

STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION Safety Division	INVITATION FOR BIDS NO. 54-12153671-ARS	
	Title: Audiometric Testing Services	
Refer all inquiries to: Allison R. Scott arscott3@ncdot.gov	Bid Opening Date: Monday, February 24, 2025	
	Issue Date: Friday, February 7, 2025	
	Commodity Number: 851217	
	Using Agency: NC Department of Transportation	
	Requisition No.: 12153671 / PR15234	

OFFER AND ACCEPTANCE

The State seeks offers the goods, software, and/or services described in this Invitation for Bids (IFB). The State's acceptance of any offer must be demonstrated by execution of the acceptance found below and any subsequent Request for Best and Final Offer (BAFO), if issued. Acceptance shall create a contract having an order of precedence as follows in cases of conflict between documents comprising the contract: (1) Best and Final Offers, if any; (2) special terms and conditions specific to this IFB; (3) specifications; (4) NC Department of Information Technology (NCDIT) Terms and Conditions of this IFB; and (5) the agreed portions of the awarded Vendor's Offer. **No contract shall be binding on the State until an encumbrance of funds has been made for payment of the sums due under the contract.**

EXECUTION

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

Failure to execute/sign offer prior to submittal shall render offer invalid. Late offers are not acceptable.

OFFEROR		
STREET ADDRESS		PO BOX, ZIP CODE
CITY, STATE, ZIP CODE		TELEPHONE NUMBER TOLL FREE TEL. NO
NAME and TITLE OF PERSON SIGNING		FAX NUMBER
AUTHORIZED SIGNATURE	DATE	E-MAIL

Offer valid for ninety (90) days from date of offer opening unless otherwise stated here: ____ days

ACCEPTANCE OF OFFER

If any or all parts of this IFB are accepted, an authorized representative of the NC Department of Transportation (NCDOT) shall affix a signature hereto. A copy of this acceptance will be forwarded to the successful Vendor.

<u>FOR STATE USE ONLY</u>	
<i>Offer accepted and Contract awarded as indicated on the attached certification by</i>	
_____	_____
Authorized representative of NC Department of Transportation	Date

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1.0 INTENT, USE, DURATION AND SCOPE

To comply with Occupational Safety and Health Administration (OSHA) requirements, NCDOT must conduct hearing tests, hearing conservation, and training for Safety and Risk Division employees who are exposed to noise levels above a specified threshold during an eight-hour shift. See Attachment A - 29 CFR 1910.95 (Occupational Noise Exposure) for more information.

Hearing tests must be completed within six (6) months of the employee's date of hire and conducted annually thereafter. Employers who utilize on-site mobile hearing testing services, however, have up to one (1) year to complete these hearing tests.

Approximately 3,200 to 3,800 employees must be tested on an annual basis. This range includes existing employees and the estimated number of new hires over a three-year period. These employees are divided into twenty (20) divisions located throughout the entire State of North Carolina.

Services will be provided in accordance with the terms and conditions of this IFB.

2.0 GENERAL INFORMATION

2.1 VENDOR QUESTIONS

All inquiries regarding this IFB must be emailed to Allison Scott at arscott3@ncdot.gov by **Friday, February 14, 2025 at 10:00am Eastern Time**.

Please enter "Questions IFB 54-12153671-ARS" as the subject for the message. Questions should be submitted in the following format:

REFERENCE	VENDOR QUESTION
IFB Section, Page Number	

2.2 ADDENDA

The Agency will issue an Addendum to provide a response to all questions received in accordance with Section 2.1 above. The Agency may issue additional Addenda as needed to modify the specifications/requirements, terms, and conditions, etc.

It is important that all Vendors bidding on this IFB periodically check the NC Electronic Vendor Portal (eVP) at <https://evp.nc.gov> for any and all Addenda that may be issued prior to the offer opening date. All addenda shall become an Addendum to this IFB.

The Agency may require Vendors to sign an Addendum and include the signed copy with their offer. **Vendors who fail to include an executed copy of an Addendum with their offer will be deemed non-responsive and their offers will be rejected.**

2.3 OFFER SUBMITTAL

Due Date: **Monday, February 24, 2025**

Time: **10:00 am Eastern Time**

Vendors must submit their offers via the NC electronic Vendor Portal (eVP) at <https://evp.nc.gov>. Proposals submitted via any other method will NOT be accepted.

It is the Vendor's sole responsibility to upload its offer by the specified time and date of opening. The Vendor shall bear the risk of late electronic submission due to unintended or unanticipated delay including, but not limited to, internet issues, network issues, or application issues. Failure to submit an offer in strict accordance with the instructions provided shall constitute sufficient cause to reject a Vendor's Offer.

- a. Submit **one (1) signed offer** via eVP at <https://evp.nc.gov>.
- b. Include all pages of this solicitation in your offer.
- c. File names should identify the Vendor name, solicitation number, and document in that order (e.g., Vendor Name – IFB 54-12153671-ARS - Proposal).
- d. File content must not be password protected. The file formats must be in .PDF, .JPEG, .DOC or .XLS format, and must be capable of being copied to other sources. Inability by the State to open the Vendor's files may result in rejection of the Offer.
- e. If your Offer includes any confidential information (as defined in Section 9.0, paragraph 18 - Confidentiality), you must submit one (1) redacted copy of your Offer in addition to the original copy.

2.4 BASIS FOR REJECTION

Pursuant to 9 NCAC 06B.0401, the State reserves the right to reject any and all offers, in whole or in part by deeming the offer unsatisfactory as to quality or quantity, delivery, price or service offered; non-compliance with the specifications or intent of this solicitation; lack of competitiveness; error(s) in specifications or indications that revision would be advantageous to the State; cancellation or other changes in the intended project, or other determination that the proposed requirement is no longer needed; limitation or lack of available funds; circumstances that prevent determination of the best offer; or any other determination that rejection would be in the best interest of the State. Vendor contact regarding this solicitation with anyone other than the person listed on Page 1 may be grounds for rejection of said Vendor's offer.

2.5 LATE OFFERS

Regardless of cause, late offers will not be accepted and will automatically be disqualified from further consideration. It shall be the Vendor's sole risk to ensure delivery at the designated office by the designated time.

2.6 NON-RESPONSIVE OFFERS

Vendor offers will be deemed non-responsive by the State and will be rejected without further consideration or evaluation if statements such as the following are included:

- “This offer does not constitute a binding offer”
- “This offer will be valid only if this offer is selected as a finalist or in the competitive range”
- “Vendor does not commit or bind itself to any terms and conditions by this submission”
- “This document and all associated documents are non-binding and shall be used for discussion purposes only”
- “This offer will not be binding on either party until incorporated in a definitive agreement signed by authorized representatives of both parties” or
- A statement of similar intent.

2.7 NOTICE TO VENDORS

The State objects to and will not be required to evaluate or consider any additional terms and conditions not previously agreed to by the State and submitted with a Vendor’s response. This applies to any language appearing in or attached to the document as part of the Vendor’s response. By execution and delivery of this solicitation and response, the Vendor agrees that any additional terms and conditions, whether submitted purposely or inadvertently, shall have no force or effect.

2.8 NC ePROCUREMENT

The State utilizes the NC eProcurement system to process requisitions and issue purchase orders. See <http://eprocurement.nc.gov/> and Section 8.0, Paragraph 38 of the NC Department of Information Technology Terms and Conditions for more information.

The transaction fee addressed in Paragraph 38 a) and b) applies to the purchase of goods (including the initial purchase of software). The transaction fee does not apply to services, SaaS, or software maintenance/support services.

It is the Vendor’s responsibility to read these provisions carefully and to consider them in preparing the offer. By signature, the Vendor acknowledges acceptance of all provisions related to NC eProcurement.

If not already registered in NC eProcurement, the Vendor selected for contract award must register at <http://eprocurement.nc.gov/Vendor.html> within two (2) days after notification of award of a contract.

As of the solicitation submission deadline, the Vendor must be current on all eProcurement fees. If the Vendor is not current on all eProcurement fees, the State may disqualify the Vendor from participating in this solicitation.

2.9 POSSESSION AND REVIEW

During the evaluation period and prior to award, possession of the bids and accompanying information is limited to personnel of the issuing agency, and to the committee responsible for participating in the evaluation. Vendors who attempt to gain this privileged information, or to influence the evaluation process (i.e., assist in evaluation) will be in violation of purchasing rules and their offer will not be further evaluated or considered.

After award of contract, the complete bid file will be available to any interested persons with the exception of trade secrets, test information or similar proprietary information as provided by statute and rule. Any proprietary or confidential information which conforms to exclusions from public records as provided by N.C.G.S. § 132-1.2 must be clearly marked as such in the offer when submitted.

2.10 BEST AND FINAL OFFERS (BAFO)

The State may establish a competitive range based upon evaluations of offers, and request BAFOs from the Vendor(s) within this range (i.e., Finalist Vendors). If negotiations or subsequent offers are solicited, the Vendor(s) shall provide BAFO(s) in response. Failure to deliver a BAFO when requested shall disqualify the non-responsive Vendor from further consideration. The State will evaluate BAFO(s), oral presentations, and product demonstrations as part of the Vendors' respective offers to determine the final rankings.

2.11 CONTRACT AWARD

It is the general intent to award this contract to one Vendor. Award will be based on Best Value Analysis, Lowest Price Technically Acceptable Source Selection Method in accordance with N.C.G.S. § 143B-1350(h), which provides that the offer must be in substantial conformity with the specifications herein and 09 NCAC 06B.0302.

Award information will be posted in the electronic Vendor Portal (eVP) at <https://evp.nc.gov>. <https://www.ips.state.nc.us/ips/>This information may not be available for several weeks depending on the complexity of the acquisition and the length of time to complete the evaluation process.

2.12 POINTS OF CONTACT

Contact with the persons shown below for contractual and technical matters related to this solicitation is only permitted if expressly agreed to by the person named on page 1 or upon award of contract:

Vendor Contractual Point of Contact	Vendor Technical Point of Contact
Contract Manager: Address: Email Address: Phone Number:	Technical Lead: Address: Email Address: Phone Number:

3.0 GENERAL SPECIFICATIONS

3.1 VENDOR STANDARD AGREEMENT(S)

The terms and conditions of Vendor's standard services, license, maintenance, or other agreement(s) applicable to Services, Goods, Software, and other Products acquired under this Agreement may apply to the extent such terms and conditions do not materially change the terms and conditions of this Agreement. In the event of any conflict between the terms and conditions of this Agreement and the Vendor's standard agreement(s), the terms and conditions of this Agreement relating to audit and records, jurisdiction, choice of law, the State's electronic procurement application of law or administrative rules, the remedy for intellectual property infringement and the exclusive remedies and limitation of liability in the DIT Terms and Conditions herein shall apply in all cases and supersede any provisions contained in Vendor's relevant standard agreement or any other agreement. The State shall not be obligated under any standard license and/or maintenance or other Vendor agreement(s) to indemnify or hold harmless the

Vendor, its licensors, successors or assigns; nor arbitrate any dispute, nor pay late fees, legal fees, or other similar costs.

3.2 **VENDOR UTILIZATION OF WORKERS OUTSIDE U.S.**

In accordance with N.C.G.S. § 143B-1361(b), the Vendor must detail in its response the manner in which it intends to utilize resources or workers located outside the U.S. The State of North Carolina will evaluate the additional risks, costs, and other factors associated with such utilization prior to making an award for any such Vendor's offer. The Vendor shall provide the following for any offer or actual utilization or contract performance:

- a) The location of work performed under a state contract by the Vendor, any subcontractors, employees, or other persons performing the contract and whether any of this work will be performed outside the United States.
- b) The corporate structure and location of corporate employees and activities of the Vendors, its affiliates, or any other subcontractors.
- c) Notice of the relocation of the Vendor, employees of the Vendor, subcontractors of the Vendor, or other persons performing Services under a state contract outside of the United States.
- d) Any Vendor or subcontractor providing call or contact center Services to the State of North Carolina shall disclose to inbound callers the location from which the call or contact center Services are being provided.

Will any work under this contract be performed outside the United States? YES NO

If YES, list the location(s) outside the United States where work will be performed by the Vendor, sub-contractors, employees, or other persons: _____

3.3 **E-VERIFY**

Pursuant to N.C.G.S. § 143B-1350(k), the State shall not enter into a contract unless the awarded Vendor and each of its subcontractors comply with the E-Verify requirements of N.C.G.S. Chapter 64, Article 2. Vendors are directed to review the foregoing laws. Any awarded Vendor must submit a certification of compliance with E-Verify to the awarding agency, and on a periodic basis thereafter as may be required by the State.

3.4 **SOLUTIONS NOT HOSTED ON STATE INFRASTRUCTURE**

The Vendor will be required to receive and securely manage data that is classified as **High Risk**.

Refer to the North Carolina Statewide Data Classification and Handling policy for more information: <https://it.nc.gov/document/statewide-data-classification-and-handling-policy>.

To comply with the State's Security Standards and Policies, State agencies are required to perform annual security/risk assessments on their information systems using NIST 800-53 controls. This requirement additionally applies to all Vendor-provided, agency-managed Infrastructure as a Service (IaaS), Platform as a Service (PaaS), and Software as a Service (SaaS) Solutions which will handle data classified as Medium Risk (Restricted) or High Risk (Highly Restricted) data.

- 1) Vendors should submit a Vendor Readiness Assessment Report – Non-State Hosted Solutions with their Offer.

This report is located at <https://it.nc.gov/documents/vendor-readiness-assessment-report>

- 2) Upon request, Vendors must provide a current independent third party assessment report in accordance with the following subparagraphs (i)-(iii) prior to contract award. However, Vendors are encouraged to provide a current independent third party assessment report in accordance with subparagraphs (i)-(iii) at the time of offer submission.
- (i) Federal Risk and Authorization Management Program (FedRAMP) certification, SOC 2 Type 2, ISO 27001, or HITRUST are the preferred assessment reports for any Vendor Solutions which will handle data classified as Medium Risk (Restricted) or High Risk (Highly Restricted).
 - (ii) A Vendor that cannot provide a preferred independent third party assessment report as described above may submit an alternative assessment, such as a SOC 2 Type 1 assessment report. The Vendor shall provide an explanation for submitting the alternative assessment report. If awarded this contract, a Vendor who submits an alternative assessment report shall submit one of the preferred assessment reports no later than 365 days of the Effective Date of the contract. Timely submission of this preferred assessment report shall be a material requirement of the contract.
 - (iii) An IaaS vendor cannot provide a certification or assessment report for a SaaS provider UNLESS permitted by the terms of a written agreement between the two vendors and the scope of the IaaS certification or assessment report clearly includes the SaaS Solution.
- (c) Additional Security Documentation. Prior to contract award, the State may in its discretion require the Vendor to provide additional security documentation, including but not limited to vulnerability assessment reports and penetration test reports. The awarded Vendor shall provide such additional security documentation upon request by the State during the term of the contract.

3.5 ENTERPRISE ARCHITECTURE SPECIFICATIONS – Reserved.

3.6 CONTRACT TERM

A contract awarded pursuant to this IFB shall have an effective date as provided in the Notice of Award. The term shall be **three (3) years** and will expire upon the anniversary date of the effective date unless otherwise stated in the Notice of Award or unless terminated earlier.

The State retains the option to extend the contract term for **two (2) additional one (1) year periods** at its sole discretion.

3.7 DELIVERY – Reserved.

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4.0 VENDOR RESPONSIBILITIES

- 4.1 The Vendor must be able to conduct audiometric testing for NCDOT employees located throughout the entire State of North Carolina.
- 4.2 Vendor staff who perform audiometric testing and/or review Work-Related Determination Evaluations must be audiologists or technicians licensed in accordance with N.C.G.S. § 90-294 and certified by the Council of Accreditation in Occupational Hearing Conservation.
- 4.3 The Vendor must be able to test at least six (6) employees simultaneously and provide privacy for each employee during testing.
- 4.4 The Vendor must utilize the following testing equipment (or equivalent equipment pre-approved in writing by NCDOT):
 - a. Audiometric Testing Equipment
 - 1. Audiometer: Monitor Instruments model MI5000 Series II
 - 2. Back-up Audiometer: Monitor Instruments model MI5000 Series II
 - b. Sound Level Meter Equipment
 - 1. Monitor Instruments model ANM-1 Ambient Noise Monitor with an Extech model number 407744 sound level calibrator to continually monitor noise levels inside the testing facility before, during and after testing
 - 2. Quest Technologies model number 2700 sound level meter with a Quest Technologies Band Analyzer that shall be calibrated daily with a Quest Technologies Calibrator.
- 4.5 All audiometric testing equipment must have a calibration date of no more than one (1) year prior to the testing date.
- 4.6 The Vendor must have licensed audiologists calibrate all audiometric testing equipment on an annual basis. Calibration records must be provided to NCDOT within four (4) hours of request.
- 4.7 The Vendor must provide on-site mobile testing services at the following locations. The Vendor must provide its own power supply at each testing site.

