

<b>STATE OF NORTH CAROLINA</b> <b>DEPARTMENT OF TRANSPORTATION</b> <b>EBS Enterprise Services</b>	<b>INVITATION FOR BIDS NO.</b> 54-12110814-CS
	<b>Offers will be publicly opened:</b> <b>March 5, 2024</b>
	<b>Issue Date:</b> <b>February 20, 2024</b>
<b>Refer <u>ALL</u> inquiries regarding this IFB to:</b>  Cheryl Schilens cschilens@ncdot.gov	<b>Commodity Number:</b> 811122
	<b>Description:</b> OpenText Maintenance and Support Renewal
	<b>Using Agency:</b> Department of Transportation
<b>See page 2 for mailing instructions.</b>	<b>Requisition No.:</b> 12110814 – PR1273

**OFFER AND ACCEPTANCE**

The State seeks offers for software maintenance described in this solicitation. 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, if issued. Acceptance shall create a contract having an order of precedence as follows: In cases of conflict between documents comprising the contract, the order of precedence shall be (1) Best and Final Offers, if any, (2) special terms and conditions specific to this IFB, (3) specifications, (4) Department of Information Technology 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, 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:	P.O. BOX:	ZIP:
CITY, STATE & ZIP:	TELEPHONE NUMBER:	TOLL FREE TEL. NO
PRINT NAME & TITLE OF PERSON SIGNING:	FAX NUMBER:	
AUTHORIZED SIGNATURE:	DATE:	E-MAIL:

Offer valid for thirty (30) 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 North Carolina Department of Transportation shall affix their signature hereto. A copy of this acceptance will be forwarded to the successful vendor(s).

<p><b><u>FOR STATE USE ONLY</u></b></p> <p>Offer accepted and contract awarded this ____ day of _____, 20____, as indicated on attached certification,  by _____ (Authorized representative of NC Department of Transportation).</p>
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## 1.0 INTENT, USE, DURATION AND SCOPE

The purpose of this Invitation for Bids is to obtain pricing for and procure annual maintenance and support of OpenText previously licensed to the North Carolina Department of Transportation. Services will be provided in accordance to the terms and conditions of this IFB. The term of the contract is for three years, paid annually at time of renewal. Services will be provided in accordance to the terms and conditions of this IFB.

## 2.0 GENERAL INFORMATION

### 2.1. VENDOR QUESTIONS

All inquiries regarding the solicitation specifications or requirements are to be addressed to the contact person listed on Page One of this solicitation via email to [cschilens@ncdot.gov](mailto:cschilens@ncdot.gov). Vendor contact regarding this Solicitation with anyone other than the contact person listed on Page One of this Solicitation may be grounds for rejection of said Vendor's offer.

Written questions concerning this Solicitation will be received **until Friday February 23 at 10am** Eastern Time. They must be submitted to the contact person listed on Page One of this Solicitation via [cschilens@ncdot.gov](mailto:cschilens@ncdot.gov). Please enter "Questions Solicitation **IFB 54-12110814-CS**" 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 State may issue addenda if Vendor questions are permitted as described below, or if additional terms, specifications, or other changes are necessary for this procurement. All addenda shall become an Addendum to this IFB.

### 2.3. OFFER SUBMITTAL

Due Date: **March 5, 2024**

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

IMPORTANT NOTE: Vendor shall bear the risk for late electronic submission due to unintended or unanticipated delay, including but not limited to internet issues, network issues, local power outages, or application issues. Vendor must include all the pages of this solicitation in their response.

Sealed offers, subject to the conditions made a part hereof, will be received until **10:00am Eastern Time on the day of opening** and then opened, for furnishing and delivering the commodity as described herein. Offers must be submitted with the Execution page signed and dated by an official authorized to bind the Vendor's firm. Failure to return a signed offer shall result in disqualification.

**Attempts to submit a proposal via facsimile (FAX) machine, telephone, email, email attachments, or in any hardcopy format in response to this Bid SHALL NOT be accepted and will automatically be deemed Non-Responsive.**

- a) All File names should start with the Vendor name first, in order to easily determine all the files to be included as part of the vendor's response. For example, files should be named as follows: Vendor Name-your file name.
- b) File contents SHALL NOT be password protected, the file formats must be in .PDF, .JPEG, .DOC or .XLS format, and shall be capable of being copied to other sources. Inability by the State to open the Vendor's files may result in the Vendor's offer(s) being rejected as Non-Responsive.
- c) If the vendor's proposal contains any confidential information (as defined in Attachment B, Section 2, Paragraph #17), then the vendor must provide one (1) signed, original electronic offer and one (1) redacted electronic 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 IFB with anyone other than Cheryl Schilens 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. Late offers will not be opened and may be returned to the Vendor at the expense of the Vendor or destroyed if requested.

