and other Exhibits governing the work, and with professional quality.
- (b) Without limiting the generality of **Section 2.241**, Contractor shall notify the State in a timely manner upon becoming aware of any circumstances that may reasonably be expected to jeopardize the timely and successful completion of any Deliverables/Services on the scheduled due dates in the latest State-approved delivery schedule and must inform the State of the projected actual delivery date.
- (c) If the Contractor believes that a delay in performance by the State has caused or will cause the Contractor to be unable to perform its obligations according to specified Contract time periods, the Contractor must notify the State in a timely manner and must use commercially reasonable efforts to perform its



obligations according to the Contract time periods notwithstanding the State's failure. Contractor will not be in default for a delay in performance to the extent the delay is caused by the State.

**2.242 SERVICE LEVEL AGREEMENT (SLA)-RESERVED**

**2.243 LIQUIDATED DAMAGES -RESERVED**

**2.244 EXCUSABLE FAILURE-RESERVED**

**2.250 Approval of Deliverables**

**2.251 DELIVERY OF DELIVERABLES**

Reserved

**2.252 CONTRACTOR SYSTEM TESTING**

Reserved

**2.253 APPROVAL OF DELIVERABLES, IN GENERAL**

Reserved

**2.254 PROCESS FOR APPROVAL OF WRITTEN DELIVERABLES**

Reserved

**2.255 PROCESS FOR APPROVAL OF CUSTOM SOFTWARE DELIVERABLES**

Reserved

**2.256 FINAL ACCEPTANCE**

Reserved

**2.260 Ownership**

**2.261 OWNERSHIP OF WORK PRODUCT BY STATE**

Reserved

**2.262 VESTING OF RIGHTS**

Reserved

**2.263 RIGHTS IN DATA**

Reserved

**2.264 OWNERSHIP OF MATERIALS**

The State and the Contractor will continue to own their respective proprietary technologies developed before entering into the Contract. Any hardware bought through the Contractor by the State, and paid for by the State, will be owned by the State. Any software licensed through the Contractor and sold to the State, will be licensed directly to the State.

**2.270 State Standards**

**2.271 EXISTING TECHNOLOGY STANDARDS**

The Contractor will adhere to all existing standards as described within the comprehensive listing of the State's existing technology standards at <http://www.michigan.gov/dit>.

**2.272 ACCEPTABLE USE POLICY**

To the extent that Contractor has access to the State computer system, Contractor must comply with the State's Acceptable Use Policy, see <http://www.michigan.gov/ditservice>. All Contractor employees must be



required, in writing, to agree to the State's Acceptable Use Policy before accessing the State system. The State reserves the right to terminate Contractor's access to the State system if a violation occurs.

### **2.273 SYSTEMS CHANGES**

Contractor is not responsible for and not authorized to make changes to any State systems without written authorization from the Project Manager. Any changes Contractor makes to State systems with the State's approval must be done according to applicable State procedures, including security, access and configuration management procedures.