Division 1

Address	County	Unit Name
1929 North Road Street Elizabeth City NC 27909	Pasquotank	Pasquotank County Maintenance
318 West Modlin Road Ahoskie NC 27910	Hertford	Hertford County Maintenance
1740 Prison Camp Road Williamston NC 27892	Martin	Martin County Maintenance
306 Simon Street Manteo NC 27954	Dare	Manteo County Maintenance

Division 2

Address	County	Unit Name
104 West Belvoir Road Greenville NC 27834	Pitt	Pitt County Maintenance
803 Grimes Road Washington NC 27889	Beaufort	Beaufort County Maintenance
209 S. Glenburnie Road New Bern NC 28560	Craven	New Bern County Maintenance
135 E. First Street Kinston NC 28504	Lenoir	Kinston County Maintenance

Division 3

Address	County	Unit Name
5310 Barbados Blvd, Unit 101 Castle Hayne NC 28429	Brunswick / New Hanover	New Hanover County Maintenance
404 S NC Hwy 11-903 Kenansville NC 28349	Duplin	Duplin County Maintenance
401 N. Smith Street Burgaw NC 28425	Pender / Onslow	Pender County Maintenance
220 N. Boulevard Clinton NC 28328	Sampson	Sampson County Maintenance

Division 4

Address	County	Unit Name
3013 US 64-Alt Nashville NC 28429	Nash	Nash County Maintenance
509 Ward Boulevard Wilson NC 27893	Wilson	Wilson County Maintenance
2008 West Wilson Street Tarboro NC 27886	Edgecombe	Edgecombe County Maintenance
14245 NC Hwy 903 Halifax NC 27839	Halifax	Halifax County Maintenance
2671 US 70 West Goldsboro NC 27530	Wayne	Wayne County Maintenance
2861 US 70 West Smithfield NC 27577	Johnston	Johnston County Maintenance

Division 5

Address	County	Unit Name
1801 Blue Ridge Road Raleigh NC 27606	Wake	Wake County Maintenance
6006 NC 39 South Bunn, NC 27508	Franklin	Franklin County Maintenance
3910 Guess Road Durham NC 27704	Durham	Durham County Maintenance
5674 Cornwall Road Oxford NC 27565	Granville	Granville County Maintenance
506 S. Morgan Street Roxboro, NC 27573	Person	Person County Maintenance
465 Gillburg Road Henderson NC 27536	Vance	Vance County Maintenance

Division 6

Address	County	Unit Name
872 NC 711 Hwy Lumberton NC 28360	Robeson	Robeson County Maintenance
558 Gillespie Street Fayetteville NC 28301	Cumberland	Cumberland County Maintenance
1123 Prison Camp Road Whiteville NC 28472	Columbus	Columbus County Maintenance

Division 7

Address	County	Unit Name
191 NC 65 Reidsville NC 27320	Rockingham	Rockingham County Maintenance
2122 Clarence Walters Hillsborough NC 27278	Orange	Orange County Maintenance
4715 Sandy Camp Road High Point NC 27265	Guilford	Guilford County Maintenance
4253 Camp Burton Road McLeansville NC 27301	Guilford	Guilford County Maintenance
77 Club House Road Yanceyville NC 27379	Caswell	Caswell County Maintenance
345 Prison Camp Road Graham NC 27253	Alamance	Alamance County Maintenance

Division 8

Address	County	Unit Name
126 DOT Drive Asheboro NC 27205	Randolph	Randolph County Maintenance
993 Priest Hill Road Carthage NC 28327	Moore	Moore County Maintenance
219 Clemmer Road Rockingham NC 28379	Richmond	Richmond County Maintenance

Division 9

Address	County	Unit Name
300 Craft Drive Winston-Salem NC 27105	Forsyth	Forsyth County Maintenance
515 Camp Road Salisbury NC 28147	Rowan	Rowan County Bridge
181 Westside Drive Mocksville NC 27208	Davie	Davie County Maintenance
2485 Highway NC 8/89 Walnut Cove NC 27052	Stokes	Stokes County Maintenance

Division 10

Address	County	Unit Name
7703 District Drive Charlotte NC 28213	Mecklenburg	Newell Maintenance
130 South Sutherland Monroe NC 28112	Union	Union County Maintenance
903 Coble Avenue Albemarle NC 28315	Stanley	Traffic Services

Division 11

Address	County	Unit Name
500 Pleasant Road Hudson NC 28638	Caldwell	Caldwell County Maintenance
303 Pleasant Road North Wilkesboro NC 28659	Wilkes	Wilkes County Maintenance
296 Buffalo Road West Jefferson NC 28694	Ashe	Ashe County Maintenance
1865 Jefferson Hwy Boone NC 28607	Watauga	Watauga County Maintenance

1975 Prison Camp Road Dobson NC 27017	Surry	Surry County Maintenance
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Division 12

Address	County	Unit Name
254 Kemper Road Shelby NC 28150	Cleveland	Cleveland County Maintenance
1302 Prison Camp Road Newton NC 28658	Catawba	Catawba County Maintenance

Division 13

Address	County	Unit Name
11 Old Charlotte Highway Asheville NC 28803	Buncombe	Buncombe County Maintenance
3931 US 226 South Marion NC 28572	McDowell	McDowell County Maintenance

Division 14

Address	County	Unit Name
253 Webster Road Sylva NC 28779	Jackson	Jackson County Maintenance
5426 NC State Road 141 Marble NC 28905	Cherokee	Cherokee County Maintenance
693 Mountain Road Hendersonville NC 28971	Henderson	Henderson County Maintenance

Central Division

Address	County	Unit Name
5105 Beryl Road Raleigh NC 27606	Wake	Central Equipment

Geotechnical Division

Address	County	Unit Name
3301 Jones Sausage Road, Suite 100 Garner NC 27529	Wake	Geotechnical Unit

Department of Motor Vehicles

Address	County	Unit Name
1405 N. Church Street Rocky Mount NC 27804	Nash	Print Shop

Global Trans Park

Address	County	Unit Name
3800 NC 58 Kinston NC 28501	Kinston	Global Trans Park

DOT Aviation

Address	County	Unit Name
1050 Meridian Drive Morrisville NC 27560	Wake	DOT Aviation

Unlike the other Divisions, the Ferry Division operates 24x7. Since some testing will need to be conducted outside of normal business hours, NCDOT anticipates incurring an additional “setup fee” for these employees. NCDOT may choose to consolidate testing sites for the Ferry Division locations in order to minimize the cost of setup.

Ferry Division

Address	County	Unit Name
2300 Ferry Road Havelock NC 28532	Craven	Cherry Branch
3619 Cedar Island Road Cedar Island NC 28520	Carteret	Cedar Island
8550 Shipyard Road Manns Harbor NC 27953	Dare	Manns Harbor Shipyard
59063 NC 12 S Hatteras NC 27943	Dare	Hatteras Branch
130 Pilot Town Circle Ocracoke NC 27960	Hyde	Ocracoke
1650 Southport Ferry Road Southport NC 28461	Brunswick	Southport Branch
175 Courthouse Road Currituck NC 27929	Currituck	Currituck Ferry Ops
229 NC Highway 306N Bath NC 27808	Pamlico	Pamlico River Ops

4.8 The Vendor must adhere to the following testing schedule:

- a. January 1 through March 31 annually for the Ferry Division.
- b. July 1 through the second week of September annually for all other Divisions.

4.9 The Vendor must notify the Divisions at least thirty (30) days in advance of the date of the testing session.

- 4.10 Testing must be conducted during the employees' work hours. Any retest that is needed for any reason (employee distraction/inattention, etc.) must be conducted immediately after the initial test.
- 4.11 The Vendor must accept retesting results from another licensed audiologist.
- 4.12 The Vendor must conduct Work-Related Determination (WRD) Evaluations for high-risk employees. Each employee's test results must be reviewed by a licensed audiologist who will determine if the employee should be placed on an OSHA 300 log and continue to be incorporated into NCDOT's Hearing Conservation Program.
- 4.13 The Vendor must provide a vendor-hosted web portal to enable NCDOT to view and manage audiometric testing data, including reports comparing current and baseline test with and without age correction. The data must be available in real-time, twenty-four (24) hours a day, seven (7) days a week.
- 4.14 Upon completion of testing, the Vendor must properly dispose of all waste and debris in accordance with the Health Insurance Portability and Accountability Act (HIPAA) requirements.
- 4.15 Upon the completion of each testing session, the Vendor must submit invoices to the NCDOT IT Invoices Service Account at NCDOTITinvoices@ncdot.gov and identify the division location.
- 4.16 The Vendor must maintain test results for a period of thirty (30) years after this contract expires.
- 4.17 The Vendor must provide employees with annual one-on-one or group training on the proper use of protective equipment and hearing conservation. The training and training materials must also be available in Spanish.
- 4.18 Contract Administration

- a) Project Manager

The Vendor must designate and make available to the State a Project Manager who will serve as the State's point of contact for contract related issues and issues concerning performance, progress review, scheduling, and service.

- b) Project Review Meetings

The Vendor, at the request of the State, must meet annually with the State for Project Review meetings via telephone or video conference call. The purpose of these meetings is to review progress reports, discuss Vendor and State performance, address outstanding issues, review problem resolution, provide direction, evaluate continuous improvement and cost saving ideas, and discuss any other pertinent topics.

- c) Continuous Improvement

The State encourages the Vendor to identify opportunities to reduce the total cost of services to the State. A continuous improvement effort consisting of various ideas to enhance business efficiencies will be discussed at the periodic Project Review Meetings.

- d) Quarterly Status Reports

The Vendor must submit progress reports on a quarterly basis as follows:

Reporting Period
 January 1 to March 31
 April 1 to June 30
 July 1 to September 30
 October 1 to December 31

Report Due
 April 15
 July 15
 October 15
 January 15

The reports must include the division name/number, date and time, information concerning the work accomplished during the reporting period, problems (real or anticipated), and notification of any significant deviation from previously agreed upon work plans and schedules. These reports shall be well-organized and easy to read.

The Vendor must submit these reports electronically to NCDOT's Contract Lead in Microsoft Excel, PowerPoint or Word format.

5.0 FURNISH AND DELIVER

YEAR 1

ITEM	QTY	UNIT	DESCRIPTION	UNIT COST	EXTENDED COST
1	3800	each	Audiometric Testing for up to 3,800 employees		
2	70	each	Work-Related Determination Evaluation		
3	14	each	Ferry Division setup fee		
4	1	year	On-Site Training for up to 3,800 employees		

Total Cost for Year 1: \$ _____

YEAR 2

ITEM	QTY	UNIT	DESCRIPTION	UNIT COST	EXTENDED COST
5	3800	each	Audiometric Testing for up to 3,800 employees		
6	70	each	Work-Related Determination Evaluation		
7	14	each	Ferry Division setup fee		
8	1	year	On-Site Training for up to 3,800 employees		

Total Cost for Year 2: \$ _____

YEAR 3

ITEM	QTY	UNIT	DESCRIPTION	UNIT COST	EXTENDED COST
9	3800	each	Audiometric Testing for up to 3,800 employees		
10	70	each	Work-Related Determination Evaluation		
11	14	each	Ferry Division setup fee		
12	1	year	On-Site Training for up to 3,800 employees		

Total Cost for Year 3: \$ _____

TOTAL THREE-YEAR COST \$ _____

OPTIONAL COSTS - may or may not be purchased by the State

FIRST OPTIONAL RENEWAL FOR YEAR 4

ITEM	QTY	UNIT	DESCRIPTION	UNIT COST	EXTENDED COST
13	3800	each	Audiometric Testing for up to 3,800 employees		
14	70	each	Work-Related Determination Evaluation		
15	14	each	Ferry Division setup fee		
16	1	year	On-Site Training for up to 3,800 employees		

Total Cost for Optional Year 4: \$ _____

SECOND OPTIONAL RENEWAL FOR YEAR 5

ITEM	QTY	UNIT	DESCRIPTION	UNIT COST	EXTENDED COST
17	3800	each	Audiometric Testing for up to 3,800 employees		
18	70	each	Work Related Determination Evaluation		
19	14	each	Ferry Division setup fee		
20	1	year	On-Site Training for up to 3,800 employees		

Total Cost for Optional Year 5: \$ _____

6.0 HISTORICALLY UNDERUTILIZED BUSINESSES

“Historically Underutilized Businesses (HUBs) consist of minority, women and disabled business firms that are at least fifty-one percent owned and operated by an individual(s) of the aforementioned categories. Also included in this category are disabled business enterprises and non-profit work centers for the blind and severely disabled.” <http://ncadmin.nc.gov/businesses/hub>

Pursuant to N.C.G.S. §§ 143B-1361(a), 143-48 and 143-128.4, the State invites and encourages participation in this procurement process by businesses owned by minorities, women, disabled, disabled business enterprises and non-profit work centers for the blind and severely disabled. This includes utilizing subcontractors to perform the required functions in this solicitation.

Is Vendor a Historically Underutilized Business? YES NO

If YES, specify classification: _____

7.0 NC DEPARTMENT OF INFORMATION TECHNOLOGY INSTRUCTIONS TO VENDORS

1) **READ, REVIEW AND COMPLY:** It shall be the Vendor’s responsibility to read this entire document, review all enclosures and attachments, and comply with all requirements specified herein.

2) **DEFINITIONS**

- **NCDIT:** The North Carolina Department of Information Technology, formerly Office of Information Technology Services
- **NCDIT CONVENIENCE CONTRACT:** A contract that is used for the procurement of IT goods or Services. These contracts are in place for the convenience of the State and use of them is optional.
- **OPEN MARKET CONTRACT:** A contract for the purchase of goods or Services not covered by a term, technical, or convenience contract.
- **TERM CONTRACT:** A contract in which a source of supply is established for a specified period of time for specified Services or supplies; usually characterized by an estimated or definite minimum quantity, with the possibility of additional requirements beyond the minimum, all at a predetermined unit price.
- **THE STATE:** The State of North Carolina and its agencies.
- **VENDOR:** Company, firm, corporation, partnership, individual, etc., submitting a response to a solicitation.

3) **PROMPT PAYMENT DISCOUNTS:** Vendors are urged to compute all discounts into the price offered. If a prompt payment discount is offered, it will not be considered in the award of the contract except as a factor to aid in resolving cases of identical prices.

4) **INFORMATION AND DESCRIPTIVE LITERATURE:** The Vendor is to furnish all information requested and in the spaces provided in this document. Further, if required elsewhere in this solicitation, the Vendor must submit with its offer sketches, descriptive literature and/or complete specifications covering the products offered. Only information that is received in response to this solicitation will be evaluated. Reference to information previously submitted or Internet Website Addresses (URLs) will not satisfy this provision. Offers which do not comply with these requirements will be subject to rejection.

5) **RECYCLING AND SOURCE REDUCTION:** It is the policy of this State to encourage and promote the purchase of products with recycled content to the extent economically practicable, and to purchase items, which are reusable, refillable, repairable, more durable, and less toxic to the extent

that the purchase or use is practicable and cost-effective. We also encourage and promote using minimal packaging and the use of recycled/recyclable products in the packaging of commodities purchased. However, no sacrifice in quality of packaging will be acceptable. The company remains responsible for providing packaging that will protect the commodity and contain it for its intended use. Companies are strongly urged to bring to the attention of the relevant purchasers in the State those products or packaging they offer which have recycled content and that are recyclable.

- 6) **CLARIFICATIONS/INTERPRETATIONS:** Any and all questions regarding this document must be addressed to the purchaser named on the cover sheet of this document. Do not contact the user directly. Any and all revisions to this document shall be made only by written addendum from NCCCS. The Vendor is cautioned that the requirements of this solicitation can be altered only by written addendum and that verbal communications from whatever source are of no effect.
- 7) **ACCEPTANCE AND REJECTION:** The State reserves the right to reject any and all offers, to waive any informality in offers and, unless otherwise specified by the Vendor, to accept any item in the offer. If either a unit price or an extended price is obviously in error and the other is obviously correct, the incorrect price will be disregarded.
- 8) **AWARD OF CONTRACT:** Responsive offers will be evaluated, and acceptance may be made in accordance with Best Value procurement practices as defined by N.C.G.S. § 143-135.9, and in accordance with N.C.G.S. § 143B-1350(h), which provides that the offer must be in substantial conformity with the specifications herein, and 09 NCAC 06B.0302. Unless otherwise specified by the State or the Vendor, the State reserves the right to accept any item or group of items on a multi-item offer. In addition, on agency specific or term contracts, NCDIT reserves the right to make partial, progressive, or multiple awards where it is advantageous to award separately by items; where more than one supplier is needed to provide the contemplated requirements as to quantity, quality, delivery, service, geographical areas; or other factors deemed by NCDIT to be pertinent or peculiar to the purchase in question.
- 9) **SAMPLES:** Samples of items, when required, must be furnished as stipulated herein, free of expense, and if not destroyed will, upon request be returned at the Vendor's expense. Written request for the return of samples must be made within ten (10) days following date of offer opening. Otherwise, the samples will become the property of the State. Each individual sample must be labeled with the Vendor's name, offer number, and item number. A sample on which an award is made will be retained until the contract is completed, and then returned, if requested, as specified above.
- 10) **MISCELLANEOUS:** Masculine pronouns shall be read to include feminine pronouns and the singular of any word or phrase shall be read to include the plural and vice versa.
- 11) **PROTEST PROCEDURES:** When an offeror wants to protest a contract awarded pursuant to this solicitation that is over \$25,000 they must submit a written request to the issuing agency at the address given in this document. This request must be received in this office within fifteen (15) calendar days from the date of the contract award and must contain specific sound reasons and any supporting documentation for the protest. **Note:** Contract award notices are sent **only** to those actually awarded contracts, and not to every person or firm responding to this solicitation. IFB status and Award notices are posted on the Internet at <https://evp.nc.gov>. **All protests will be governed by NCAC Title 9, Department of Information Technology (formerly Office of Information Technology Services), Subchapter 06B Sections .1101 - .1121.**
- 12) **VENDOR REGISTRATION AND SOLICITATION NOTIFICATION SYSTEM:** Vendor Link NC allows Vendors to electronically register with the State to receive electronic notification of current procurement opportunities for goods and services available on the Interactive Purchasing System at <https://www.ips.state.nc.us/ips>.

13) DIGITAL IMAGING: The State will digitize the Vendor's response if not received electronically and any awarded contract together with associated contract documents. This electronic copy shall be a preservation record and serve as the official record of this solicitation with the same force and effect as the original written documents comprising such record. Any printout or other output readable by sight shown to reflect such record accurately is an "original."

8.0 NC DEPARTMENT OF INFORMATION TECHNOLOGY TERMS AND CONDITIONS

Section 1: Terms and Conditions Applicable to All Purchases

- 1) **DEFINITIONS:** As used herein
 - a) Deliverable/Product Warranties shall mean and include the warranties provided for products or deliverables licensed to the State in Section 2, Paragraph 2 of these Terms and Conditions unless superseded by a Vendor's Warranties pursuant to Vendor's License or Support Agreements.
 - b) Purchasing State Agency or Agency shall mean the Agency purchasing the goods or Services.
 - c) Services shall mean the duties and obligations undertaken by the Vendor under, and to fulfill, the specifications, requirements, terms, and conditions of the Agreement.
 - d) State shall mean the State of North Carolina, the NC Department of Information Technology (NCDIT), or the Purchasing State Agency in its capacity as the Contracting Agency, as appropriate.
- 2) **STANDARDS:** Any Deliverables shall meet all applicable State and federal requirements, such as State or Federal Regulation, and NC State Chief Information Officer's (CIO) policy or regulation. The Vendor will provide and maintain a quality assurance system or program that includes any Deliverables and will tender or provide to the State only those Deliverables that have been inspected and found to conform to the RFP specifications. All Deliverables are subject to operation, certification, testing and inspection, and any accessibility specifications.
- 3) **WARRANTIES:** Unless otherwise expressly provided, any goods Deliverables provided by the Vendor shall be warranted for a period of ninety (90) days after acceptance.
- 4) **SUBCONTRACTING:** The Vendor may subcontract the performance of required Services with Resources under the Agreement only with the prior written consent of the State contracting authority. Vendor shall provide the State with complete copies of any agreements made by and between Vendor and all subcontractors. The selected Vendor remains solely responsible for the performance of its subcontractors. Subcontractors, if any, shall adhere to the same standards required of the selected Vendor and the Agreement. Any contracts made by the Vendor with a subcontractor shall include an affirmative statement that the State is an intended third party beneficiary of the Agreement; that the subcontractor has no agreement with the State; and that the State shall be indemnified by the Vendor for any claim presented by the subcontractor. Notwithstanding any other term herein, the Vendor shall timely exercise its contractual remedies against any non-performing subcontractor and, when appropriate, substitute another subcontractor.
- 5) **TRAVEL EXPENSES:** **All travel expenses should be included in the Vendor's proposed costs. Separately stated travel expenses will not be reimbursed.** In the event that the Vendor, upon specific request in writing by the State, is deemed eligible to be reimbursed for travel expenses arising under the performance of the Agreement, reimbursement will be at the out-of-state rates set forth in N.C.G.S. § 138-6 as amended from time to time. The Vendor agrees to use the lowest available airfare not requiring a weekend stay and to use the lowest available rate for rental vehicles. All Vendor incurred travel

expenses shall be billed on a monthly basis, shall be supported by receipt, and shall be paid by the State within thirty (30) days after invoice approval. Travel expenses exceeding the foregoing rates shall not be paid by the State. The State will reimburse travel allowances only for days on which the Vendor is required to be in North Carolina performing Services under the Agreement.