#### **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 an Offeror's response. This applies to any language appearing in or attached to the document as part of the Offeror's response. By execution and delivery of this Invitation for Bids and response(s), the Offeror agrees that any additional terms and conditions, whether submitted purposely or inadvertently, shall have no force or effect.**

## **2.8. E-PROCUREMENT SOLICITATION**

**This is not an E-Procurement solicitation** (only Services will be procured). See Paragraph #33 of the attached Department of Information Technology Terms and Conditions. The Support Services Terms and Conditions made part of this solicitation contain language necessary for the implementation of North Carolina's statewide E-Procurement initiative. It is the Vendor's responsibility to read these terms and conditions carefully and to consider them in preparing the offer. By signature vendor acknowledges acceptance of all terms and conditions including those related to E-Procurement.

- a) General information on the E-Procurement service can be found at <http://eprourement.nc.gov>.
- b) Within two days after notification of award of a contract, vendor must register in NC E-Procurement @ Your Service at the following web site: <https://vendor.ncgov.com/vendor/login>
- c) As of the IFB submittal date, the Vendor must be current on all E-Procurement fees. If the Vendor is not current on all E-Procurement fees, the State may disqualify the Vendor from participation in this IFB.

## **2.9. DISTRIBUTORS AND RESELLERS**

"Resellers" as used herein, refers to businesses that routinely sell or distribute Vendor's Products, and may include "Distributors", "Value Added Resellers" (VARs), "Original Equipment Manufacturers" (OEMs), Channel Partners, or such other designations. These businesses must be approved by the State prior to placement of any orders. Any contract established will be subject to this solicitation and any resulting Agreement(s), and to the terms and conditions of the State's competitive bidding process.

The Agency acknowledges that the Reseller has merely purchased the Third Party Items for resale or license to the Agency, and that the proprietary and intellectual property rights to the Third Party Items are owned by parties other than the Reseller ("Third Parties"). The Agency further acknowledges that except for the payment to the Reseller for the Third Party Items, all of its rights and obligations with respect thereto flow from and to the Third Parties. The Reseller shall provide the Agency with copies of all documentation and warranties for the Third Party Items which are provided to the Reseller. The Reseller shall assign all applicable third party warranties for Deliverables to the Agency.

## **2.10. 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.

## **2.11. AWARD**

It is the general intent to award this contract to one Vendor. As provided by statute, award will be based on Best Value Analysis, Lowest Price Technically Acceptable Source Selection Method in accordance with 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.

The State has implemented the electronic Vendor Portal (eVP) that allow the public to retrieve award notices and information on the Internet at <https://evp.nc.gov>. Results may be found by searching by Solicitation Number or agency name. This information may not be available for several weeks dependent upon the complexity of the acquisition and the length of time to complete the evaluation process.

**2.12. 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; e.g. “Finalist Vendor(s)”. 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.

**2.13. POINTS OF CONTACT**

Contact by the Offeror with the persons shown below for contractual and technical matters related to this IFB only permitted if expressly agreed to by the procurement officer named on page 4, or upon award of contract:

Vendor Contractual Point of Contact	Vendor Technical Point of Contact
<p>[NAME OF VENDOR]            Street: [STREET ADDRESS]            [CITY, STATE, ZIP]            Attn: Assigned Contract Manager</p>	<p>[NAME OF VENDOR]            Street: [STREET ADDRESS]            [CITY, STATE, ZIP]            Attn: Assigned Technical Lead</p>

**3.0 SPECIFICATIONS**

**3.1. VENDOR STANDARD AGREEMENT(S)**

The terms and conditions of Vendor’s standard license, maintenance or other agreement(s) applicable to 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 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.

*The Addendum to the OpenText End User License US 2016; by and between OpenText and NC Department of Transportation executed on September 11, 2019, is applicable to this IFB 54-12110814-CS and is hereby incorporated by reference herein and attached as Attachment A North Carolina State Addendum To the OpenText End User License US and Attachment B OpenText End User License US.2016*

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

In accordance with N.C.G.S. §143B-1361(b), Vendor must detail in the IFB 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

### **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. BRAND SPECIFIC PRODUCT**

Manufacturer(s) name and product descriptions used in this solicitation are product specific. The items offered in response to this solicitation must be the manufacturer and type specified. Failure to comply with this requirement will result in rejection of offer.