#### **2.280 Extended Purchasing**

### **2.281 MIDEAL (MICHIGAN DELIVERY EXTENDED AGREEMENTS LOCALLY -RESERVED**

### **2.282 STATE EMPLOYEE PURCHASES**

Reserved

#### **2.290 Environmental Provision**

### **2.291 ENVIRONMENTAL PROVISION**

Reserved

#### **2.300 Deliverables**

### **2.301 SOFTWARE**

Reserved

### **2.302 HARDWARE**

Reserved

#### **2.310 Software Warranties**

### **2.311 PERFORMANCE WARRANTY-RESERVED**

### **2.312 NO SURREPTITIOUS CODE WARRANTY-RESERVED**

### **2.313 CALENDAR WARRANTY-RESERVED**

### **2.314 THIRD-PARTY SOFTWARE WARRANTY-RESERVED**

### **2.315 PHYSICAL MEDIA WARRANTY-RESERVED**

#### **2.320 Software Licensing**

### **2.321 CROSS-LICENSE, DELIVERABLES ONLY, LICENSE TO CONTRACTOR**

Reserved

### **2.322 CROSS-LICENSE, DELIVERABLES AND DERIVATIVE WORK, LICENSE TO CONTRACTOR**

Reserved

### **2.323 LICENSE BACK TO THE STATE**

Reserved

### **2.324 LICENSE RETAINED BY CONTRACTOR**

Reserved

### **2.325 PRE-EXISTING MATERIALS FOR CUSTOM SOFTWARE DELIVERABLES**

Reserved



### **2.330 Source Code Escrow**

#### **2.331 DEFINITION**

Reserved

#### **2.332 DELIVERY OF SOURCE CODE INTO ESCROW**

Reserved

#### **2.333 DELIVERY OF NEW SOURCE CODE INTO ESCROW**

Reserved

#### **2.334 VERIFICATION**

Reserved

#### **2.335 ESCROW FEES**

Reserved

#### **2.336 RELEASE EVENTS**

Reserved

#### **2.337 RELEASE EVENT PROCEDURES**

Reserved

#### **2.338 LICENSE**

Reserved

#### **2.339 DERIVATIVE WORKS**

Reserved



**ATTACHMENT A – COST TABLE**



**Implementation Proposal  
State of Michigan-BJJ  
Revised BJJ RFP Proposal**

**Quotation Summary**

Quote Date	<u>12/3/2010</u>	Account Executive	<u>Sheryl Morris</u>
Quote Expires	<u>3/3/2011 (90 Days From Quote Date)</u>	Office Phone No.	<u>313-378-9573</u>
Quote Prepared For	<u>Joyce Hunbarger</u>	Fax No.	<u>616-588-5992</u>
School District Name	<u>State of Michigan-BJJ</u>	E-mail Address	<u>Sheryl.morris@pearson.com</u>
No. of Schools Quoted	<u>1</u>		

**NovaNET Product Pricing Details**

Type of Purchase	<u>Renewal</u>	Months of Service	<u>60</u>
Type of Licensing	<u>Internet</u>		

Quantity	Item Description	Unit Cost	Extended Cost
<b>SOFTWARE</b>			
25	NovaNET Subscription License	x Months 60	\$ 700.00 \$ 87,500.00
		<i>Multi-Year Pre-Paid Discount</i> 25.00%	\$ (21,875.00)
<p><b>Annual contract amount is \$13,125.00 based upon Prepayment Letter</b></p> <p><b>Annual Subscription Fee</b>                      NovaNET is available for a subscription fee. The fee is based on the number of connections activated and includes access to NovaNET's current and future courseware and features, all support (online and toll free), and all upgrades to the NovaNET system.</p> <p><b>Annual Subscription now includes My Training Connection</b>                      MyTrainingConnection.net is the latest innovation in delivering high-quality, product-focused training from Pearson's expert training team. With flexible delivery options to meet your needs and your schedule, this new subscription-based service provides you with timely and convenient access to a wide range of product training options during the term of your contract: Seconds2Success (quick how-to tutorials), Minutes2Mastery (product tutorials), Interactive Webinars and Events.</p>			
<b>Software Subtotal</b>			\$ 65,625.00
<b>NovaNET Product Total</b>			\$ 65,625.00

Important Product Notes

Please submit PO for \$65,625.00  
 NCS Pearson  
 3075 W Ray Rd, Mail Stop 220  
 Chandler, AZ 85226  
 Phone: (888) 977-7900  
 Fax: 616-588-5992

<b>TOTAL COST OF IMPLEMENTATION</b>	<b>\$ 65,625.00</b>
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This is a price quotation for customer's convenience only and not an offer to contract. All quotations are subject to review and final acceptance by a duly authorized representative of Pearson Education at its offices. Not responsible for typographical or other errors. Pearson Education's standard licensing terms and conditions will apply to any order.

All pricing in this quotation is exclusive of any applicable sales, use or other similar taxes or duties. The customer is responsible for any such taxes or duties

**1. DEFINITIONS.** This Licensed Product Agreement (“Agreement”) is between NCS Pearson, Inc. (“Pearson”) and the school, school district or other entity (“Customer”) licensing Licensed Product from Pearson. In addition, the following definitions shall apply:

**1.1 “Documentation”** shall mean all written user information, whether in electronic, printed or other format, delivered to Customer by Pearson with respect to the Licensed Product, including, but not limited to, user manuals and training materials.