- 6) **GOVERNMENTAL RESTRICTIONS:** In the event any restrictions are imposed by governmental requirements that necessitate alteration of the material, quality, workmanship, or performance of the Deliverables offered prior to delivery thereof, the Vendor shall provide written notification of the necessary alteration(s) to the Agency Contract Administrator. The State reserves the right to accept any such alterations, including any price adjustments occasioned thereby or to cancel the Agreement. The State may advise the Vendor of any restrictions or changes in specifications required by North Carolina legislation, rule or regulatory authority that require compliance by the State. In such event, the Vendor shall use its best efforts to comply with the required restrictions or changes. If compliance cannot be achieved by the date specified by the State, the State may terminate the Agreement and compensate Vendor for sums then due under the Agreement.
- 7) **PROHIBITION AGAINST CONTINGENT FEES AND GRATUITIES:** The Vendor warrants that it has not paid, and agrees not to pay, any bonus, commission, fee, or gratuity to any employee or official of the State for the purpose of obtaining any Contract or award issued by the State. The Vendor further warrants that no commission or other payment has been or will be received from or paid to any third party contingent on the award of any Contract by the State, except as shall have been expressly communicated to the State Purchasing Agent in writing prior to acceptance of the Agreement or award in question. Each individual signing below warrants that he or she is duly authorized by their respective Party to sign the Agreement and bind the Party to the terms and conditions of this RFP. The Vendor and its authorized signatory further warrant that no officer or employee of the State has any direct or indirect financial or personal beneficial interest, in the subject matter of the Agreement; obligation or Contract for future award of compensation as an inducement or consideration for making the Agreement. Subsequent discovery by the State of non-compliance with these provisions shall constitute sufficient cause for immediate termination of all outstanding contracts. Violations of this provision may result in debarment of the Vendor(s) as permitted by 9 NCAC 06B.1206, or other provision of law.
- 8) **AVAILABILITY OF FUNDS:** Any and all payments to the Vendor are expressly contingent upon and subject to the appropriation, allocation, and availability of funds to the Agency for the purposes set forth in the Agreement. If the Agreement or any Purchase Order issued hereunder is funded in whole or in part by federal funds, the Agency's performance and payment shall be subject to and contingent upon the continuing availability of said federal funds for the purposes of the Agreement or Purchase Order. If the term of the Agreement extends into fiscal years subsequent to that in which it is approved, such continuation of the Agreement is expressly contingent upon the appropriation, allocation, and availability of funds by the N.C. Legislature for the purposes set forth in this RFP. If funds to effect payment are not available, the Agency will provide written notification to the Vendor. If the Agreement is terminated under this paragraph, the Vendor agrees to take back any affected Deliverables and software not yet delivered under the Agreement, terminate any Services supplied to the Agency under the Agreement, and relieve the Agency of any further obligation thereof. The State shall remit payment for Deliverables and Services accepted prior to the date of the aforesaid notice in conformance with the payment terms.
- 9) **ACCEPTANCE PROCESS**
- a) The State shall have the obligation to notify the Vendor in writing ten (10) calendar days following provision, performance (under a provided milestone or otherwise as agreed) or delivery of any Services or other Deliverables described in the Agreement that are not acceptable.
- b) Acceptance testing is required for all Vendor supplied software and software or platform services unless provided otherwise in the solicitation documents or a Statement of Work. The State may define

such processes and procedures as may be necessary or proper, in its opinion and discretion, to ensure compliance with the State's specifications and the Vendor's Product Warranties and technical representations. The State shall have the obligation to notify the Vendor, in writing and within thirty (30) days following installation of any software deliverable if it is not acceptable.

- c) Acceptance of Services or other Deliverables including software or platform services may be controlled by an amendment hereto, or additional terms as agreed by the Parties consistent with IT Project management under N.C.G.S. § 143B-1340.
- d) The notice of non-acceptance shall specify in reasonable detail the reason(s) a Service or given Deliverable is unacceptable. Acceptance by the State shall not be unreasonably withheld but may be conditioned or delayed as required for installation and/or testing of Deliverables. Final acceptance is expressly conditioned upon completion of any applicable inspection and testing procedures. Should a Service or Deliverable fail to meet any specifications or acceptance criteria, the State may exercise any and all rights hereunder. Services or Deliverables discovered to be defective or failing to conform to the specifications may be rejected upon initial inspection or at any later time if the defects or errors contained in the Services or Deliverables or non-compliance with the specifications were not reasonably ascertainable upon initial inspection. If the Vendor fails to promptly cure or correct the defect or replace or re-perform the Services or Deliverables, the State reserves the right to cancel the Purchase Order, contract with a different Vendor, and to invoice the original Vendor for any differential in price over the original Contract price.

10) PAYMENT TERMS: Payment terms are Net 30 days after receipt of correct invoice or acceptance of the Deliverables, whichever is later, unless a period of more than 30 days is required by the Agency. The Purchasing State Agency is responsible for all payments under the Contract. No additional charges to the Agency will be permitted based upon, or arising from, the Agency's use of a Business Procurement Card. The State may exercise any and all rights of Set Off as permitted in Chapter § 105A-1 *et seq.* of the N.C. General Statutes and applicable Administrative Rules. Upon Vendor's written request of not less than 30 days and approval by the State and Agency, the Agency may:

- a) a) Forward the Vendor's payment check(s) directly to any person or entity designated by the Vendor, or
- b) Include any person or entity designated in writing by Vendor as a joint payee on the Vendor's payment check(s), however
- c) In no event shall such approval and action obligate the State to anyone other than the Vendor and the Vendor shall remain responsible for fulfillment of all Contract obligations.

NOTE: When a Community College seeks Vendor Services, requested Vendors shall submit a Statement of Work (SOW) or Quote to the Community College for consideration. The Community College shall evaluate the submitted documents and select the Vendor that proposes the Solution which represents the best value to the Community College. All agreements shall be between the Community College and the selected Vendor. The Community College shall be the responsible party to perform the obligations (including payment for the Services) and receive the benefits under the SOW. NCCCS shall not be liable or responsible for and performance and/or payment under the individual SOWs.

11) EQUAL EMPLOYMENT OPPORTUNITY: The Vendor shall comply with all Federal and State requirements concerning fair employment and employment of the disabled and concerning the treatment of all employees without regard to discrimination by reason of race, color, religion, sex, national origin, or physical disability.

12) ADVERTISING/PRESS RELEASE: The Vendor absolutely shall not publicly disseminate any information concerning the Agreement without prior written approval from the State or its Agent. For the purpose of

this provision of the Agreement, the Agent is the Purchasing Agency Contract Administrator unless otherwise named in the solicitation documents.

- 13) LATE DELIVERY:** The Vendor shall advise the Agency contact person or office immediately upon determining that any Deliverable will not, or may not, be delivered or performed at the time or place specified. Together with such notice, the Vendor shall state the projected delivery time and date. In the event the delay projected by the Vendor is unsatisfactory, the Agency shall so advise the Vendor and may proceed to procure the particular substitute Services or other Deliverables.
- 14) ACCESS TO PERSONS AND RECORDS:** Pursuant to N.C.G.S. § 147-64.7, the Agency, the State Auditor, appropriate federal officials, and their respective authorized employees or agents are authorized to examine all books, records, and accounts of the Vendor insofar as they relate to transactions with any department, board, officer, commission, institution, or other agency of the State of North Carolina pursuant to the performance of this Contract or to costs charged to this Contract. The Vendor shall retain any such books, records, and accounts for a minimum of three (3) years after the completion of this Contract. Additional audit or reporting requirements may be required by any Agency, if in the Agency's opinion, such requirement is imposed by federal or state law or regulation.
- 15) ASSIGNMENT:** The Vendor may not assign the Agreement or its obligations hereunder except as permitted by 09 NCAC 06B.1003 and this Paragraph. The Vendor shall provide reasonable notice of not less than thirty (30) days prior to any consolidation, acquisition, or merger. Any assignee shall affirm the Agreement attorning and agreeing to the terms and conditions agreed, and that Vendor shall affirm that the assignee is fully capable of performing all obligations of Vendor under the Agreement. An assignment may be made, if at all, in writing by the Vendor, Assignee and the State setting forth the foregoing obligation of Vendor and Assignee.
- 16) INSURANCE COVERAGE:** During the term of the Agreement, the Vendor at its sole cost and expense shall provide commercial insurance of such type and with such terms and limits as may be reasonably associated with the Agreement. At a minimum, the Vendor shall provide and maintain the following coverage and limits:
- a) **Worker's Compensation** - The Vendor shall provide and maintain Worker's Compensation Insurance, as required by the laws of North Carolina, as well as employer's liability coverage with minimum limits of \$100,000.00, covering all of Vendor's employees who are engaged in any work under the Agreement. If any work is sublet, the Vendor shall require the subcontractor to provide the same coverage for any of his employees engaged in any work under the Agreement; and
 - b) **Commercial General Liability** - General Liability Coverage on a Comprehensive Broad Form on an occurrence basis in the minimum amount of \$2,000,000.00 Combined Single Limit (Defense cost shall be in excess of the limit of liability); and
 - c) **Automobile** - Automobile Liability Insurance, to include liability coverage, covering all owned, hired and non-owned vehicles, used in connection with the Agreement. The minimum combined single limit shall be \$500,000.00 bodily injury and property damage; \$500,000.00 uninsured/under insured motorist; and \$5,000.00 medical payment; and
 - d) Providing and maintaining adequate insurance coverage described herein is a material obligation of the Vendor and is of the essence of the Agreement. All such insurance shall meet all laws of the State of North Carolina. Such insurance coverage shall be obtained from companies that are authorized to provide such coverage and that are authorized by the Commissioner of Insurance to do business in North Carolina. The Vendor shall at all times comply with the terms of such insurance policies, and all requirements of the insurer under any such insurance policies, except as they may conflict with existing North Carolina laws or the Agreement. The limits of coverage under each insurance policy

maintained by the Vendor shall not be interpreted as limiting the Vendor's liability and obligations under the Agreement.

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

18) CONFIDENTIALITY: In accordance with N.C.G.S. §§ 143B-1350(e) and 143B-1375, and 09 NCAC 06B.0103 and 06B.1001, the State may maintain the confidentiality of certain types of information described in N.C.G.S. § 132-1 *et seq.* Such information may include trade secrets defined by N.C.G.S. § 66-152 and other information exempted from the Public Records Act pursuant to N.C.G.S. § 132-1.2. The Vendor may designate appropriate portions of its response as confidential, consistent with and to the extent permitted under the Statutes and Rules set forth above, by marking the top and bottom of pages containing confidential information with a legend in boldface type "**CONFIDENTIAL.**" By so marking any page, the Vendor warrants that it has formed a good faith opinion, having received such necessary or proper review by counsel and other knowledgeable advisors that the portions marked confidential meet the requirements of the Rules and Statutes set forth above. *However, under no circumstances shall price information be designated as confidential.* The State may serve as custodian of the Vendor's confidential information and not as an arbiter of claims against Vendor's assertion of confidentiality. If an action is brought pursuant to N.C.G.S. § 132-9 to compel the State to disclose information marked confidential, the Vendor agrees that it will intervene in the action through its counsel and participate in defending the State, including any public official(s) or public employee(s). The Vendor agrees that it shall hold the State and any official(s) and individual(s) harmless from any and all damages, costs, and attorneys' fees awarded against the State in the action. The State agrees to promptly notify the Vendor in writing of any action seeking to compel the disclosure of Vendor's confidential information. The State shall have the right, at its option and expense, to participate in the defense of the action through its counsel. The State shall have no liability to the Vendor with respect to the disclosure of the Vendor's confidential information ordered by a court of competent jurisdiction pursuant to N.C.G.S. § 132-9 or other applicable law.

- a) Care of Information: The Vendor agrees to use commercial best efforts to safeguard and protect any data, documents, files, and other materials received from the State or the Agency during performance of any contractual obligation from loss, destruction, or erasure. The Vendor agrees to abide by all facilities and security requirements and policies of the agency where work is to be performed. Any Vendor personnel shall abide by such facilities and security requirements and shall agree to be bound by the terms and conditions of the Agreement.
- b) The Vendor warrants that all its employees and any approved third party contractors or subcontractors are subject to a non-disclosure and confidentiality agreement enforceable in North Carolina. The Vendor will, upon request of the State, verify and produce true copies of any such agreements. Production of such agreements by the Vendor may be made subject to applicable confidentiality, non-disclosure, or privacy laws provided that the Vendor produces satisfactory evidence supporting exclusion of such agreements from disclosure under the N.C. Public Records laws in N.C.G.S. § 132-1 *et seq.* The State may, in its sole discretion, provide a non-disclosure and confidentiality agreement satisfactory to the State for the Vendor's execution. The State may exercise its rights under this subparagraph as necessary or proper, in its discretion, to comply with applicable security regulations or statutes including, but not limited to, 26 USC § 6103 and IRS Publication 1075,

(Tax Information Security Guidelines for Federal, State, and Local Agencies), HIPAA, 42 USC § 1320(d) (Health Insurance Portability and Accountability Act), any implementing regulations in the Code of Federal Regulations, and any future regulations imposed upon the N.C. Department of Information Technology or the N.C. Department of Revenue pursuant to future statutory or regulatory requirements.

- c) Non-disclosure: The Vendor agrees and specifically warrants that it, its officers, directors, principals and employees, and any subcontractors, shall hold all information received during performance of the Agreement in the strictest confidence and shall not disclose the same to any third party without the express written approval of the State.
- d) The Vendor shall protect the confidentiality of all information, data, instruments, studies, reports, records, and other materials provided to it by the Agency or maintained or created in accordance with this Agreement. No such information, data, instruments, studies, reports, records, and other materials in the possession of the Vendor shall be disclosed in any form without the prior written consent of the State Agency. The Vendor will have written policies governing access to and duplication and dissemination of all such information, data, instruments, studies, reports, records, and other materials.
- e) All project materials including software, data, and documentation created during the performance or provision of Services hereunder that are not licensed to the State or are not proprietary to the Vendor are the property of the State of North Carolina and must be kept confidential or returned to the State or destroyed. Proprietary Vendor materials shall be identified to the State by the Vendor prior to use or provision of Services hereunder and shall remain the property of the Vendor. Derivative works of any Vendor proprietary materials prepared or created during the performance of provision of Services hereunder shall be subject to a perpetual, royalty free, non-exclusive license to the State.

19) DEFAULT: In the event Services or other Deliverable furnished or performed by the Vendor during performance of any Contract term fail to conform to any material requirement(s) of the Contract specifications, notice of the failure is provided by the State and if the failure is not cured within ten (10) days or the Vendor fails to meet the requirements of Paragraph 9) herein, the State may cancel the contract. Default may be cause for debarment as provided in 09 NCAC 06B.1206. The rights and remedies of the State provided above shall not be exclusive and are in addition to any other rights and remedies provided by law or under the Contract.

- a) If the Vendor fails to deliver or provide correct Services or other Deliverables within the time required by the Agreement, the State shall provide written notice of said failure to the Vendor, and by such notice require performance assurance measures pursuant to N.C.G.S. § 143B-1340(f). The Vendor is responsible for the delays resulting from its failure to deliver or provide services or other Deliverables.
- b) Should the State fail to perform any of its obligations upon which the Vendor's performance is conditioned, the Vendor shall not be in default for any delay, cost increase or other consequences resulting from the State's failure. The Vendor will use reasonable efforts to mitigate delays, costs or expenses arising from assumptions in the Vendor's offer documents that prove erroneous or are otherwise invalid. Any deadline that is affected by any such failure in assumptions or performance by the State shall be extended by an amount of time reasonably necessary to compensate for the effect of such failure.
- c) The Vendor shall provide a plan to cure any delay or default if requested by the State. The plan shall state the nature of the delay or default, the time required for cure, any mitigating factors causing or tending to cause the delay or default, and such other information as the Vendor may deem necessary or proper to provide.

- d) If the prescribed acceptance testing stated in the Solicitation Documents or performed pursuant to Paragraph 9) of the NCDIT Terms and Conditions is not completed successfully, the State may request substitute Software, cancel the portion of the Contract that relates to the unaccepted Software, or continue the acceptance testing with or without the assistance of the Vendor. These options shall remain in effect until such time as the testing is successful or the expiration of any time specified for completion of the testing. If the testing is not completed after exercising any of the State's options, the State may cancel any portion of the contract related to the failed Software and take action to procure substitute software. If the failed software (or the substituted software) is an integral and critical part of the proper completion of the work for which the Deliverables identified in the solicitation documents or statement of work were acquired, the State may terminate the entire contract.

20) WAIVER OF DEFAULT: Waiver by either party of any default or breach by the other Party shall not be deemed a waiver of any subsequent default or breach and shall not be construed to be a modification or novation of the terms of the Agreement unless so stated in writing and signed by authorized representatives of the Agency and the Vendor, and made as an amendment to the Agreement pursuant to Paragraph 30) herein below.

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

- a) The parties may mutually terminate the Agreement by written agreement at any time.
- b) The State may terminate the Agreement, in whole or in part, pursuant to Paragraph 19), or pursuant to the Special Terms and Conditions in the Solicitation Documents, if any, or for any of the following:
 - i) Termination for Cause: In the event any goods, software, or service furnished by the Vendor during performance of any Contract term fails to conform to any material requirement of the Contract, and the failure is not cured within the specified time after providing written notice thereof to the Vendor, the State may cancel and procure the articles or Services from other sources holding the Vendor liable for any excess costs occasioned thereby, subject only to the limitations provided in Paragraphs 22) and 23) herein. The rights and remedies of the State provided above shall not be exclusive and are in addition to any other rights and remedies provided by law or under the Contract. The Vendor shall not be relieved of liability to the State for damages sustained by the State arising from the Vendor's breach of the Agreement and the State may, in its discretion, withhold any payment due as a setoff until such time as the damages are finally determined or as agreed by the parties. Voluntary or involuntary Bankruptcy or receivership by the Vendor shall be cause for termination.
 - ii) Termination For Convenience Without Cause: The State may terminate service and indefinite quantity contracts in whole or in part by giving thirty (30) days' prior notice in writing to the Vendor. The Vendor shall be entitled to sums due as compensation for Deliverables provided and Services performed in conformance with the Contract. In the event the Contract is terminated for the convenience of the State, the Agency will pay for all work performed and products delivered in conformance with the Contract up to the date of termination.
 - iii) Consistent failure to participate in problem resolution meetings, two (2) consecutive missed or rescheduled meetings, or failure to make a good faith effort to resolve problems, may result in termination of the Agreement.

22) LIMITATION OF VENDOR'S LIABILITY

- a) Where Deliverables are under the State's exclusive management and control, the Vendor shall not be liable for direct damages caused by the State's failure to fulfill any State responsibilities of assuring the proper use, management and supervision of the Deliverables and programs, audit controls, operating methods, office procedures, or for establishing all proper checkpoints necessary for the State's intended use of the Deliverables. The Vendor shall not be responsible for any damages that arise from (i) misuse or modification of the Vendor's Software by or on behalf of the State, (ii) the State's failure to use corrections or enhancements made available by the Vendor, (iii) the quality or integrity of data from other automated or manual systems with which the Vendor's Software interfaces, (iv) errors in or changes to third party software or hardware implemented by the State or a third party (including the vendors of such software or hardware) that is not a subcontractor of the Vendor or that is not supported by the Deliverables, or (vi) the operation or use of the Vendor's Software not in accordance with the operating procedures developed for the Vendor's Software or otherwise in a manner not contemplated by this Agreement.
- b) The Vendor's liability for damages to the State arising under the contract shall be limited to two (2) times the value of the Contract.
- c) The foregoing limitation of liability shall not apply to claims covered by other specific provisions including, but not limited to, Service Level Agreement or Deliverable/Product Warranties pursuant to Section II, 2) of these Terms and Conditions or to claims for injury to persons or damage to tangible personal property, gross negligence or willful or wanton conduct. This limitation of liability does not apply to contributions among joint tortfeasors under N.C.G.S. § 1B-1 *et seq.*, the receipt of court costs, or attorney's fees that might be awarded by a court in addition to damages after litigation based on the Agreement. For avoidance of doubt, the Parties agree that the Service Level Agreement and Deliverable/Product Warranty Terms in the Contract are intended to provide the sole and exclusive remedies available to the State under the Contract for the Vendor's failure to comply with the requirements stated therein.