### **3.5. 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, paid annually at the time of renewal and will expire upon the anniversary date of the effective date unless otherwise stated in the Notice of Award, or unless terminated earlier.

**4.0 FURNISH AND DELIVER**

**THREE-YEAR CONTRACT**

Annual maintenance fee Part# RC684117 (includes software upgrades, patches and support) for previously licensed software to the NC Department of Transportation, Lines 1 – 10, for prorated period beginning April 1, 2024 and ending March 31, 2025.

**Year One for period beginning April 1, 2024 and ending March 31, 2025**

ITEM #	QTY	UNIT	DESCRIPTION	UNIT PRICE	EXTENDED COST
1	1,000	each	CAD Manager for Bentley Microstation Maintenance	\$ _____	\$ _____
2	1	each	Content Server Prime Protect	\$ _____	\$ _____
3	10,000,000	each	Capture Center Unlimited Field Extraction – Max. Pages/Year Maintenance	\$ _____	\$ _____
4	10,000	each	Application Governance & Archiving for Microsoft SharePoint Upgrade from Storage Services (Add-on) S-LLUPGSSAGAAD	\$ _____	\$ _____
5	1,000	each	Level 2 CAD Annotation Ad-on Brava module Maintenance S-IGRBRAVAVWPTANT	\$ _____	\$ _____
6	375,000	each	Vendor Invoice Management for SAP Solutions Maintenance S-OPTVIMVOL	\$ _____	\$ _____
7	1	each	GISLink for ESRI Maintenance S-LLGISESRI	\$ _____	\$ _____
8	2	each	Everywhere 5000 – User Package maintenance S-LLEVERYWERE5000	\$ _____	\$ _____
9	10,000	each	Extended ECM for SAP Solutions – Professional Users, maintenance 69061-12225 S-LLPGRMSAP	\$ _____	\$ _____
10	10,000	each	Email Management for Microsoft Exchange 69061-12225 S-LLPGEMGTMS	\$ _____	\$ _____
11	10,000	each	File System Archiving Maintenance 69061-12225 S-IXSPGFSA	\$ _____	\$ _____

**Total Offer Cost for Year One \$ \_\_\_\_\_**



**Year Two (2) for period beginning April 1, 2025 and ending March 31, 2026**

ITEM #	QTY	UNIT	DESCRIPTION	UNIT PRICE	EXTENDED COST
1	1,000	each	CAD Manager for Bentley Microstation Maintenance	\$ _____	\$ _____
2	1	each	Content Server Prime Protect	\$ _____	\$ _____
3	10,000,000	each	Capture Center Unlimited Field Extraction – Max. Pages/Year Maintenance	\$ _____	\$ _____
4	10,000	each	Application Governance & Archiving for Microsoft SharePoint Upgrade from Storage Services (Add-on) S-LLUPGSSAGAAD	\$ _____	\$ _____
5	1,000	each	Level 2 CAD Annotation Ad-on Brava module Maintenance S-IGRBRAVAVWPTANT	\$ _____	\$ _____
6	375,000	each	Vendor Invoice Management for SAP Solutions Maintenance S-OPTVIMVOL	\$ _____	\$ _____
7	1	each	GISLink for ESRI Maintenance S-LLGISESRI	\$ _____	\$ _____
8	2	each	Everywhere 5000 – User Package maintenance S-LLEVERYWERE5000	\$ _____	\$ _____
9	10,000	each	Extended ECM for SAP Solutions – Professional Users, maintenance 69061-12225 S-LLPGRMSAP	\$ _____	\$ _____
10	10,000	each	Email Management for Microsoft Exchange 69061-12225 S-LLPGEMGTMS	\$ _____	\$ _____
11	10,000	each	File System Archiving Maintenance 69061-12225 S-IXSPGFSA	\$ _____	\$ _____

**Total Offer Cost for Year Two (2) \$ \_\_\_\_\_**

**Year Three (3) for period beginning April 1, 2026 and ending March 31, 2027**

ITEM #	QTY	UNIT	DESCRIPTION	UNIT PRICE	EXTENDED COST
1	1,000	each	CAD Manager for Bentley Microstation Maintenance	\$ _____	\$ _____
2	1	each	Content Server Prime Protect	\$ _____	\$ _____
3	10,000,000	each	Capture Center Unlimited Field Extraction – Max. Pages/Year Maintenance	\$ _____	\$ _____
4	10,000	each	Application Governance & Archiving for Microsoft SharePoint Upgrade from Storage Services (Add-on)	\$ _____	\$ _____