**1.2 “Licensed Product”** shall mean all components of the NovaNET online curriculum system provided to or made available for use by Customer hereunder. This includes: (a) all software applications and content hosted by Pearson and made available to Customer’s users as part of the NovaNET system; (b) all software applications and content that may be provided by Pearson to Customer to be deployed locally at the Licensed Sites as part of the NovaNET system; and (c) all Documentation. All future enhancements to any of the foregoing provided or made available to Customer will be considered part of the Licensed Product and are subject to, and will be governed by, the terms of this Agreement.

**1.3 “Licensed Sites”** shall mean those sites for which Pearson has received the applicable Subscription Fees for Customer to access the Licensed Product.

**1.4 “License Term”** shall mean the term of Customer’s license to access and use the Licensed Product, including the initial term described in Section 8.1 and any renewal terms entered into pursuant to such Section. The License Term may vary for different Licensed Sites.

**1.5 “Subscription Fee”** shall mean the fee payable to Pearson for the initial or a renewal License Term for the license of the Licensed Product and the support services provided by Pearson as described herein.

**2. LICENSE GRANT.** Subject to the terms and conditions set forth herein, Pearson grants to Customer a restricted, personal, non-exclusive, non-transferable license to use the Licensed Product for the License Term. The Licensed Product shall be accessed only by students or authorized personnel of Customer, only at the Licensed Sites, through no more than the number of connections for which the applicable fees have been paid to Pearson. There is no restriction on the number of computers that may be configured with the necessary software to access the Licensed Product; however, at any given time, Customer will not be able to use any more than the number of connections for which fees have been paid. If, at any time, Pearson permits Customer to increase the number of connections through which the Licensed Product may be accessed, or permits access from additional Licensed Sites, such additional connections and/or Licensed Sites shall also be subject to the terms and conditions of this Agreement (unless Pearson provides new terms and conditions to Customer at the time such additional access is granted, in which case such new terms and conditions shall apply).

**3. OWNERSHIP; RESTRICTIONS ON USE.**

**3.1 Title.** The Licensed Product is protected by trade secret and/or copyright law and is proprietary to Pearson and/or its licensors. Title to all complete or partial copies, together with all applicable rights to copyrights, patents and trade secrets in the Licensed Product and any derivative works thereof, are and shall remain the property of Pearson or its licensors.

**3.2 Confidentiality.** Customer shall maintain the confidentiality of the Licensed Product, and, except as expressly provided herein, Customer shall not, and shall not allow any other person or entity to, reproduce, copy, create derivative works, repost, distribute, download or otherwise transfer to any other system or media any portion of any Licensed Product without the written consent of Pearson; provided, however, that Customer may make copies of Documentation and the portal software used to access the Licensed Product as necessary for internal use. Customer shall not, and shall not allow others to, reverse engineer any software that is provided as part of the Licensed Product.

**3.3 Customer Content.** To the extent that the Licensed Product allows Customer to input or post any content (e.g., through a bulletin board or similar feature), Customer will not input or post any content that infringes any patent, copyright, trade secret or other proprietary right of any other party. Customer acknowledges and agrees that Pearson may delete, or require Customer to delete, any such content from the Licensed Product upon determining in its sole discretion, or upon receiving notice from Customer or any third party of any claim, that such content is infringing upon the intellectual property rights of a third party, or that such content is indecent, obscene, libelous, slanderous, illegal, or otherwise inappropriate. As part of its routine maintenance efforts, Pearson may delete any content input or posted in the Licensed Product by Customer after one (1) calendar year, and student data that has remained inactive for at least one (1) calendar year. In addition, upon termination of this Agreement, Pearson may delete any of Customer’s student data or any content input or posted in the Licensed Product by Customer.