23) VENDOR'S LIABILITY FOR INJURY TO PERSONS OR DAMAGE TO PROPERTY

- a) The Vendor shall be liable for damages arising out of personal injuries and/or damage to real or tangible personal property of the State, employees of the State, persons designated by the State for training, or person(s) other than agents or employees of the Vendor, designated by the State for any purpose, prior to, during, or subsequent to delivery, installation, acceptance, and use of the Deliverables either at the Vendor's site or at the State's place of business, provided that the injury or damage was caused by the fault or negligence of the Vendor.
- b) The Vendor agrees to indemnify, defend and hold the Agency and the State and its Officers, employees, agents and assigns harmless from any liability relating to personal injury or injury to real or personal property of any kind, accruing or resulting to any other person, firm or corporation furnishing or supplying work, Services, materials or supplies in connection with the performance of the Agreement, whether tangible or intangible, arising out of the ordinary negligence, wilful or wanton negligence, or intentional acts of the Vendor, its officers, employees, agents, assigns or subcontractors.
- c) The Vendor shall not be liable for damages arising out of or caused by an alteration or an attachment not made or installed by the Vendor.

24) TIME IS OF THE ESSENCE: Time is of the essence in the performance of the Agreement.

- 25) DATE AND TIME WARRANTY:** The Vendor warrants that any Deliverable, whether Services, hardware, firmware, middleware, custom or commercial software, or internal components, subroutines, and interface therein which performs, modifies, or affects any date and/or time data recognition function, calculation, or sequencing, will still enable the modified function to perform accurate date/time data and leap year calculations. This warranty shall survive termination or expiration of the Contract.
- 26) INDEPENDENT CONTRACTORS:** The Vendor and its employees, officers and executives, and subcontractors, if any, shall be independent contractors and not employees or agents of the State. The Agreement shall not operate as a joint venture, partnership, trust, agency, or any other similar business relationship.
- 27) TRANSPORTATION:** Transportation of any tangible Deliverables shall be FOB Destination unless otherwise specified in the solicitation document or purchase order. Freight, handling, hazardous material charges, and distribution and installation charges shall be included in the total price of each item. Any additional charges shall not be honored for payment unless authorized in writing by the Purchasing State Agency. In cases where parties other than the Vendor ship materials against this order, the shipper must be instructed to show the purchase order number on all packages and shipping manifests to ensure proper identification and payment of invoices. A complete packing list must accompany each shipment.
- 28) NOTICES:** Any notices required under the Agreement should be delivered to the Contract Administrator for each party. Unless otherwise specified in the Solicitation Documents, any notices shall be delivered in writing by U.S. Mail, Commercial Courier or by hand.
- 29) TITLES AND HEADINGS:** Titles and Headings in the Agreement are used for convenience only and do not define, limit, or proscribe the language of terms identified by such Titles and Headings.
- 30) AMENDMENT:** The Agreement may not be amended orally or by performance. Any amendment must be made in written form and signed by duly authorized representatives of the State and Vendor in conformance with Paragraph 36) herein.
- 31) TAXES:** The State of North Carolina is exempt from Federal excise taxes and no payment will be made for any personal property taxes levied on the Vendor or for any taxes levied on employee wages. Agencies of the State may have additional exemptions or exclusions for federal or state taxes. Evidence of such additional exemptions or exclusions may be provided to Vendor by Agencies, as applicable, during the term of the Agreement. Applicable State or local sales taxes shall be invoiced as a separate item.

32) GOVERNING LAWS, JURISDICTION, AND VENUE

- a) The Agreement is made under and shall be governed and construed in accordance with the laws of the State of North Carolina and applicable Administrative Rules. The place of the Agreement or purchase order, its situs and forum, shall be Wake County, North Carolina where all matters, whether sounding in Contract or in tort, relating to its validity, construction, interpretation, and enforcement shall be determined. The Vendor agrees and submits, solely for matters relating to the Agreement, to the jurisdiction of the courts of the State of North Carolina and stipulates that Wake County shall be the proper venue for all matters.
- b) Except to the extent the provisions of the Contract are clearly inconsistent therewith, the applicable provisions of the Uniform Commercial Code as modified and adopted in North Carolina shall govern the Agreement. To the extent the Contract entails both the supply of "goods" and "Services," such shall be deemed "goods" within the meaning of the Uniform Commercial Code except when deeming such Services as "goods" would result in a clearly unreasonable interpretation.

- 33) FORCE MAJEURE:** Neither party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations as a result of events beyond its reasonable control, including without limitation, fire, power failures, any act of war, hostile foreign action, nuclear explosion, riot, strikes or failures or refusals to perform under subcontracts, civil insurrection, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.
- 34) COMPLIANCE WITH LAWS:** The Vendor shall comply with all laws, ordinances, codes, rules, regulations, and licensing requirements that are applicable to the conduct of its business, including those of federal, state, and local agencies having jurisdiction and/or authority.
- 35) SEVERABILITY:** In the event that a court of competent jurisdiction holds that a provision or requirement of the Agreement violates any applicable law, each such provision or requirement shall be enforced only to the extent it is not in violation of law or is not otherwise unenforceable and all other provisions and requirements of the Agreement shall remain in full force and effect. All promises, requirements, terms, conditions, provisions, representations, guarantees, and warranties contained herein shall survive the expiration or termination date unless specifically provided otherwise herein, or unless superseded by applicable federal or State statute, including statutes of repose or limitation.
- 36) CHANGES:** The Agreement and subsequent purchase order(s) is awarded subject to the provision of the specified Services and the shipment or provision of other Deliverables as specified herein. Any changes made to the Agreement or purchase order proposed by the Vendor are hereby rejected unless accepted in writing by the Agency or State Award Authority. The State shall not be responsible for Services or other Deliverables delivered without a purchase order from the Agency or State Award Authority.
- 37) FEDERAL INTELLECTUAL PROPERTY BANKRUPTCY PROTECTION ACT:** The Parties agree that the Agency shall be entitled to all rights and benefits of the Federal Intellectual Property Bankruptcy Protection Act, Public Law 100-506, codified at 11 U.S.C. § 365(n), and any amendments thereto.
- 38) ELECTRONIC PROCUREMENT:** (Applies to all contracts that include E-Procurement and are identified as such in the body of the solicitation document): Purchasing shall be conducted through the Statewide E-Procurement Services. The State's third party agent shall serve as the Supplier Manager for this E-Procurement Services. The Vendor shall register for the Statewide E-Procurement Services within two (2) business days of notification of award in order to receive an electronic purchase order resulting from award of the Agreement.
- a) Reserved.
 - b) Reserved.
 - c) The Supplier Manager will capture the order from the State approved user, including the shipping and payment information, and submit the order in accordance with the E-Procurement Services. Subsequently, the Supplier Manager will send those orders to the appropriate Vendor on State Contract. The State or State approved user, not the Supplier Manager, shall be responsible for the solicitation, offers received, evaluation of offers received, award of Contract, and the payment for goods delivered.
 - d) The Vendor agrees at all times to maintain the confidentiality of its username and password for the Statewide E-Procurement Services. If the Vendor is a corporation, partnership, or other legal entity, the Vendor may authorize its employees to use its password. The Vendor shall be responsible for all activity and all charges for such employees. The Vendor agrees not to permit a third party to use the Statewide E-Procurement Services through its account. If there is a breach of security through the Vendor's account, the Vendor shall immediately change its password and notify the Supplier Manager

of the security breach by e-mail. The Vendor shall cooperate with the state and the Supplier Manager to mitigate and correct any security breach.

39) PATENT, COPYRIGHT, AND TRADE SECRET PROTECTION

- a) The Vendor has created, acquired or otherwise has rights in, and may, in connection with the performance of Services for the State, employ, provide, create, acquire or otherwise obtain rights in various concepts, ideas, methods, methodologies, procedures, processes, know-how, techniques, models, templates and general-purpose consulting and software tools, utilities and routines (collectively, the "Vendor technology"). To the extent that any Vendor technology is contained in any of the Services or Deliverables including any derivative works, the Vendor hereby grants the State a royalty-free, fully paid, worldwide, perpetual, non-exclusive license to use such Vendor technology in connection with the Services or Deliverables for the State's purposes.
- b) The Vendor shall not acquire any right, title, and interest in and to the copyrights for goods, any and all software, technical information, specifications, drawings, records, documentation, data, or derivative works thereof, or other work products provided by the State to the Vendor. The State hereby grants the Vendor a royalty-free, fully paid, worldwide, perpetual, non-exclusive license for the Vendor's internal use to non-confidential deliverables first originated and prepared by the Vendor for delivery to the State.
- c) The Vendor, at its own expense, shall defend any action brought against the State to the extent that such action is based upon a claim that the Services or other Deliverables supplied by the Vendor, or the operation of such pursuant to a current version of Vendor-supplied software, infringes a patent, or copyright or violates a trade secret in the United States. The Vendor shall pay those costs and damages finally awarded against the State in any such action; damages shall be limited as provided in N.C.G.S. § 143B-1350(h1). Such defense and payment shall be conditioned on the following:
 - i. That the Vendor shall be notified within a reasonable time in writing by the State of any such claim; and,
 - ii. That the Vendor shall have the sole control of the defense of any action on such claim and all negotiations for its settlement or compromise provided, however, that the State shall have the option to participate in such action at its own expense.
- d) Should any Services or other Deliverables supplied by the Vendor, or the operation thereof become, or in the Vendor's opinion are likely to become, the subject of a claim of infringement of a patent, copyright, or a trade secret in the United States, the State shall permit the Vendor, at its option and expense, either to procure for the State the right to continue using the Services or Deliverables, or to replace or modify the same to become non-infringing and continue to meet procurement specifications in all material respects. If neither of these options can reasonably be taken, or if the use of such Services or Deliverables by the State shall be prevented by injunction, the Vendor agrees to take back any goods/hardware or software and refund any sums the State has paid the Vendor less any reasonable amount for use or damage and make every reasonable effort to assist the State in procuring substitute Services or Deliverables. If, in the sole opinion of the State, the return of such infringing Services or Deliverables makes the retention of other Services or Deliverables acquired from the Vendor under the agreement impractical, the State shall then have the option of terminating the contract, or applicable portions thereof, without penalty or termination charge. The Vendor agrees to take back Services or Deliverables and refund any sums the State has paid the Vendor less any reasonable amount for use or damage.
- e) The Vendor will not be required to defend or indemnify the State if any claim by a third party against the State for infringement or misappropriation (i) results from the State's alteration of any Vendor-

branded Service or Deliverable, or (ii) results from the continued use of the good(s) or services and other Services or Deliverables after receiving notice they infringe a trade secret of a third party.

- f) Nothing stated herein, however, shall affect the Vendor's ownership in or rights to its preexisting intellectual property and proprietary rights.

40) UNANTICIPATED TASKS: In the event that additional work must be performed that was wholly unanticipated, and that is not specified in the Agreement, but which in the opinion of both parties is necessary to the successful accomplishment of the contracted scope of work, the procedures outlined in this article will be followed. For each item of unanticipated work, the Vendor shall prepare a work authorization in accordance with the State's practices and procedures.

- a) It is understood and agreed by both parties that all of the terms and conditions of the Agreement shall remain in force with the inclusion of any work authorization. A work authorization shall not constitute a contract separate from the Agreement, nor in any manner amend or supersede any of the other terms or provisions of the Agreement or any amendment hereto.
- b) Each work authorization shall comprise a detailed statement of the purpose, objective, or goals to be undertaken by the Vendor, the job classification or approximate skill level or sets of the personnel required, an identification of all significant material then known to be developed by the Vendor's personnel as a Deliverable, an identification of all significant materials to be delivered by the State to the Vendor's personnel, an estimated time schedule for the provision of the Services by the Vendor, completion criteria for the work to be performed, the name or identification of Vendor's personnel to be assigned, the Vendor's estimated work hours required to accomplish the purpose, objective or goals, the Vendor's billing rates and units billed, and the Vendor's total estimated cost of the work authorization.
- c) All work authorizations must be submitted for review and approval by the procurement office that approved the original Contract and procurement. This submission and approval must be completed prior to execution of any work authorization documentation or performance thereunder. All work authorizations must be written and signed by the Vendor and the State prior to beginning work.
- d) The State has the right to require the Vendor to stop or suspend performance under the "Stop Work" provision of the North Carolina Department of Information Technology Terms and Conditions.
- e) The Vendor shall not expend Personnel resources at any cost to the State in excess of the estimated work hours unless this procedure is followed: If, during performance of the work, the Vendor determines that a work authorization to be performed under the Agreement cannot be accomplished within the estimated work hours, the Vendor will be required to complete the work authorization in full. Upon receipt of such notification, the State may:
 - i. Authorize the Vendor to expend the estimated additional work hours or service in excess of the original estimate necessary to accomplish the work authorization, or
 - ii. Terminate the work authorization, or
 - iii. Alter the scope of the work authorization in order to define tasks that can be accomplished within the remaining estimated work hours.
 - iv. The State will notify the Vendor in writing of its election within seven (7) calendar days after receipt of the Vendor's notification. If notice of the election is given to proceed, the Vendor may expend the estimated additional work hours or Services.

41) STOP WORK ORDER: The State may issue a written Stop Work Order to the Vendor for cause at any time requiring the Vendor to suspend or stop all, or any part, of the performance due under the Agreement for a period up to ninety (90) days after the Stop Work Order is delivered to the Vendor. The ninety (90) day period may be extended for any further period for which the parties may agree.

- a) The Stop Work Order shall be specifically identified as such and shall indicate that it is issued under this term. Upon receipt of the Stop Work Order, the Vendor shall 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 suspension or stoppage. Within a period of ninety (90) days after a Stop Work Order is delivered to the Vendor, or within any extension of that period to which the parties agree, the State shall either:
 - i) Cancel the Stop Work Order, or
 - ii) Terminate the work covered by the Stop Work Order as provided for in the termination for default or the termination for convenience clause of the Agreement.
- b) If a Stop Work Order issued under this clause is canceled or the period of the Stop Work Order or any extension thereof expires, the Vendor shall resume work. The State shall make an equitable adjustment in the delivery schedule, the Agreement price, or both, and the Agreement shall be modified, in writing, accordingly, if:
 - i) The Stop Work Order results in an increase in the time required for, or in the Vendor's cost properly allocable to the performance of any part of the Agreement, and
 - ii) The Vendor asserts its right to an equitable adjustment within thirty (30) 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 an offer submitted at any time before final payment under the Agreement.
- c) If a Stop Work Order is not canceled and the work covered by the Stop Work Order is terminated in accordance with the provision entitled Termination for Convenience of the State, the State shall allow reasonable direct costs resulting from the Stop Work Order in arriving at the termination settlement.
- d) The State shall not be liable to the Vendor for loss of profits because of a Stop Work Order issued under this term.

42) TRANSITION ASSISTANCE: If the Agreement is not renewed at the end of the term, or is canceled prior to its expiration, for any reason, the Vendor must provide for up to six (6) months after the expiration or cancellation of the Agreement, all reasonable transition assistance requested by the State, to allow for the expired or canceled portion of the Services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such Services to the State or its designees. Such transition assistance will be deemed by the parties to be governed by the terms and conditions of the Agreement, (notwithstanding this expiration or cancellation) except for those Contract terms or conditions that do not reasonably apply to such transition assistance. The State shall pay the Vendor for any resources utilized in performing such transition assistance at the most current rates provided by the Agreement for Contract performance. If the State cancels the Agreement for cause, then the State will be entitled to offset the cost of paying the Vendor for the additional resources the Vendor utilized in providing transition assistance with any damages the State may have otherwise accrued as a result of said cancellation.

Section 2. General Terms and Conditions Applicable to Online Services

1) DEFINITIONS

- a) "Data" includes information, formulae, algorithms, or other content that the State, the State's employees, agents, and end users upload, create or modify using the Services pursuant to this Agreement. Data also includes user identification information and metadata which may contain Data or from which the State's Data may be ascertainable.
- b) "Deliverable/Product Warranties" shall mean and include the warranties provided for products or deliverables licensed to the State as included in these Terms and Conditions unless superseded by the Vendor's Warranties pursuant to the Vendor's License or Support Agreements.
- c) "Services" shall mean the duties and tasks undertaken by the Vendor to fulfill the requirements and specifications of this solicitation including, without limitation, providing web browser access by authorized users to certain Vendor online software applications identified herein, and to related services, such as Vendor hosted Computer storage, databases, Support, documentation, and other functionalities, all as a Software as a Service ("SaaS") solution.
- d) "State" shall mean the State of North Carolina, the NC Department of Information Technology as an agency, or the agency identified in this solicitation as the Purchasing Agency and Award Authority.
- e) "Support" includes provision of ongoing updates and maintenance for the Vendor online software applications, and as may be specified herein, consulting, training, and other support Services as provided by the Vendor for SaaS tenants receiving similar SaaS Services.

2) ACCESS AND USE OF ONLINE SERVICES

- a) The Vendor grants the State a personal non-transferable and non-exclusive right to use and access, all Services and other functionalities or services provided, furnished, or accessible under this Agreement. The State may utilize the Services as agreed herein and in accordance with any mutually agreed Acceptable Use Policy. The State is authorized to access State Data and any Vendor-provided data as specified herein and to transmit revisions, updates, deletions, enhancements, or modifications to the State Data. This shall include the right of the State to, and access to, Support without the Vendor requiring a separate maintenance or support agreement. Subject to an agreed limitation on the number of users, the State may use the Services with any computer, computer system, server, or desktop workstation owned or utilized by the State or other authorized users. User access to the Services shall be routinely provided by the Vendor and may be subject to a more specific Service Level Agreement (SLA) agreed to in writing by the parties. The State shall notify the Vendor of any unauthorized use of any password or account, or any other known or suspected breach of security access. The State also agrees to refrain from taking any steps, such as reverse engineering, reverse assembly, or reverse compilation to derive a source code equivalent to the Services or any portion thereof. Use of the Services to perform services for commercial third parties (so-called "service bureau" uses) is not permitted, but the State may utilize the Services to perform its governmental functions. If the Services fees are based upon the number of Users and/or hosted instances, the number of Users/hosted instances available may be adjusted at any time (subject to the restrictions on the maximum number of Users specified in the Furnish and Deliver Table herein above) by mutual agreement and State Procurement approval. All Services and information designated as "confidential" or "proprietary" shall be kept in confidence except as may be required by the North Carolina Public Records Act: N.C.G.S. § 132-1 *et seq.*

- b) The State's right to access the Services and its associated services neither transfers, vests, nor infers any title or other ownership right in any intellectual property rights of the Vendor or any third party, nor does this right of access transfer, vest, or infer any title or other ownership right in any source code associated with the Services unless otherwise agreed to by the parties. The provisions of this paragraph will not be construed as a sale of any ownership rights in the Services. Any Services or technical and business information owned by the Vendor or its suppliers or licensors made accessible or furnished to the State shall be and remain the property of the Vendor or such other party, respectively. The Vendor has a limited, non-exclusive license to access and use the State Data as provided to the Vendor but solely for performing its obligations under this Agreement and in confidence as provided herein.
- c) The Vendor or its suppliers shall, at a minimum, and except as otherwise agreed, provide telephone assistance to the State for all Services procured hereunder during the State's normal business hours (unless different hours are specified herein). The Vendor warrants that its Support and customer service and assistance will be performed in accordance with generally accepted industry standards. The State has the right to receive the benefit of upgrades, updates, maintenance releases or other enhancements or modifications made generally available to the Vendor's SaaS tenants for similar Services. The Vendor's right to a new use agreement for new version releases of the Services shall not be abridged by the foregoing. The Vendor may, at no additional charge, modify the Services to improve operation and reliability or to meet legal requirements.
- d) The Vendor will provide to the State the same Services for updating, maintaining and continuing optimal performance for the Services as provided to other similarly situated users or tenants of the Services, but minimally as provided for and specified herein. Unless otherwise agreed in writing, Support will also be provided for any other (e.g., third party) software provided by the Vendor in connection with the Vendor's Solution herein. The technical and professional activities required for establishing, managing, and maintaining the Services environment are the responsibilities of the Vendor. Any training specified herein will be provided by the Vendor to certain State users for the fees or costs as set forth herein or in an SLA.
- e) Services provided pursuant to this Solicitation may, in some circumstances, be accompanied by a user clickwrap agreement. The term clickwrap agreement refers to an agreement that requires the end user to manifest his or her assent to terms and conditions by clicking an "ok" or "agree" button on a dialog box or pop-up window as part of the process of access to the Services. All terms and conditions of any clickwrap agreement provided with any Services solicited herein shall have no force and effect and shall be non-binding on the State, its employees, agents, and other authorized users of the Services.
- f) The Vendor may utilize partners and/or subcontractors to assist in the provision of the Services, so long as the State Data is not removed from the United States unless the terms of storage of the State Data are clearly disclosed, the security provisions referenced herein can still be complied with, and such removal is done with the prior express written permission of the State. The Vendor shall identify all of its strategic business partners related to Services provided under this contract including, but not limited to, all subcontractors or other entities or individuals who may be a party to a joint venture or similar agreement with the Vendor, or who will be involved in any application development and/or operations.
- g) The Vendor warrants that all Services will be performed with professional care and skill, in a workmanlike manner and in accordance with the Services documentation and this Agreement.
- h) An SLA or other agreed writing shall contain provisions for scalability of Services and any variation in fees or costs as a result of any such scaling.

- i) Professional services provided by the Vendor at the request by the State in writing in addition to agreed Services shall be at the then-existing Vendor hourly rates when provided, unless otherwise agreed in writing by the parties.

3) WARRANTY OF NON-INFRINGEMENT; REMEDIES

- a) The Vendor warrants to the best of its knowledge that:
 - i) The Services do not infringe any intellectual property rights of any third party; and
 - ii) There are no actual or threatened actions arising from, or alleged under, any intellectual property rights of any third party.
- b) Should any Services supplied by the Vendor become the subject of a claim of infringement of a patent, copyright, Trademark, or a trade secret in the United States, the Vendor shall, at its option and expense, either procure for the State the right to continue using the Services or replace or modify the same to become non-infringing. If neither of these options can reasonably be taken in the Vendor's judgment, or if further use shall be prevented by injunction, the Vendor agrees to cease provision of any affected Services and refund any sums the State has paid the Vendor and make every reasonable effort to assist the State in procuring substitute Services. If, in the sole opinion of the State, the cessation of use by the State of any such Services due to infringement issues makes the retention of other items acquired from the Vendor under this Agreement impractical, the State shall then have the option of terminating the Agreement, or applicable portions thereof, without penalty or termination charge and the Vendor agrees to refund any sums the State paid for unused Services.
- c) The Vendor, at its own expense, shall defend any action brought against the State to the extent that such action is based upon a claim that the Services supplied by the Vendor, their use or operation, infringes on a patent, copyright, trademark or violates a trade secret in the United States. The Vendor shall pay those costs and damages finally awarded or agreed in a settlement against the State in any such action. Such defense and payment shall be conditioned on the following:
 - i) That the Vendor shall be notified within a reasonable time in writing by the State of any such claim; and
 - ii) That the Vendor shall have the sole control of the defense of any action on such claim and all negotiations for its settlement or compromise provided, however, that the State shall have the option to participate in such action at its own expense.
- d) The Vendor will not be required to defend or indemnify the State if any claim by a third party against the State for infringement or misappropriation results from the State's material alteration of any Vendor-branded Services, or from the continued use of the good(s) or Services after receiving notice they infringe on a trade secret of a third party.

4) ACCESS AVAILABILITY; REMEDIES

- a) The Vendor warrants that the Services will be in good working order and operating in conformance with the Vendor's standard specifications and functions as well as any other specifications agreed to by the parties in writing, and shall remain accessible 24/7, with the exception of scheduled outages for maintenance and of other service level provisions agreed in writing, e.g., in an SLA. The Vendor does not warrant that the operation of the Services will be completely uninterrupted

or error free, or that the Services functions will meet all the State's requirements unless developed as Customized Services.

- b) The State shall notify the Vendor if the Services are not in good working order or inaccessible during the term of the Agreement. The Vendor shall, at its option, either repair, replace or reperform any Services reported or discovered as not being in good working order and accessible during the applicable contract term without cost to the State. If the Services' monthly availability averages less than 99.9% (excluding agreed-upon maintenance downtime), the State shall be entitled to receive automatic credits as indicated immediately below, or the State may use other contractual remedies such as recovery of damages, as set forth herein in writing, e.g., in Specifications, Special Terms or in an SLA, and as such other contractual damages are limited by N.C.G.S. § 143B-1350(h1) and the Limitation of Liability paragraph herein. If not otherwise provided, the automatic remedies for non-availability of the Subscription Services during a month are:
1. A 10% service credit applied against future fees if Vendor does not reach 99.9% availability.
 2. A 25% service credit applied against future fees if Vendor does not reach 99% availability.
 3. A 50% service credit applied against future fees or eligibility for early termination of the Agreement if Vendor does not reach 95% availability.

If, however, Services meet the 99.9% service availability level for a month but are not available for a consecutive 120 minutes during that month, the Vendor shall grant to the State a credit of a pro-rated one-day of the monthly subscription Services fee against future Services charges. Such credit(s) shall be applied to the bill immediately following the month in which the Vendor failed to meet the performance requirements or other service levels, and the credit will continue to be deducted from the monthly invoice for each prior month that the Vendor fails to meet the support response times for the remainder of the duration of the Agreement. If Services monthly availability averages less than 99.9% (excluding agreed-upon maintenance downtime), for three (3) or more months in a rolling twelve (12)-month period, the State may also terminate the contract for material breach in accordance with the Default provisions hereinbelow.

- c) Support Services. If the Vendor fails to meet Support Service response times as set forth herein or in an SLA for a period of three (3) consecutive months, a ten percent (10%) service credit will be deducted from the invoice in the month immediately following the third month, and the ten percent (10%) service credit will continue to be deducted from the monthly invoice for each month that the Vendor fails to meet the support response times for the remainder of the duration of the Agreement.

5) EXCLUSIONS

- a) Except as stated above in Paragraphs 3 and 4, the Vendor and its parent, subsidiaries, and affiliates, subcontractors, and suppliers make no warranties, express or implied, as to the Services.
- b) The warranties provided in Paragraphs 3 and 4 above do not cover repair for damages, malfunctions or service failures substantially caused by:
- i) Actions of non-Vendor personnel;
 - ii) Failure to follow the Vendor's written instructions relating to the Services provided to the State;
 - iii) Force Majeure conditions set forth hereinbelow; or
 - iv) The State's sole misuse of, or its own inability to use, the Services.

- 6) **PERFORMANCE REVIEW AND ACCOUNTABILITY:** N.C.G.S. § 143B-1340(f) and 09 NCAC 06B.1207 require provisions for performance review and accountability in State IT contracts. For this procurement, these shall include the holding a retainage of ten percent (10%) of the contract value and withholding the final payment contingent on final acceptance by the State as provided in 09 NCAC 06B.1207(3) and (4), unless waived or otherwise agreed, in writing. The Services herein will be provided consistent with and under these Services performance review and accountability guarantees.
- 7) **LIMITATION OF LIABILITY: Limitation of Vendor's Contract Damages Liability** – Reserved.
- 8) **VENDOR'S LIABILITY FOR INJURY TO PERSONS OR DAMAGE TO PROPERTY** – Reserved.
- 9) **MODIFICATION OF SERVICES:** If the Vendor modifies or replaces the Services provided to the State and other tenants, and if the State has paid all applicable Subscription Fees, the State shall be entitled to receive, at no additional charge, access to a newer version of the Services that supports substantially the same functionality as the then accessible version of the Services. Newer versions of the Services containing substantially increased functionality may be made available to the State for an additional subscription fee. In the event of either of such modifications, the then accessible version of the Services shall remain fully available to the State until the newer version is provided to the State and accepted. If a modification materially affects the functionality of the Services as used by the State, the State, at its sole option, may defer such modification.

10) TRANSITION PERIOD

- a) For ninety (90) days, either prior to the expiration date of this Agreement, or upon notice of termination of this Agreement, the Vendor shall assist the State, upon written request, in extracting and/or transitioning all Data in the format determined by the State ("Transition Period").
- b) The Transition Period may be modified in an SLA or as agreed upon in writing by the parties in a contract amendment.
- c) During the Transition Period, Services access shall continue to be made available to the State without alteration.
- d) The Vendor agrees to compensate the State for damages or losses the State incurs as a result of Vendor's failure to comply with this Transition Period section in accordance with the Limitation of Liability provisions above.
- e) Upon termination, and unless otherwise stated in an SLA, and after providing the State Data to the State as indicated above in this section with acknowledged receipt by the State in writing, the Vendor shall permanently destroy or render inaccessible any portion of the State Data in the Vendor's and/or subcontractor's possession or control following the completion and expiration of all obligations in this section. Within thirty (30) days, the Vendor shall issue a written statement to the State confirming the destruction or inaccessibility of the State Data.
- f) The State, at its option, may purchase additional Transition Services as may be agreed upon in a supplemental agreement.

11) TRANSPORTATION: Reserved.

12) TRAVEL EXPENSES: Reserved.

13) PROHIBITION AGAINST CONTINGENT FEES AND GRATUITIES: Reserved.

14) AVAILABILITY OF FUNDS: Reserved

15) PAYMENT TERMS

- a) Payment may be made by the State in advance of or in anticipation of subscription Services to be actually performed under the Agreement or upon proper invoice for other Services rendered. Payment terms are Net 30 days after receipt of correct invoice. Initial payments are to be made after final acceptance of the Services. Payments are subject to any retainage requirements herein. The Purchasing State Agency is responsible for all payments under the Agreement. Subscription fees for term years after the initial year shall be as quoted under State options herein but shall not increase more than five percent (5%) over the prior term except as the parties may have agreed to an alternate formula to determine such increases in writing. No additional charges to the State will be permitted based upon, or arising from, the State's use of a Business Procurement Card. The State may exercise any and all rights of Set Off as permitted in Chapter § 105A-1 *et seq.* of the N.C. General Statutes and applicable Administrative Rules.
- b) Upon the Vendor's written request of not less than thirty (30) days and approval by the State, the State may:
 - i) Forward the Vendor's payment check(s) directly to any person or entity designated by the Vendor or
 - ii) Include any person or entity designated in writing by Vendor as a joint payee on the Vendor's payment check(s), however,
 - iii) In no event shall such approval and action obligate the State to anyone other than the Vendor and the Vendor shall remain responsible for fulfillment of all Agreement obligations.
- c) For any third party software licensed by the Vendor or its subcontractors for use by the State, a copy of the software license including terms acceptable to the State, an assignment acceptable to the State, and documentation of license fees paid by the Vendor must be provided to the State before any related license fees or costs may be billed to the State.
- d) An undisputed invoice is an invoice for which the State and/or the Purchasing State Agency has not disputed in writing within thirty (30) days from the invoice date unless the agency requests more time for review of the invoice. Upon the Vendor's receipt of a disputed invoice notice, the Vendor will work to correct the applicable invoice error provided that such dispute notice shall not relieve the State or the applicable Purchasing State Agency from its payment obligations for the undisputed items on the invoice or for any disputed items that are ultimately corrected. The Purchasing State Agency is not required to pay the Vendor for any Software or Services provided without a written purchase order from the appropriate Purchasing State Agency. In addition, all such Services provided must meet all terms, conditions, and specifications of this Agreement and purchase order and be accepted as satisfactory by the Purchasing State Agency before payment will be issued.
- e) The Purchasing State Agency shall release any amounts held as retainages for Services completed within a reasonable period after the end of the period(s) or term(s) for which the retainage was withheld. Payment retainage shall apply to all invoiced items, excepting only such items as the Vendor obtains from Third Parties and for which costs are chargeable to the State by agreement of the Parties. The Purchasing State Agency, in its sole discretion, may release retainages withheld from any invoice upon acceptance of the Services identified or associated with such invoices.

16) ACCEPTANCE CRITERIA

- a) Initial acceptance testing is required for all Vendor supplied Services before going live unless provided otherwise in the solicitation documents or a Statement of Work. The State may define such processes and procedures as may be necessary or proper, in its opinion and discretion, to ensure compliance with the State's specifications and the Vendor's technical representations. Acceptance of Services may be controlled by additional written terms as agreed by the parties.
- b) After initial acceptance of Services, the State shall have the obligation to notify the Vendor in writing and within ten (10) days following provision of any Deliverable described in the contract if it is not acceptable. The notice shall specify in reasonable detail the reason(s) a Deliverable is unacceptable. Acceptance by the State of any Vendor re-performance or correction shall not be unreasonably withheld but may be conditioned or delayed as required for confirmation by the State that the issue(s) in the notice have been successfully corrected.

17) CONFIDENTIALITY: Reserved.

18) SECURITY OF STATE DATA

- a) All materials, including software, Data, information, and documentation provided by the State to the Vendor (State Data) during the performance or provision of Services hereunder are the property of the State of North Carolina and must be kept secure and returned to the State. The Vendor will protect State Data in its hands from unauthorized disclosure, loss, damage, destruction by natural event, or other eventuality. Proprietary Vendor materials shall be identified to the State by the Vendor prior to use or provision of Services hereunder and shall remain the property of the Vendor. Derivative works of any Vendor proprietary materials prepared or created during the performance of provision of Services hereunder shall be provided to the State as part of the Services. The Vendor shall not access State User accounts, or State Data, except (i) during data center operations; (ii) in response to service or technical issues; (iii) as required by the express terms of this contract; or (iv) at the State's written request. The Vendor shall protect the confidentiality of all information, Data, instruments, studies, reports, records, and other materials provided to it by the State or maintained or created in accordance with this Agreement. No such information, Data, instruments, studies, reports, records, and other materials in the possession of Vendor shall be disclosed in any form without the prior written agreement with the State. The Vendor will have written policies governing access to and duplication and dissemination of all such information, Data, instruments, studies, reports, records, and other materials.
- b) The Vendor shall not store or transfer non-public State data outside of the United States. This includes backup data and Disaster Recovery locations. The Service Provider will permit its personnel and contractors to access State of North Carolina data remotely only as required to provide technical support.
- c) Protection of personal privacy and sensitive data. The Vendor acknowledges its responsibility for securing any restricted or highly restricted data, as defined by the Statewide Data Classification and Handling Policy (<https://it.nc.gov/document/statewide-data-classification-and-handling-policy>) that is collected by the State and stored in any Vendor site or other Vendor housing systems including, but not limited to, computer systems, networks, servers, or databases, maintained by the Vendor or its agents or subcontractors in connection with the provision of the Services. The Vendor warrants, at its sole cost and expense, that it shall implement processes and maintain the security of data classified as restricted or highly restricted; provide reasonable care and efforts to detect fraudulent activity involving the data; and promptly notify the State of any breaches of security within twenty-four (24) hours of confirmation as required by N.C.G.S. § 143B-1379.

- d) The Vendor will provide and maintain secure backup of the State Data. The Vendor shall implement and maintain secure passwords for its online system providing the Services, as well as all appropriate administrative, physical, technical and procedural safeguards at all times during the term of this Agreement to secure such Data from Data Breach, protect the Data and the Services from loss, corruption, unauthorized disclosure, and the introduction of viruses, disabling devices, malware and other forms of malicious or inadvertent acts that can disrupt the State's access to its Data and the Services. The Vendor will allow periodic back-up of State Data by the State to the State's infrastructure as the State requires or as may be provided by law.
- e) The Vendor shall certify to the State:
- i) The sufficiency of its security standards, tools, technologies and procedures in providing Services under this Agreement;
 - ii) That the system used to provide the Subscription Services under this Contract has and will maintain a valid third party security certification not to exceed one (1) year and is consistent with the data classification level and security controls appropriate for low or moderate information system(s) per the National Institute of Standards and Technology NIST 800-53 revision 4. The State reserves the right to independently evaluate, audit, and verify such requirements.
 - iii) That the Services will comply with the following:
 - (1) Any DIT security policy regarding Cloud Computing, and the DIT Statewide Information Security Policy Manual; to include encryption requirements as defined below:
 - (a) The Vendor shall encrypt all non-public data in transit regardless of the transit mechanism.
 - (b) For engagements where the Vendor stores sensitive personally identifiable or otherwise confidential information, this data shall be encrypted at rest. Examples are social security number, date of birth, driver's license number, financial data, federal/state tax information, and hashed passwords. The Vendor's encryption shall be consistent with validated cryptography standards as specified in National Institute of Standards and Technology FIPS140-2, Security Requirements. The key location and other key management details will be discussed and negotiated by both parties. When the Service Provider cannot offer encryption at rest, it must maintain, for the duration of the contract, cyber security liability insurance coverage for any loss resulting from a data breach. Additionally, where encryption of data at rest is not possible, the Vendor must describe existing security measures that provide a similar level of protection.
 - (2) Privacy provisions of the Federal Privacy Act of 1974;
 - (3) The North Carolina Identity Theft Protection Act, N.C.G.S. Chapter 75, Article 2A (e.g., N.C.G.S. §§ 75-65 and -66);
 - (4) The North Carolina Public Records Act, N.C.G.S. Chapter 132;
 - (5) Applicable Federal, State and industry standards and guidelines including, but not limited to, relevant security provisions of the Payment Card Industry (PCI) Data Security Standard (PCIDSS) including the PCIDSS Cloud Computing Guidelines, Criminal Justice Information, The Family Educational Rights and Privacy Act (FERPA), Health

Insurance Portability and Accountability Act (HIPAA); and

- (6) Any requirements implemented by the State under N.C.G.S. §§ 143B-1376 and -1377.
- f) Security Breach. “Security Breach” under the NC Identity Theft Protection Act (N.C.G.S. § 75-60 *et seq.*) means (1) any circumstance pursuant to which applicable Law requires notification of such breach to be given to affected parties or other activity in response to such circumstance (e.g., N.C.G.S. § 75-65); or (2) any actual, attempted, suspected, threatened, or reasonably foreseeable circumstance that compromises, or could reasonably be expected to compromise, either Physical Security or Systems Security (as such terms are defined below) in a fashion that either does or could reasonably be expected to permit unauthorized Processing (as defined below), use, disclosure or acquisition of or access to any the State Data or state confidential information. “Physical Security” means physical security at any site or other location housing systems maintained by the Vendor or its agents or subcontractors in connection with the Services. “Systems Security” means security of computer, electronic or telecommunications systems of any variety (including data bases, hardware, software, storage, switching and interconnection devices and mechanisms), and networks of which such systems are a part or communicate with, used directly or indirectly by the Vendor or its agents or subcontractors in connection with the Services. “Processing” means any operation or set of operations performed upon the State Data or State confidential information, whether by automatic means, such as creating, collecting, procuring, obtaining, accessing, recording, organizing, storing, adapting, altering, retrieving, consulting, using, disclosing, or destroying.
- g) Breach Notification. In the event the Vendor becomes aware of any Security Breach due to Vendor acts or omissions other than in accordance with the terms of the Agreement, the Vendor shall, at its own expense, (1) immediately notify the State’s Agreement Administrator of such Security Breach and perform a root cause analysis thereon; (2) investigate such Security Breach; (3) provide a remediation plan, acceptable to the State, to address the Security Breach and prevent any further incidents; (4) conduct a forensic investigation to determine what systems, data and information have been affected by such event; and (5) cooperate with the State, and any law enforcement or regulatory officials, credit reporting companies, and credit card associations investigating such Security Breach. The State shall make the final decision on notifying the State’s persons, entities, employees, service providers and/or the public of such Security Breach, and the implementation of the remediation plan. If a notification to a customer is required under any Law or pursuant to any of the State’s privacy or security policies, then notifications to all persons and entities who are affected by the same event (as reasonably determined by the State) shall be considered legally required.
- h) Notification Related Costs. The Vendor shall reimburse the State for all Notification Related Costs incurred by the State arising out of or in connection with any such Security Breach due to Vendor acts or omissions other than in accordance with the terms of the Agreement resulting in a requirement for legally required notifications. “Notification Related Costs” shall include the State’s internal and external costs associated with addressing and responding to the Security Breach including, but not limited to, (1) preparation and mailing or other transmission of legally required notifications; (2) preparation and mailing or other transmission of such other communications to customers, agents or others as the State deems reasonably appropriate; (3) establishment of a call center or other communications procedures in response to such Security Breach (e.g., customer service FAQs, talking points and training); (4) public relations and other similar crisis management services; (5) legal and accounting fees and expenses associated with the State’s investigation of and response to such event; and (6) costs for credit reporting services that are associated with legally required notifications or are advisable, in the State’s opinion, under the circumstances. If the Vendor becomes aware of any Security Breach which is not due to Vendor acts or omissions other than in accordance with the terms of the Agreement, the Vendor shall

immediately notify the State of such Security Breach, and the parties shall reasonably cooperate regarding which of the foregoing or other activities may be appropriate under the circumstances, including any applicable Charges for the same.