**4. PAYMENT TERMS.**

**4.1 Fees.** Pearson’s fees for installation and training services, and Subscription Fees for the initial and any renewal terms, shall be due and payable in advance in accordance with Pearson’s invoice terms. Customer agrees to pay to Pearson all such fees and charges.

**4.2 Purchasing Consortia.** In some cases, Customer may purchase the Licensed Product through a central or regional purchasing consortium or similar entity (“Consortium”). In these situations, Customer may: (i) participate in a certain pricing structure for the Licensed Product and some related services, per an arrangement between the Consortium and Pearson; and/or (ii) receive the benefit of certain hardware and communications equipment that is provided by or through the Consortium, and is necessary to establish and maintain Customer’s access to the Licensed Product. Customer acknowledges that in the event that the above-referenced arrangements between Consortium and Pearson terminate, Customer may no longer be eligible to receive the benefit of the pricing structure or infrastructure

provided pursuant to these arrangements, in which case Customer may be subject to additional fees and/or may need to acquire other equipment in order to maintain its license to the Licensed Product.

**5. SUPPORT AND SERVICES.** During the term of this Agreement, (i) Pearson shall make available to Customer any upgrades, enhancements and/or additions to the Licensed Product that Pearson prepares in its discretion, and (ii) Customer shall have access to customer support for the Licensed Product via Pearson's on-line utilities and a toll-free number (which support is available during Pearson's normal business hours on weekdays, excluding Pearson holidays). Customer support is available to Customer's employees only; support is not available to students or their parents. If requested by Customer, Pearson shall provide training, installation or other services at mutually agreed upon times and rates. All such services must be scheduled and delivered within twelve (12) months of purchase; any portion of amounts prepaid for such services that have not actually been rendered within this twelve (12) month period shall be forfeited. Pearson's rates and charges for such services are subject to change at any time.

## **6. HARDWARE AND PREMISES.**

**6.1 Pearson-supplied Equipment.** If Pearson provides communications equipment, data circuits, or other hardware to any Licensed Sites to enable Customer to access the Licensed Product, such Pearson-supplied equipment shall remain the property of Pearson.

**6.2 Customer's Responsibilities.** Customer shall be responsible for the provision of personal computers compatible with the Licensed Product for use in accessing the Licensed Product, for maintaining all necessary connections from such computers to the hardware, Internet, or other network that may be required to access the Licensed Product, and for otherwise maintaining an operating environment compatible with Pearson's hardware and equipment so that the Licensed Product may be accessed through same. Specifications relating to the foregoing are available upon request. Such specifications are subject to change over time based on changes in technology or Licensed Product delivery methods.

**7. SYSTEM CONTENT AND AVAILABILITY.** Customer acknowledges and agrees that Pearson may, from time to time and in its sole discretion, (i) add new content to the Licensed Product, or (ii) limit, modify or discontinue any existing content made available within the Licensed Product. The Licensed Product shall generally be available during the following hours (hereinafter, "Prime Time") or as otherwise announced: 7:00 am to midnight Central Time Monday through Friday; 8:00 am through 6:00 pm Central Time Saturday; and 2:00 pm through midnight Central Time Sunday. While the Licensed Product may also be available other than during Prime Time, Customer acknowledges that Pearson may take the Licensed Product down to perform maintenance and/or upgrades. Customer acknowledges that the Licensed Product is Internet accessible and that as such, in connection with Customer's use of the Licensed Product, some information may be transmitted over local exchange and Internet carrier lines, as well as through routers, switches and other devices owned, maintained and serviced by third parties, all of which are beyond the control of Pearson and which can be

impaired or disrupted through no fault of Pearson. Pearson cannot control the flow of data over the Internet and assumes no liability for or relating to the delay, failure, interruption or corruption of any data or other information transmitted in connection with use of the Licensed Product.

## **8. TERM AND TERMINATION.**

**8.1 Term and Renewal.** The initial License Term for each Licensed Site shall begin on the date that Pearson has completed initial installation and the Licensed Product is available for Customer's use at such site, and shall continue for a period consistent with the Subscription Fees paid to Pearson. Either party may terminate this Agreement as of the end of the then-current License Term by providing written notice to the other party prior to the end of such License Term that such party does not wish to renew this Agreement. This Agreement may be renewed only by mutual written agreement of the parties.