- i) The Vendor shall allow the State reasonable access to Services security logs, latency statistics, and other related Services security data that affect this Agreement and the State's Data, at no cost to the State.
- j) In the course of normal operations, it may become necessary for the Vendor to copy or move Data to another storage destination on its online system, and delete the Data found in the original location. In any such event, the Vendor shall preserve and maintain the content and integrity of the Data, except by prior written notice to, and prior written approval by, the State.
- k) Remote access to Data from outside the continental United States including, without limitation, remote access to Data by authorized Services support staff in identified support centers, is prohibited unless approved in advance by the State Chief Information Officer or the Using Agency.
- l) In the event of temporary loss of access to Services, the Vendor shall promptly restore continuity of Services, restore Data in accordance with this Agreement and as may be set forth in an SLA, restore accessibility of Data and the Services to meet the performance requirements stated herein or in an SLA. As a result, Service Level remedies will become available to the State as provided herein, in the SLA or other agreed and relevant documents. Failure to promptly remedy any such temporary loss of access may result in the State exercising its options for assessing damages under this Agreement.
- m) In the event of disaster or catastrophic failure that results in significant State Data loss or extended loss of access to Data or Services, the Vendor shall notify the State by the fastest means available and in writing, with additional notification provided to the State Chief Information Officer or designee of the contracting agency. The Vendor shall provide such notification within twenty-four (24) hours after the Vendor reasonably believes there has been such a disaster or catastrophic failure. In the notification, the Vendor shall inform the State of:
 - 1) The scale and quantity of the State Data loss;
 - 2) What the Vendor has done or will do to recover the State Data from backups and mitigate any deleterious effect of the State Data and Services loss; and
 - 3) What corrective action the Vendor has taken or will take to prevent future State Data and Services loss.
 - 4) If the Vendor fails to respond immediately and remedy the failure, the State may exercise its options for assessing damages or other remedies under this Agreement.

The Vendor shall investigate the disaster or catastrophic failure and shall share the report of the investigation with the State. The State and/or its authorized agents shall have the right to lead (if required by law) or participate in the investigation. The Vendor shall cooperate fully with the State, its agents and law enforcement.

- n) In the event of termination of this contract, cessation of business by the Vendor or other event preventing the Vendor from continuing to provide the Services, the Vendor shall not withhold the State Data or any other State confidential information or refuse, for any reason, to promptly return to the State the State Data and any other State confidential information (including copies thereof) if requested to do so on such media as reasonably requested by the State, even if the State is then or is alleged to be in breach of the Agreement. As a part of the Vendor's obligation to provide

the State Data pursuant to this Paragraph 18) n), the Vendor will also provide the State any data maps, documentation, software, or other materials necessary, including, without limitation, handwritten notes, materials, working papers or documentation, for the State to use, translate, interpret, extract, and convert the State Data.

- o) Secure Data Disposal. When requested by the State, the Vendor shall destroy all requested data in all of its forms (e.g., disk, CD/DVD, backup tape, and paper). Data shall be permanently deleted and shall not be recoverable, in accordance with National Institute of Standards and Technology (NIST) approved methods, and certificates of destruction shall be provided to the State.

19) ACCESS TO PERSONS AND RECORDS: Pursuant to N.C.G.S. § 147-64.7, the State, the State Auditor, appropriate federal officials, and their respective authorized employees or agents are authorized to examine all books, records, and accounts of the Vendor insofar as they relate to transactions with any department, board, officer, commission, institution, or other agency of the State of North Carolina pursuant to the performance of this Agreement or to costs charged to this Agreement. The Vendor shall retain any such books, records, and accounts for a minimum of three (3) years after the completion of this Agreement. Additional audit or reporting requirements may be required by any State, if in the State's opinion, such requirement is imposed by federal or state law or regulation. The Vendor shall allow the State to audit conformance including contract terms, system security and data centers as appropriate. The State may perform this audit or contract with a third party at its discretion at the State's expense. Such reviews shall be conducted with at least thirty (30) days' advance written notice and shall not unreasonably interfere with the Service Provider's business.

20) ASSIGNMENT: Reserved.

21) NOTICES: Reserved.

22) TITLES AND HEADINGS: Reserved.

23) AMENDMENT: Reserved.

24) TAXES: Reserved.

25) GOVERNING LAWS, JURISDICTION, AND VENUE: Reserved.

26) DEFAULT: Reserved.

27) FORCE MAJEURE: Reserved.

28) COMPLIANCE WITH LAWS: Reserved.

29) TERMINATION: Reserved.

30) DISPUTE RESOLUTION: Reserved.

31) SEVERABILITY: Reserved.

32) FEDERAL INTELLECTUAL PROPERTY BANKRUPTCY PROTECTION ACT: Reserved.

33) ELECTRONIC PROCUREMENT: Reserved.

Section 3: Terms and Conditions Applicable to Personnel and Personal Services

- 1) **VENDOR'S REPRESENTATION:** The Vendor warrants that qualified personnel will provide Services in a professional manner. "Professional manner" means that the personnel performing the Services will possess the skill and competence consistent with the prevailing business standards in the information technology industry. The Vendor agrees that it will not enter any agreement with a third party that might abridge any rights of the State under the Agreement. The Vendor will serve as the prime Vendor under the Agreement. Should the State approve any subcontractor(s), the Vendor shall be legally responsible for the performance and payment of the subcontractor(s). Names of any third party Vendors or subcontractors of the Vendor may appear for purposes of convenience in Contract documents and shall not limit the Vendor's obligations hereunder. Such third party subcontractors, if approved, may serve as subcontractors to the Vendor. The Vendor will retain executive representation for functional and technical expertise as needed in order to incorporate any work by third party subcontractor(s).
 - a) Intellectual Property. The Vendor represents that it has the right to provide the Services and other Deliverables without violating or infringing any law, rule, regulation, copyright, patent, trade secret or other proprietary right of any third party. The Vendor also represents that its Services and other Deliverables are not the subject of any actual or threatened actions arising from, or alleged under, any intellectual property rights of any third party.
 - b) Inherent Services. If any Services or other Deliverables, functions, or responsibilities not specifically described in the Agreement are required for the Vendor's proper performance, provision and delivery of the Services and other Deliverables pursuant to the Agreement, or are an inherent part of or necessary sub-task included within the Services, they will be deemed to be implied by and included within the scope of the Contract to the same extent and in the same manner as if specifically described in the Contract.
 - c) The Vendor warrants that it has the financial capacity to perform and to continue to perform its obligations under the Contract; that the Vendor has no constructive or actual knowledge of an actual or potential legal proceeding being brought against the Vendor that could materially adversely affect performance of the Agreement; and that entering into the Agreement is not prohibited by any Contract, or order by any court of competent jurisdiction.
- 2) **SERVICES PROVIDED BY VENDOR:** The Vendor shall provide the State with implementation Services as specified in a Statement of Work ("SOW") executed by the parties. This Agreement in combination with each SOW individually comprises a separate and independent contractual obligation from any other SOW. A breach by the Vendor under one SOW will not be considered a breach under any other SOW. The Services intended hereunder are related to the State's implementation and/or use of one or more Software Deliverables licensed hereunder or in a separate software license agreement between the parties ("License Agreement").
- 3) **PERSONNEL:** The Vendor shall not substitute key personnel assigned to the performance of the Agreement without prior written approval by the Agency Contract Administrator. The individuals designated as key personnel for purposes of the Agreement are those specified in the Vendor's offer. Any desired substitution shall be noticed to the Agency's Contract Administrator in writing accompanied by the names and references of the Vendor's recommended substitute personnel. The Agency will approve or disapprove the requested substitution in a timely manner. The Agency may, in its sole discretion, terminate the Services of any person providing Services under the Agreement. Upon such termination, the Agency may request acceptable substitute personnel or terminate the Contract Services provided by such personnel.
 - a) Unless otherwise expressly provided in the Contract, the Vendor will furnish all of its own necessary management, supervision, labor, facilities, furniture, computer and telecommunications equipment,

software, supplies and materials necessary for the Vendor to provide and deliver the Services and other Deliverables.

- b) Vendor personnel shall perform their duties on the premises of the State, during the State's regular work days and normal work hours, except as may be specifically agreed otherwise, established in the specification, or statement of work.
- c) The Agreement shall not prevent the Vendor or any of its personnel supplied under the Agreement from performing similar Services elsewhere or restrict Vendor from using the personnel provided to the State provided that such use does not conflict with:
 - i) The terms, specifications or any amendments to the Agreement;
 - ii) Any procurement law, regulation or policy; or
 - iii) Any non-disclosure agreement, or term thereof, by and between the State and Vendor or Vendor's personnel.
- d) Unless otherwise provided by the Agency, the Vendor shall furnish all necessary personnel, Services, and otherwise perform all acts, duties and responsibilities necessary or incidental to the accomplishment of the tasks specified in the Agreement. The Vendor shall be legally and financially responsible for its personnel including, but not limited to, any deductions for social security and other withholding taxes required by state or federal law. The Vendor shall be solely responsible for acquiring any equipment, furniture, and office space not furnished by the State necessary for the Vendor to comply with the Agreement. Vendor personnel shall comply with any applicable State facilities or other security rules and regulations.

4) PERSONAL SERVICES: The State shall have and retain the right to obtain personal Services of any individuals providing Services under the Agreement. This right may be exercised at the State's discretion in the event of any transfer of the person providing personal Services, termination, default, merger, acquisition, bankruptcy or receivership of the Vendor to ensure continuity of Services provided under the Agreement provided, however, that the Agency shall not retain or solicit any Vendor employee for purposes other than completion of personal Services due as all or part of any performance due under the Agreement.

- a) Vendor personnel shall perform any duties on the premises of the State during the State's regular work days and normal work hours, except as may be specifically agreed otherwise, established in the specification, or statement of work.
- b) The State has and reserves the right to disapprove the continuing assignment of Vendor personnel provided by the Vendor under the Agreement. If this right is exercised and the Vendor is not able to replace the disapproved personnel as required by the State, the Parties agree to employ best commercial efforts to informally resolve such failure equitably by adjustment of other duties, set-off, or modification to other terms that may be affected by Vendor's failure.
- c) The Vendor will make every reasonable effort consistent with prevailing business practices to honor the specific requests of the State regarding assignment of the Vendor's employees. The Vendor reserves the sole right to determine the assignment of its employees. If one of Vendor's employees is unable to perform due to illness, resignation, or other factors beyond the Vendor's control, the Vendor will provide suitable personnel at no additional cost to the State.
- d) The Agreement shall not prevent the Vendor or any of its personnel supplied under the Agreement from performing similar Services elsewhere or restrict the Vendor from using the personnel provided to the State provided that such use does not conflict with:
 - i) The terms, specifications or any amendments to the Agreement;

- ii) Any procurement law, regulation or policy, or
- iii) Any non-disclosure agreement, or term thereof, by and between the State and the Vendor or the Vendor's personnel

This content is from the eCFR and is authoritative but unofficial.

Title 29 – Labor

Subtitle B – Regulations Relating to Labor

Chapter XVII – Occupational Safety and Health Administration, Department of Labor

Part 1910 – Occupational Safety and Health Standards

Subpart G – Occupational Health and Environmental Control

Authority: 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 50017), 5-2007 (72 FR 31159), 4-2010 (75 FR 55355), or 1-2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

Authority: 33 U.S.C. 941; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12-71 (36 FR 8754); 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), 5-2007 (72 FR 31160), 4-2010 (75 FR 55355), 1-2012 (77 FR 3912), or 08-2020 (85 FR 58393); 29 CFR part 1911; and 5 U.S.C. 553, as applicable.

Source: 39 FR 23502, June 27, 1974, unless otherwise noted.

§ 1910.95 Occupational noise exposure.

- (a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:

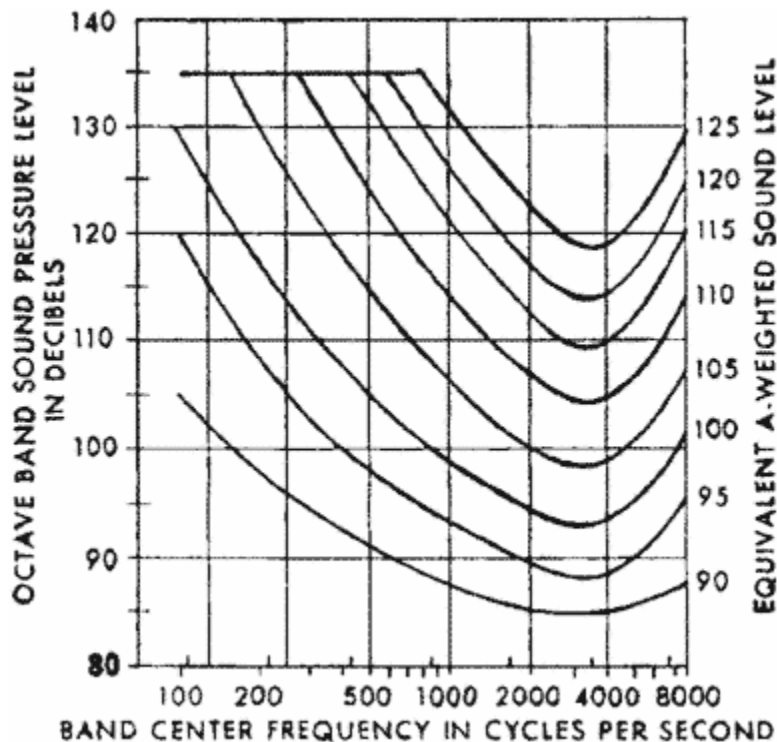


FIGURE G-9

Equivalent sound level contours. Octave band sound pressure levels may be converted to the equivalent A-weighted sound level by plotting them on this graph and noting the A-weighted sound level corresponding to the point of highest penetration into the sound level contours. This equivalent A-weighted sound level, which may differ from the actual A-weighted sound level of the noise, is used to determine exposure limits from Table 1.G-16.

(b)

- (1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.
- (2) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

TABLE G-16—PERMISSIBLE NOISE EXPOSURES¹

Duration per day, hours	Sound level dBA slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

¹ When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: $C_1/T_1 + C_2/T_2 + \dots + C_n/T_n$ exceeds unity, then, the mixed exposure should be considered to exceed the limit value. C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level.

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

(c) **Hearing conservation program.**

- (1) The employer shall administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (o) of this section, whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent. For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with appendix A and Table G-16a, and without regard to any attenuation provided by the use of personal protective equipment.
- (2) For purposes of paragraphs (c) through (n) of this section, an 8-hour time-weighted average of 85 decibels or a dose of fifty percent shall also be referred to as the action level.

(d) **Monitoring.**

- (1) When information indicates that any employee's exposure may equal or exceed an 8-hour time-weighted average of 85 decibels, the employer shall develop and implement a monitoring program.

- (i) The sampling strategy shall be designed to identify employees for inclusion in the hearing conservation program and to enable the proper selection of hearing protectors.
- (ii) Where circumstances such as high worker mobility, significant variations in sound level, or a significant component of impulse noise make area monitoring generally inappropriate, the employer shall use representative personal sampling to comply with the monitoring requirements of this paragraph unless the employer can show that area sampling produces equivalent results.

(2)

- (i) All continuous, intermittent and impulsive sound levels from 80 decibels to 130 decibels shall be integrated into the noise measurements.
- (ii) Instruments used to measure employee noise exposure shall be calibrated to ensure measurement accuracy.

(3) Monitoring shall be repeated whenever a change in production, process, equipment or controls increases noise exposures to the extent that:

- (i) Additional employees may be exposed at or above the action level; or
- (ii) The attenuation provided by hearing protectors being used by employees may be rendered inadequate to meet the requirements of paragraph (j) of this section.

(e) **Employee notification.** The employer shall notify each employee exposed at or above an 8-hour time-weighted average of 85 decibels of the results of the monitoring.

(f) **Observation of monitoring.** The employer shall provide affected employees or their representatives with an opportunity to observe any noise measurements conducted pursuant to this section.

(g) **Audiometric testing program.**

- (1) The employer shall establish and maintain an audiometric testing program as provided in this paragraph by making audiometric testing available to all employees whose exposures equal or exceed an 8-hour time-weighted average of 85 decibels.
- (2) The program shall be provided at no cost to employees.
- (3) Audiometric tests shall be performed by a licensed or certified audiologist, otolaryngologist, or other physician, or by a technician who is certified by the Council of Accreditation in Occupational Hearing Conservation, or who has satisfactorily demonstrated competence in administering audiometric examinations, obtaining valid audiograms, and properly using, maintaining and checking calibration and proper functioning of the audiometers being used. A technician who operates microprocessor audiometers does not need to be certified. A technician who performs audiometric tests must be responsible to an audiologist, otolaryngologist or physician.
- (4) All audiograms obtained pursuant to this section shall meet the requirements of appendix C: *Audiometric Measuring Instruments*.
- (5) **Baseline audiogram.**
 - (i) Within 6 months of an employee's first exposure at or above the action level, the employer shall establish a valid baseline audiogram against which subsequent audiograms can be compared.

- (ii) **Mobile test van exception.** Where mobile test vans are used to meet the audiometric testing obligation, the employer shall obtain a valid baseline audiogram within 1 year of an employee's first exposure at or above the action level. Where baseline audiograms are obtained more than 6 months after the employee's first exposure at or above the action level, employees shall wearing hearing protectors for any period exceeding six months after first exposure until the baseline audiogram is obtained.
 - (iii) Testing to establish a baseline audiogram shall be preceded by at least 14 hours without exposure to workplace noise. Hearing protectors may be used as a substitute for the requirement that baseline audiograms be preceded by 14 hours without exposure to workplace noise.
 - (iv) The employer shall notify employees of the need to avoid high levels of non-occupational noise exposure during the 14-hour period immediately preceding the audiometric examination.
- (6) **Annual audiogram.** At least annually after obtaining the baseline audiogram, the employer shall obtain a new audiogram for each employee exposed at or above an 8-hour time-weighted average of 85 decibels.
- (7) **Evaluation of audiogram.**
- (i) Each employee's annual audiogram shall be compared to that employee's baseline audiogram to determine if the audiogram is valid and if a standard threshold shift as defined in paragraph (g)(10) of this section has occurred. This comparison may be done by a technician.
 - (ii) If the annual audiogram shows that an employee has suffered a standard threshold shift, the employer may obtain a retest within 30 days and consider the results of the retest as the annual audiogram.
 - (iii) The audiologist, otolaryngologist, or physician shall review problem audiograms and shall determine whether there is a need for further evaluation. The employer shall provide to the person performing this evaluation the following information:
 - (A) A copy of the requirements for hearing conservation as set forth in paragraphs (c) through (n) of this section;
 - (B) The baseline audiogram and most recent audiogram of the employee to be evaluated;
 - (C) Measurements of background sound pressure levels in the audiometric test room as required in appendix D: Audiometric Test Rooms.
 - (D) Records of audiometer calibrations required by paragraph (h)(5) of this section.
- (8) **Follow-up procedures.**
- (i) If a comparison of the annual audiogram to the baseline audiogram indicates a standard threshold shift as defined in paragraph (g)(10) of this section has occurred, the employee shall be informed of this fact in writing, within 21 days of the determination.
 - (ii) Unless a physician determines that the standard threshold shift is not work related or aggravated by occupational noise exposure, the employer shall ensure that the following steps are taken when a standard threshold shift occurs:
 - (A) Employees not using hearing protectors shall be fitted with hearing protectors, trained in their use and care, and required to use them.

- (B) Employees already using hearing protectors shall be refitted and retrained in the use of hearing protectors and provided with hearing protectors offering greater attenuation if necessary.
 - (C) The employee shall be referred for a clinical audiological evaluation or an otological examination, as appropriate, if additional testing is necessary or if the employer suspects that a medical pathology of the ear is caused or aggravated by the wearing of hearing protectors.
 - (D) The employee is informed of the need for an otological examination if a medical pathology of the ear that is unrelated to the use of hearing protectors is suspected.
- (iii) If subsequent audiometric testing of an employee whose exposure to noise is less than an 8-hour TWA of 90 decibels indicates that a standard threshold shift is not persistent, the employer:
- (A) Shall inform the employee of the new audiometric interpretation; and
 - (B) May discontinue the required use of hearing protectors for that employee.
- (9) **Revised baseline.** An annual audiogram may be substituted for the baseline audiogram when, in the judgment of the audiologist, otolaryngologist or physician who is evaluating the audiogram:
- (i) The standard threshold shift revealed by the audiogram is persistent; or
 - (ii) The hearing threshold shown in the annual audiogram indicates significant improvement over the baseline audiogram.
- (10) **Standard threshold shift.**
- (i) As used in this section, a standard threshold shift is a change in hearing threshold relative to the baseline audiogram of an average of 10 dB or more at 2000, 3000, and 4000 Hz in either ear.
 - (ii) In determining whether a standard threshold shift has occurred, allowance may be made for the contribution of aging (presbycusis) to the change in hearing level by correcting the annual audiogram according to the procedure described in appendix F: *Calculation and Application of Age Correction to Audiograms*.
- (h) **Audiometric test requirements.**
- (1) Audiometric tests shall be pure tone, air conduction, hearing threshold examinations, with test frequencies including as a minimum 500, 1000, 2000, 3000, 4000, and 6000 Hz. Tests at each frequency shall be taken separately for each ear.
 - (2) Audiometric tests shall be conducted with audiometers (including microprocessor audiometers) that meet the specifications of, and are maintained and used in accordance with, American National Standard Specification for Audiometers, S3.6-1969, which is incorporated by reference as specified in § 1910.6.
 - (3) Pulsed-tone and self-recording audiometers, if used, shall meet the requirements specified in appendix C: *Audiometric Measuring Instruments*.
 - (4) Audiometric examinations shall be administered in a room meeting the requirements listed in appendix D: *Audiometric Test Rooms*.

(5) **Audiometer calibration.**

- (i) The functional operation of the audiometer shall be checked before each day's use by testing a person with known, stable hearing thresholds, and by listening to the audiometer's output to make sure that the output is free from distorted or unwanted sounds. Deviations of 10 decibels or greater require an acoustic calibration.
- (ii) Audiometer calibration shall be checked acoustically at least annually in accordance with appendix E: *Acoustic Calibration of Audiometers*. Test frequencies below 500 Hz and above 6000 Hz may be omitted from this check. Deviations of 15 decibels or greater require an exhaustive calibration.
- (iii) An exhaustive calibration shall be performed at least every two years in accordance with sections 4.1.2; 4.1.3.; 4.1.4.3; 4.2; 4.4.1; 4.4.2; 4.4.3; and 4.5 of the American National Standard Specification for Audiometers, S3.6-1969. Test frequencies below 500 Hz and above 6000 Hz may be omitted from this calibration.

(i) **Hearing protectors.**

- (1) Employers shall make hearing protectors available to all employees exposed to an 8-hour time-weighted average of 85 decibels or greater at no cost to the employees. Hearing protectors shall be replaced as necessary.
- (2) Employers shall ensure that hearing protectors are worn:
 - (i) By an employee who is required by paragraph (b)(1) of this section to wear personal protective equipment; and
 - (ii) By any employee who is exposed to an 8-hour time-weighted average of 85 decibels or greater, and who:
 - (A) Has not yet had a baseline audiogram established pursuant to paragraph (g)(5)(ii); or
 - (B) Has experienced a standard threshold shift.
- (3) Employees shall be given the opportunity to select their hearing protectors from a variety of suitable hearing protectors provided by the employer.
- (4) The employer shall provide training in the use and care of all hearing protectors provided to employees.
- (5) The employer shall ensure proper initial fitting and supervise the correct use of all hearing protectors.

(j) **Hearing protector attenuation.**

- (1) The employer shall evaluate hearing protector attenuation for the specific noise environments in which the protector will be used. The employer shall use one of the evaluation methods described in appendix B: *Methods for Estimating the Adequacy of Hearing Protection Attenuation*.
- (2) Hearing protectors must attenuate employee exposure at least to an 8-hour time-weighted average of 90 decibels as required by paragraph (b) of this section.
- (3) For employees who have experienced a standard threshold shift, hearing protectors must attenuate employee exposure to an 8-hour time-weighted average of 85 decibels or below.

- (4) The adequacy of hearing protector attenuation shall be re-evaluated whenever employee noise exposures increase to the extent that the hearing protectors provided may no longer provide adequate attenuation. The employer shall provide more effective hearing protectors where necessary.

(k) **Training program.**

- (1) The employer shall train each employee who is exposed to noise at or above an 8-hour time weighted average of 85 decibels in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.
- (2) The training program shall be repeated annually for each employee included in the hearing conservation program. Information provided in the training program shall be updated to be consistent with changes in protective equipment and work processes.
- (3) The employer shall ensure that each employee is informed of the following:
 - (i) The effects of noise on hearing;
 - (ii) The purpose of hearing protectors, the advantages, disadvantages, and attenuation of various types, and instructions on selection, fitting, use, and care; and
 - (iii) The purpose of audiometric testing, and an explanation of the test procedures.

(l) **Access to information and training materials.**

- (1) The employer shall make available to affected employees or their representatives copies of this standard and shall also post a copy in the workplace.
- (2) The employer shall provide to affected employees any informational materials pertaining to the standard that are supplied to the employer by the Assistant Secretary.
- (3) The employer shall provide, upon request, all materials related to the employer's training and education program pertaining to this standard to the Assistant Secretary and the Director.

(m) **Recordkeeping –**

- (1) **Exposure measurements.** The employer shall maintain an accurate record of all employee exposure measurements required by paragraph (d) of this section.
- (2) **Audiometric tests.**
 - (i) The employer shall retain all employee audiometric test records obtained pursuant to paragraph (g) of this section:
 - (ii) This record shall include:
 - (A) Name and job classification of the employee;
 - (B) Date of the audiogram;
 - (C) The examiner's name;
 - (D) Date of the last acoustic or exhaustive calibration of the audiometer; and
 - (E) Employee's most recent noise exposure assessment.

- (F) The employer shall maintain accurate records of the measurements of the background sound pressure levels in audiometric test rooms.
- (3) **Record retention.** The employer shall retain records required in this paragraph (m) for at least the following periods.
- (i) Noise exposure measurement records shall be retained for two years.
- (ii) Audiometric test records shall be retained for the duration of the affected employee's employment.
- (4) **Access to records.** All records required by this section shall be provided upon request to employees, former employees, representatives designated by the individual employee, and the Assistant Secretary. The provisions of 29 CFR 1910.1020 (a)-(e) and (g)-(i) apply to access to records under this section.
- (5) **Transfer of records.** If the employer ceases to do business, the employer shall transfer to the successor employer all records required to be maintained by this section, and the successor employer shall retain them for the remainder of the period prescribed in paragraph (m)(3) of this section.
- (n) **Appendices.**
- (1) Appendices A, B, C, D, and E to this section are incorporated as part of this section and the contents of these appendices are mandatory.
- (2) Appendices F and G to this section are informational and are not intended to create any additional obligations not otherwise imposed or to detract from any existing obligations.
- (o) **Exemptions.** Paragraphs (c) through (n) of this section shall not apply to employers engaged in oil and gas well drilling and servicing operations.

Appendix A to § 1910.95—Noise Exposure Computation

This appendix is Mandatory

I. Computation of Employee Noise Exposure

(1) Noise dose is computed using Table G-16a as follows:

(i) When the sound level, L , is constant over the entire work shift, the noise dose, D , in percent, is given by: $D = 100 C/T$ where C is the total length of the work day, in hours, and T is the reference duration corresponding to the measured sound level, L , as given in Table G-16a or by the formula shown as a footnote to that table.

(ii) When the workshift noise exposure is composed of two or more periods of noise at different levels, the total noise dose over the work day is given by:

$$D = 100(C_1 / T_1 + C_2 / T_2 + C_n / T_n),$$

where C_n indicates the total time of exposure at a specific noise level, and T_n indicates the reference duration for that level as given by Table G-16a.

(2) The eight-hour time-weighted average sound level (TWA), in decibels, may be computed from the dose, in percent, by means of the formula: $TWA = 16.61 \log_{10} (D/100) + 90$. For an eight-hour workshift with the noise level constant over the entire shift, the TWA is equal to the measured sound level.

(3) A table relating dose and TWA is given in Section II.

TABLE G-16A

A-weighted sound level, L (decibel)	Reference duration, T (hour)
80	32
81	27.9
82	24.3
83	21.1
84	18.4
85	16
86	13.9
87	12.1
88	10.6
89	9.2
90	8
91	7.0
92	6.1
93	5.3
94	4.6
95	4
96	3.5
97	3.0
98	2.6
99	2.3
100	2
101	1.7
102	1.5
103	1.3
104	1.1
105	1
106	0.87
107	0.76
108	0.66
109	0.57
110	0.5

A-weighted sound level, L (decibel)	Reference duration, T (hour)
111	0.44
112	0.38
113	0.33
114	0.29
115	0.25
116	0.22
117	0.19
118	0.16
119	0.14
120	0.125
121	0.11
122	0.095
123	0.082
124	0.072
125	0.063
126	0.054
127	0.047
128	0.041
129	0.036
130	0.031

In the above table the reference duration, T, is computed by

$$T = \frac{8}{2^{(L-90)/5}}$$

where L is the measured A-weighted sound level.

II. Conversion Between “Dose” and “8-Hour Time-Weighted Average” Sound Level

Compliance with paragraphs (c)-(r) of this regulation is determined by the amount of exposure to noise in the workplace. The amount of such exposure is usually measured with an audiodosimeter which gives a readout in terms of “dose.” In order to better understand the requirements of the amendment, dosimeter readings can be converted to an “8-hour time-weighted average sound level.” (TWA).

In order to convert the reading of a dosimeter into TWA, see Table A-1, below. This table applies to dosimeters that are set by the manufacturer to calculate dose or percent exposure according to the relationships in Table G-16a. So, for example, a dose of 91 percent over an eight hour day results in a TWA of 89.3 dB, and, a dose of 50 percent corresponds to a TWA of 85 dB.

If the dose as read on the dosimeter is less than or greater than the values found in Table A-1, the TWA may be calculated by using the formula: $TWA = 16.61 \log_{10} (D/100) + 90$ where TWA = 8-hour time-weighted average sound level and D = accumulated dose in percent exposure.

**TABLE A-1—CONVERSION FROM “PERCENT NOISE EXPOSURE” OR “DOSE” TO
“8-HOUR TIME-WEIGHTED AVERAGE SOUND LEVEL” (TWA)**

Dose or percent noise exposure	TWA
10	73.4
15	76.3
20	78.4
25	80.0
30	81.3
35	82.4
40	83.4
45	84.2
50	85.0
55	85.7
60	86.3
65	86.9
70	87.4
75	87.9
80	88.4
81	88.5
82	88.6
83	88.7
84	88.7
85	88.8
86	88.9
87	89.0
88	89.1
89	89.2
90	89.2
91	89.3
92	89.4
93	89.5
94	89.6
95	89.6
96	89.7
97	89.8

	Dose or percent noise exposure	TWA
98		89.9
99		89.9
100		90.0
101		90.1
102		90.1
103		90.2
104		90.3
105		90.4
106		90.4
107		90.5
108		90.6
109		90.6
110		90.7
111		90.8
112		90.8
113		90.9
114		90.9
115		91.1
116		91.1
117		91.1
118		91.2
119		91.3
120		91.3
125		91.6
130		91.9
135		92.2
140		92.4
145		92.7
150		92.9
155		93.2
160		93.4
165		93.6
170		93.8
175		94.0
180		94.2
185		94.4
190		94.6
195		94.8
200		95.0

	Dose or percent noise exposure	TWA
210		95.4
220		95.7
230		96.0
240		96.3
250		96.6
260		96.9
270		97.2
280		97.4
290		97.7
300		97.9
310		98.2
320		98.4
330		98.6
340		98.8
350		99.0
360		99.2
370		99.4
380		99.6
390		99.8
400		100.0
410		100.2
420		100.4
430		100.5
440		100.7
450		100.8
460		101.0
470		101.2
480		101.3
490		101.5
500		101.6
510		101.8
520		101.9
530		102.0
540		102.2
550		102.3
560		102.4
570		102.6
580		102.7
590		102.8

	Dose or percent noise exposure	TWA
600		102.9
610		103.0
620		103.2
630		103.3
640		103.4
650		103.5
660		103.6
670		103.7
680		103.8
690		103.9
700		104.0
710		104.1
720		104.2
730		104.3
740		104.4
750		104.5
760		104.6
770		104.7
780		104.8
790		104.9
800		105.0
810		105.1
820		105.2
830		105.3
840		105.4
850		105.4
860		105.5
870		105.6
880		105.7
890		105.8
900		105.8
910		105.9
920		106.0
930		106.1
940		106.2
950		106.2
960		106.3
970		106.4
980		106.5

Dose or percent noise exposure	TWA
990	106.5
999	106.6

Appendix B to § 1910.95—Methods for Estimating the Adequacy of Hearing Protector Attenuation

This appendix is Mandatory

For employees who have experienced a significant threshold shift, hearing protector attenuation must be sufficient to reduce employee exposure to a TWA of 85 dB. Employers must select one of the following methods by which to estimate the adequacy of hearing protector attenuation.

The most convenient method is the Noise Reduction Rating (NRR) developed by the Environmental Protection Agency (EPA). According to EPA regulation, the NRR must be shown on the hearing protector package. The NRR is then related to an individual worker's noise environment in order to assess the adequacy of the attenuation of a given hearing protector. This appendix describes four methods of using the NRR to determine whether a particular hearing protector provides adequate protection within a given exposure environment. Selection among the four procedures is dependent upon the employer's noise measuring instruments.

Instead of using the NRR, employers may evaluate the adequacy of hearing protector attenuation by using one of the three methods developed by the National Institute for Occupational Safety and Health (NIOSH), which are described in the "List of Personal Hearing Protectors and Attenuation Data," HEW Publication No. 76-120, 1975, pages 21-37. These methods are known as NIOSH methods #1B1, #1B2 and #1B3. The NRR described below is a simplification of NIOSH method #1B2. The most complex method is NIOSH method #1B1, which is probably the most accurate method since it uses the largest amount of spectral information from the individual employee's noise environment. As in the case of the NRR method described below, if one of the NIOSH methods is used, the selected method must be applied to an individual's noise environment to assess the adequacy of the attenuation. Employers should be careful to take a sufficient number of measurements in order to achieve a representative sample for each time segment.

Note: The employer must remember that calculated attenuation values reflect realistic values only to the extent that the protectors are properly fitted and worn.

When using the NRR to assess hearing protector adequacy, one of the following methods must be used:

(i) When using a dosimeter that is capable of C-weighted measurements:

(A) Obtain the employee's C-weighted dose for the entire workshift, and convert to TWA (see appendix A, II).

(B) Subtract the NRR from the C-weighted TWA to obtain the estimated A-weighted TWA under the ear protector.

(ii) When using a dosimeter that is not capable of C-weighted measurements, the following method may be used:

(A) Convert the A-weighted dose to TWA (see appendix A).

(B) Subtract 7 dB from the NRR.

(C) Subtract the remainder from the A-weighted TWA to obtain the estimated A-weighted TWA under the ear protector.

(iii) When using a sound level meter set to the A-weighting network:

(A) Obtain the employee's A-weighted TWA.

(B) Subtract 7 dB from the NRR, and subtract the remainder from the A-weighted TWA to obtain the estimated A-weighted TWA under the ear protector.

(iv) When using a sound level meter set on the C-weighting network:

(A) Obtain a representative sample of the C-weighted sound levels in the employee's environment.

(B) Subtract the NRR from the C-weighted average sound level to obtain the estimated A-weighted TWA under the ear protector.

(v) When using area monitoring procedures and a sound level meter set to the A-weighting network.

(A) Obtain a representative sound level for the area in question.

(B) Subtract 7 dB from the NRR and subtract the remainder from the A-weighted sound level for that area.

(vi) When using area monitoring procedures and a sound level meter set to the C-weighting network:

(A) Obtain a representative sound level for the area in question.

(B) Subtract the NRR from the C-weighted sound level for that area.