**8.2 Termination.** Either party shall have the right to terminate this Agreement in whole or in part upon thirty (30) days written notice to the other party, in the event the other party materially breaches this Agreement and fails to correct such breach within such thirty (30) day period. If another party, such as a Consortium (as defined in Section 4.2), is responsible for payment on Customer's behalf of the Subscription Fees for Customer's access to the Licensed Product, Customer acknowledges that the failure of such other party to pay such fees when due is grounds for termination under this Section. Sections 3, 4, 10, 11 and 12 shall survive the termination of this Agreement.

**9. LIMITED WARRANTY.** During the term of this Agreement, Pearson shall attempt to correct any material defect in any hardware or equipment installed by Pearson pursuant to Section 6.1 or any material failure of the Licensed Product to conform substantially to the applicable description and specifications contained in the Documentation delivered with same (collectively, "Errors") that precludes access to the Licensed Product, after receiving written notification of such Error from Customer. If Pearson is unable to correct the Error after a reasonable opportunity, Pearson shall reimburse Customer for a prorated portion of the Subscription Fees paid to Pearson hereunder, computed from the date of Customer's notice as described above through the scheduled expiration date of the current License Term, and Customer's license to use the Licensed Product shall terminate. The foregoing remedy shall not apply to Errors resulting from Customer's negligence, abuse or failure to meet its responsibilities under Section 6.2 ("Customer-caused Errors"). The foregoing states the complete and entire remedies that Customer has under this warranty. Pearson shall have no responsibility for any warranty claims made outside of the warranty period.

**10. DISCLAIMER OF OTHER WARRANTIES. THE WARRANTIES SET FORTH IN SECTION 9 ABOVE CONSTITUTE AND EXPRESS THE ENTIRE STATEMENT OF PEARSON AS TO WARRANTIES FOR THE LICENSED PRODUCT, SUPPORT, SERVICES AND OTHER ITEMS PROVIDED HEREUNDER. PEARSON AND ITS LICENSORS DISCLAIM ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

**11. LIMITATION OF LIABILITY. PEARSON AND ITS LICENSORS SHALL NOT BE LIABLE TO CUSTOMER FOR ANY LOST PROFITS, LOST FUNDING, LOST SAVINGS OR ANY SPECIAL, EXEMPLARY, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING FROM THIS AGREEMENT, THE LICENSED PRODUCT, SUPPORT, SERVICES OR OTHER ITEMS PROVIDED HEREUNDER, OR ARISING FROM THE USE OF OR INABILITY TO USE THE LICENSED PRODUCT, EVEN IF PEARSON OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY ANY OTHER PARTY. IN NO EVENT WILL THE LIABILITY OF PEARSON AND ITS LICENSORS FOR ANY CLAIM UNDER THIS AGREEMENT EXCEED THE TOTAL FEES PAID FOR THE LICENSED PRODUCT OR OTHER ITEM OR SERVICE ON WHICH THE CLAIM IS BASED DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE LOSS OR INJURY.**

**12. GENERAL. THIS AGREEMENT SHALL BE GOVERNED BY, CONSTRUED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF MICHIGAN.**

This Agreement constitutes the complete agreement between Customer and Pearson, and supersedes all prior discussions, understandings, arrangements and negotiations between the parties with respect to its subject matter. Any additional or variant terms and conditions submitted by Customer, in a purchase order or otherwise, with respect to the Licensed Product or any support or other services shall be of no effect. No action, regardless of form, may be brought by Customer more than one year after the cause of action has arisen. In the case of notices to Pearson, such notices shall be sent to: NCS Pearson, Inc., Attn.: Contracts Department, 3075 W. Ray Road, Suite 200, Mailstop 315, Chandler, AZ 85226. In the case of notices to Customer, such notices shall be sent to Pearson's address of record for Customer. Either party may change its notice address by notifying the other in like manner.