Appendix C to § 1910.95—Audiometric Measuring Instruments

This appendix is Mandatory

1. In the event that pulsed-tone audiometers are used, they shall have a tone on-time of at least 200 milliseconds.

2. Self-recording audiometers shall comply with the following requirements:

(A) The chart upon which the audiogram is traced shall have lines at positions corresponding to all multiples of 10 dB hearing level within the intensity range spanned by the audiometer. The lines shall be equally spaced and shall be separated by at least $\frac{1}{4}$ inch. Additional increments are optional. The audiogram pen tracings shall not exceed 2 dB in width.

(B) It shall be possible to set the stylus manually at the 10-dB increment lines for calibration purposes.

(C) The slewing rate for the audiometer attenuator shall not be more than 6 dB/sec except that an initial slewing rate greater than 6 dB/sec is permitted at the beginning of each new test frequency, but only until the second subject response.

(D) The audiometer shall remain at each required test frequency for 30 seconds (± 3 seconds). The audiogram shall be clearly marked at each change of frequency and the actual frequency change of the audiometer shall not deviate from the frequency boundaries marked on the audiogram by more than ± 3 seconds.

(E) It must be possible at each test frequency to place a horizontal line segment parallel to the time axis on the audiogram, such that the audiometric tracing crosses the line segment at least six times at that test frequency. At each test frequency the threshold shall be the average of the midpoints of the tracing excursions.

Appendix D to § 1910.95—Audiometric Test Rooms

This appendix is Mandatory

Rooms used for audiometric testing shall not have background sound pressure levels exceeding those in Table D-1 when measured by equipment conforming at least to the Type 2 requirements of American National Standard Specification for Sound Level Meters, S1.4-1971 (R1976), and to the Class II requirements of American National Standard Specification for Octave, Half-Octave, and Third-Octave Band Filter Sets, S1.11-1971 (R1976).

**TABLE D-1—MAXIMUM ALLOWABLE OCTAVE-BAND SOUND PRESSURE LEVELS FOR
AUDIOMETRIC TEST ROOMS**

Octave-band center frequency (Hz)	500	1000	2000	4000	8000
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Sound pressure level (dB)	40	40	47	57	62
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Appendix E to § 1910.95—Acoustic Calibration of Audiometers

This appendix is Mandatory

Audiometer calibration shall be checked acoustically, at least annually, according to the procedures described in this appendix. The equipment necessary to perform these measurements is a sound level meter, octave-band filter set, and a National Bureau of Standards 9A coupler. In making these measurements, the accuracy of the calibrating equipment shall be sufficient to determine that the audiometer is within the tolerances permitted by American Standard Specification for Audiometers, S3.6-1969.

(1) *Sound Pressure Output Check*

- A. Place the earphone coupler over the microphone of the sound level meter and place the earphone on the coupler.
- B. Set the audiometer's hearing threshold level (HTL) dial to 70 dB.
- C. Measure the sound pressure level of the tones at each test frequency from 500 Hz through 6000 Hz for each earphone.
- D. At each frequency the readout on the sound level meter should correspond to the levels in Table E-1 or Table E-2, as appropriate, for the type of earphone, in the column entitled "sound level meter reading."

(2) *Linearity Check*

- A. With the earphone in place, set the frequency to 1000 Hz and the HTL dial on the audiometer to 70 dB.
- B. Measure the sound levels in the coupler at each 10-dB decrement from 70 dB to 10 dB, noting the sound level meter reading at each setting.
- C. For each 10-dB decrement on the audiometer the sound level meter should indicate a corresponding 10 dB decrease.
- D. This measurement may be made electrically with a voltmeter connected to the earphone terminals.

(3) *Tolerances*

When any of the measured sound levels deviate from the levels in Table E-1 or Table E-2 by ± 3 dB at any test frequency between 500 and 3000 Hz, 4 dB at 4000 Hz, or 5 dB at 6000 Hz, an exhaustive calibration is advised. An exhaustive calibration is required if the deviations are greater than 15 dB or greater at any test frequency.

**TABLE E-1—REFERENCE THRESHOLD LEVELS FOR TELEPHONICS—TDH-39
EARPHONES**

Frequency, Hz	Reference threshold level for TDH-39 earphones, dB	Sound level meter reading, dB
500	11.5	81.5
1000	7	77
2000	9	79
3000	10	80
4000	9.5	79.5
6000	15.5	85.5

**TABLE E-2—REFERENCE THRESHOLD LEVELS FOR TELEPHONICS—TDH-49
EARPHONES**

Frequency, Hz	Reference threshold level for TDH-49 earphones, dB	Sound level meter reading, dB
500	13.5	83.5
1000	7.5	77.5
2000	11	81.0
3000	9.5	79.5
4000	10.5	80.5

Frequency, Hz	Reference threshold level for TDH-49 earphones, dB	Sound level meter reading, dB
6000	13.5	83.5

Appendix F to § 1910.95—Calculations and Application of Age Corrections to Audiograms

This appendix Is Non-Mandatory

In determining whether a standard threshold shift has occurred, allowance may be made for the contribution of aging to the change in hearing level by adjusting the most recent audiogram. If the employer chooses to adjust the audiogram, the employer shall follow the procedure described below. This procedure and the age correction tables were developed by the National Institute for Occupational Safety and Health in the criteria document entitled "Criteria for a Recommended Standard . . . Occupational Exposure to Noise," ((HSM)-11001).

For each audiometric test frequency;

(i) Determine from Tables F-1 or F-2 the age correction values for the employee by:

(A) Finding the age at which the most recent audiogram was taken and recording the corresponding values of age corrections at 1000 Hz through 6000 Hz;

(B) Finding the age at which the baseline audiogram was taken and recording the corresponding values of age corrections at 1000 Hz through 6000 Hz.

(ii) Subtract the values found in step (i)(B) from the value found in step (i)(A).

(iii) The differences calculated in step (ii) represented that portion of the change in hearing that may be due to aging.

Example: Employee is a 32-year-old male. The audiometric history for his right ear is shown in decibels below.

Employee's age	Audiometric test frequency (Hz)				
	1000	2000	3000	4000	6000
26	10	5	5	10	5
*27	0	0	0	5	5
28	0	0	0	10	5

Employee's age	Audiometric test frequency (Hz)				
	1000	2000	3000	4000	6000
29	5	0	5	15	5
30	0	5	10	20	10
31	5	10	20	15	15
*32	5	10	10	25	20

The audiogram at age 27 is considered the baseline since it shows the best hearing threshold levels. Asterisks have been used to identify the baseline and most recent audiogram. A threshold shift of 20 dB exists at 4000 Hz between the audiograms taken at ages 27 and 32.

(The threshold shift is computed by subtracting the hearing threshold at age 27, which was 5, from the hearing threshold at age 32, which is 25). A retest audiogram has confirmed this shift. The contribution of aging to this change in hearing may be estimated in the following manner:

Go to Table F-1 and find the age correction values (in dB) for 4000 Hz at age 27 and age 32.

	Frequency (Hz)				
	1000	2000	3000	4000	6000
Age 32	6	5	7	10	14
Age 27	5	4	6	7	11
Difference	1	1	1	3	3

The difference represents the amount of hearing loss that may be attributed to aging in the time period between the baseline audiogram and the most recent audiogram. In this example, the difference at 4000 Hz is 3 dB. This value is subtracted from the hearing level at 4000 Hz, which in the most recent audiogram is 25, yielding 22 after adjustment. Then the hearing threshold in the baseline audiogram at 4000 Hz (5) is subtracted from the adjusted annual audiogram hearing threshold at 4000 Hz (22). Thus the age-corrected threshold shift would be 17 dB (as opposed to a threshold shift of 20 dB without age correction).

TABLE F-1—AGE CORRECTION VALUES IN DECIBELS FOR MALES

Years	Audiometric Test Frequencies (Hz)				
	1000	2000	3000	4000	6000
20 or younger	5	3	4	5	8

Years	Audiometric Test Frequencies (Hz)				
	1000	2000	3000	4000	6000
21	5	3	4	5	8
22	5	3	4	5	8
23	5	3	4	6	9
24	5	3	5	6	9
25	5	3	5	7	10
26	5	4	5	7	10
27	5	4	6	7	11
28	6	4	6	8	11
29	6	4	6	8	12
30	6	4	6	9	12
31	6	4	7	9	13
32	6	5	7	10	14
33	6	5	7	10	14
34	6	5	8	11	15
35	7	5	8	11	15
36	7	5	9	12	16
37	7	6	9	12	17
38	7	6	9	13	17
39	7	6	10	14	18
40	7	6	10	14	19
41	7	6	10	14	20
42	8	7	11	16	20
43	8	7	12	16	21
44	8	7	12	17	22
45	8	7	13	18	23
46	8	8	13	19	24
47	8	8	14	19	24
48	9	8	14	20	25
49	9	9	15	21	26
50	9	9	16	22	27
51	9	9	16	23	28
52	9	10	17	24	29
53	9	10	18	25	30
54	10	10	18	26	31
55	10	11	19	27	32
56	10	11	20	28	34
57	10	11	21	29	35
58	10	12	22	31	36

Years	Audiometric Test Frequencies (Hz)				
	1000	2000	3000	4000	6000
59	11	12	22	32	37
60 or older	11	13	23	33	38

TABLE F-2—AGE CORRECTION VALUES IN DECIBELS FOR FEMALES

Years	Audiometric Test Frequencies (Hz)				
	1000	2000	3000	4000	6000
20 or younger	7	4	3	3	6
21	7	4	4	3	6
22	7	4	4	4	6
23	7	5	4	4	7
24	7	5	4	4	7
25	8	5	4	4	7
26	8	5	5	4	8
27	8	5	5	5	8
28	8	5	5	5	8
29	8	5	5	5	9
30	8	6	5	5	9
31	8	6	6	5	9
32	9	6	6	6	10
33	9	6	6	6	10
34	9	6	6	6	10
35	9	6	7	7	11
36	9	7	7	7	11
37	9	7	7	7	12
38	10	7	7	7	12
39	10	7	8	8	12
40	10	7	8	8	13
41	10	8	8	8	13
42	10	8	9	9	13
43	11	8	9	9	14
44	11	8	9	9	14
45	11	8	10	10	15
46	11	9	10	10	15
47	11	9	10	11	16

Years	Audiometric Test Frequencies (Hz)				
	1000	2000	3000	4000	6000
48	12	9	11	11	16
49	12	9	11	11	16
50	12	10	11	12	17
51	12	10	12	12	17
52	12	10	12	13	18
53	13	10	13	13	18
54	13	11	13	14	19
55	13	11	14	14	19
56	13	11	14	15	20
57	13	11	15	15	20
58	14	12	15	16	21
59	14	12	16	16	21
60 or older	14	12	16	17	22

Appendix G to § 1910.95—Monitoring Noise Levels Non-Mandatory Informational Appendix

This appendix provides information to help employers comply with the noise monitoring obligations that are part of the hearing conservation amendment.

WHAT IS THE PURPOSE OF NOISE MONITORING?

This revised amendment requires that employees be placed in a hearing conservation program if they are exposed to average noise levels of 85 dB or greater during an 8 hour workday. In order to determine if exposures are at or above this level, it may be necessary to measure or monitor the actual noise levels in the workplace and to estimate the noise exposure or “dose” received by employees during the workday.

WHEN IS IT NECESSARY TO IMPLEMENT A NOISE MONITORING PROGRAM?

It is not necessary for every employer to measure workplace noise. Noise monitoring or measuring must be conducted only when exposures are at or above 85 dB. Factors which suggest that noise exposures in the workplace may be at this level include employee complaints about the loudness of noise, indications that employees are losing their hearing, or noisy conditions which make normal conversation difficult. The employer should also consider any information available regarding noise emitted from specific machines. In addition, actual workplace noise measurements can suggest whether or not a monitoring program should be initiated.

HOW IS NOISE MEASURED?

Basically, there are two different instruments to measure noise exposures: the sound level meter and the dosimeter. A sound level meter is a device that measures the intensity of sound at a given moment. Since sound level meters provide a measure of sound intensity at only one point in time, it is generally necessary to take a number of measurements at different times during the day to estimate noise exposure over a workday. If noise levels fluctuate, the amount of time noise remains at each of the various measured levels must be determined.

To estimate employee noise exposures with a sound level meter it is also generally necessary to take several measurements at different locations within the workplace. After appropriate sound level meter readings are obtained, people sometimes draw "maps" of the sound levels within different areas of the workplace. By using a sound level "map" and information on employee locations throughout the day, estimates of individual exposure levels can be developed. This measurement method is generally referred to as *area* noise monitoring.

A dosimeter is like a sound level meter except that it stores sound level measurements and integrates these measurements over time, providing an average noise exposure reading for a given period of time, such as an 8-hour workday. With a dosimeter, a microphone is attached to the employee's clothing and the exposure measurement is simply read at the end of the desired time period. A reader may be used to read-out the dosimeter's measurements. Since the dosimeter is worn by the employee, it measures noise levels in those locations in which the employee travels. A sound level meter can also be positioned within the immediate vicinity of the exposed worker to obtain an individual exposure estimate. Such procedures are generally referred to as *personal* noise monitoring.

Area monitoring can be used to estimate noise exposure when the noise levels are relatively constant and employees are not mobile. In workplaces where employees move about in different areas or where the noise intensity tends to fluctuate over time, noise exposure is generally more accurately estimated by the personal monitoring approach.

In situations where personal monitoring is appropriate, proper positioning of the microphone is necessary to obtain accurate measurements. With a dosimeter, the microphone is generally located on the shoulder and remains in that position for the entire workday. With a sound level meter, the microphone is stationed near the employee's head, and the instrument is usually held by an individual who follows the employee as he or she moves about.

Manufacturer's instructions, contained in dosimeter and sound level meter operating manuals, should be followed for calibration and maintenance. To ensure accurate results, it is considered good professional practice to calibrate instruments before and after each use.

HOW OFTEN IS IT NECESSARY TO MONITOR NOISE LEVELS?

The amendment requires that when there are significant changes in machinery or production processes that may result in increased noise levels, remonitoring must be conducted to determine whether additional employees need to be included in the hearing conservation program. Many companies choose to remonitor periodically (once every year or two) to ensure that all exposed employees are included in their hearing conservation programs.

WHERE CAN EQUIPMENT AND TECHNICAL ADVICE BE OBTAINED?

Noise monitoring equipment may be either purchased or rented. Sound level meters cost about \$500 to \$1,000, while dosimeters range in price from about \$750 to \$1,500. Smaller companies may find it more economical to rent equipment rather than to purchase it. Names of equipment suppliers may be found in the telephone book (Yellow Pages) under headings such as: "Safety Equipment," "Industrial Hygiene," or "Engineers-Acoustical." In addition to providing information on obtaining noise monitoring equipment, many companies and individuals included under such listings can provide professional advice on how to conduct a valid noise monitoring program. Some audiological testing firms and industrial hygiene firms also provide noise monitoring services. Universities with audiology, industrial hygiene, or acoustical engineering departments may also provide information or may be able to help employers meet their obligations under this amendment.

Free, on-site assistance may be obtained from OSHA-supported state and private consultation organizations. These safety and health consultative entities generally give priority to the needs of small businesses.

Appendix H to § 1910.95—Availability of Referenced Documents

Paragraphs (c) through (o) of 29 CFR 1910.95 and the accompanying appendices contain provisions which incorporate publications by reference. Generally, the publications provide criteria for instruments to be used in monitoring and audiometric testing. These criteria are intended to be mandatory when so indicated in the applicable paragraphs of § 1910.95 and appendices.

It should be noted that OSHA does not require that employers purchase a copy of the referenced publications. Employers, however, may desire to obtain a copy of the referenced publications for their own information.

The designation of the paragraph of the standard in which the referenced publications appear, the titles of the publications, and the availability of the publications are as follows:

Paragraph designation	Referenced publication	Available from—
Appendix B	"List of Personal Hearing Protectors and Attenuation Data," HEW Pub. No. 76-120, 1975. NTIS-PB267461	National Technical Information Service, Port Royal Road, Springfield, VA 22161.
Appendix D	"Specification for Sound Level Meters," S1.4-1971 (R1976)	American National Standards Institute, Inc., 1430 Broadway, New York, NY 10018.
§ 1910.95(k)(2), appendix E	"Specifications for Audiometers," S3.6-1969	American National Standards Institute, Inc., 1430 Broadway, New York, NY 10018.
Appendix D	"Specification for Octave, Half-Octave and Third-Octave Band Filter Sets,"	Back Numbers Department, Dept. STD, American Institute of Physics, 333 E. 45th St., New York, NY 10017; American National Standards Institute, Inc.,

Paragraph designation	Referenced publication	Available from—
	S1.11-1971 (R1976)	1430 Broadway, New York, NY 10018.

The referenced publications (or a microfiche of the publications) are available for review at many universities and public libraries throughout the country. These publications may also be examined at the OSHA Technical Data Center, Room N2439, United States Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 219-7500 or at any OSHA Regional Office (see telephone directories under United States Government—Labor Department).

Appendix I to § 1910.95—Definitions

These definitions apply to the following terms as used in paragraphs (c) through (n) of [29 CFR 1910.95](#).

Action level—An 8-hour time-weighted average of 85 decibels measured on the A-scale, slow response, or equivalently, a dose of fifty percent.

Audiogram—A chart, graph, or table resulting from an audiometric test showing an individual's hearing threshold levels as a function of frequency.

Audiologist—A professional, specializing in the study and rehabilitation of hearing, who is certified by the American Speech-Language-Hearing Association or licensed by a state board of examiners.

Baseline audiogram—The audiogram against which future audiograms are compared.

Criterion sound level—A sound level of 90 decibels.

Decibel (dB)—Unit of measurement of sound level.

Hertz (Hz)—Unit of measurement of frequency, numerically equal to cycles per second.

Medical pathology—A disorder or disease. For purposes of this regulation, a condition or disease affecting the ear, which should be treated by a physician specialist.

Noise dose—The ratio, expressed as a percentage, of (1) the time integral, over a stated time or event, of the 0.6 power of the measured SLOW exponential time-averaged, squared A-weighted sound pressure and (2) the product of the criterion duration (8 hours) and the 0.6 power of the squared sound pressure corresponding to the criterion sound level (90 dB).

Noise dosimeter—An instrument that integrates a function of sound pressure over a period of time in such a manner that it directly indicates a noise dose.

Otolaryngologist—A physician specializing in diagnosis and treatment of disorders of the ear, nose and throat.

Representative exposure—Measurements of an employee's noise dose or 8-hour time-weighted average sound level that the employers deem to be representative of the exposures of other employees in the workplace.

Sound level—Ten times the common logarithm of the ratio of the square of the measured A-weighted sound pressure to the square of the standard reference pressure of 20 micropascals. Unit: decibels (dB). For use with this regulation, SLOW time response, in accordance with ANSI S1.4-1971 (R1976), is required.

Sound level meter—An instrument for the measurement of sound level.

Time-weighted average sound level—That sound level, which if constant over an 8-hour exposure, would result in the same noise dose as is measured.

[39 FR 23502, June 27, 1974, as amended at 46 FR 4161, Jan. 16, 1981; 46 FR 62845, Dec. 29, 1981; 48 FR 9776, Mar. 8, 1983; 48 FR 29687, June 28, 1983; 54 FR 24333, June 7, 1989; 61 FR 9236, Mar. 7, 1996; 71 FR 16672, Apr. 3, 2006; 73 FR 75584, Dec. 12, 2008]