			S-LLUPGSSAGAAD		
5	1,000	each	Level 2 CAD Annotation Ad-on Brava module Maintenance S-IGRBRAVAVWPTANT	\$ _____	\$ _____
6	375,000	each	Vendor Invoice Management for SAP Solutions Maintenance S-OPTVIMVOL	\$ _____	\$ _____
7	1	each	GISLink for ESRI Maintenance S-LLGISESRI	\$ _____	\$ _____
8	2	each	Everywhere 5000 – User Package maintenance S-LLEVERYWERE5000	\$ _____	\$ _____
9	10,000	each	Extended ECM for SAP Solutions – Professional Users, maintenance 69061-12225 S-LLPGRMSAP	\$ _____	\$ _____
10	10,000	each	Email Management for Microsoft Exchange 69061- 12225 S-LLPGEMGTMS	\$ _____	\$ _____
11	10,000	each	File System Archiving Maintenance 69061-12225 S-IXSPGFSA	\$ _____	\$ _____

**Total Offer Cost for Year Three (3) \$ \_\_\_\_\_**

**TOTAL COST FOR YEARS 1,2 AND 3 \$ \_\_\_\_\_**

**5.0 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 IFB.

Is Vendor a Historically Underutilized Business?     YES     NO

If “YES”, specify classification. \_\_\_\_\_

## 6.0 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:** Is 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) **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 NCDIT. The Vendor is cautioned that the requirements of this IFB can be altered only by written addendum and that verbal communications from whatever source are of no effect.
- 5) **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.
- 6) **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; or where more than one supplier is needed to provide the contemplated requirements as to quantity, quality, delivery, service, geographical areas; other factors deemed by NCDIT to be pertinent or peculiar to the purchase in question.
- 7) **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.
- 8) **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.

- 9) **VENDOR REGISTRATION AND SOLICITATION NOTIFICATION SYSTEM:** The electronic Vendor Portal (eVP) allows Vendors to electronically register with the State to receive electronic notification of current procurement opportunities for goods and services available on the eVP at the following web site: <https://evp.nc.gov>.
- 10) **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."

*The remainder of this page is intentionally left blank*

## 7.0 **DEPARTMENT OF INFORMATION TECHNOLOGY TERMS AND CONDITIONS**

### 1) **DEFINITIONS:** Supplementing the Definitions appearing in the body of this solicitation, above:

- a) "Agency" means the Agency purchasing the goods or Services.
- b) "Custom or Modified Software" means Software that may be modified by the State, or by Vendor at the State's request or direction to perform in accordance with specifications.
- c) "Deliverable"/"Product Warranties" shall mean and include the warranties provided for products or deliverables licensed to the State, and as included in Paragraph 3 c), of these Terms and Conditions unless superseded by a Vendor's Warranties pursuant to Vendor's License or Support Agreements.
- d) "Products" includes Software, Hardware, equipment, options, documentation, accessories, supplies, spare parts.
- e) "Services" means the tasks and duties associated with the provision of support and maintenance for the Software hereunder.
- f) "Software" means in the context of this IFB the previously licensed software application(s) for which support and maintenance Services are sought, including any modifications, patches, additions or other programming done to such software applications by the Vendor as part of the Support Services.
- g) "State" shall mean the State of North Carolina, the Office of Information Technology Services as an Agency, or in its capacity as the Award Authority.
- h) "Support" includes Software maintenance and repair (outside any required by any applicable warranty), Software updates maintenance and support Services, consulting, training and other support Services provided by or through Vendor under this solicitation.

### 2) **INTELLECTUAL PROPERTY INDEMNITY**

- a) The Vendor, at its own expense, shall defend any action brought against the State to the extent that such action is based upon a claim that the Services or material supplied by the Vendor, their use or operation infringes on a patent, copyright, trademark or violates a trade secret in the United States. The Vendor shall pay those costs and damages finally awarded or agreed in settlement against the State in any such action; 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.
- b) If any modifications to the Software applied by Vendor become the subject of a claim of infringement of a patent, copyright, Trademark or a trade secret in the United States, the Vendor, shall at its option and expense, either procure for the State the right to continue using the Software, or to replace or modify the same to become noninfringing. If neither of these options can reasonably be taken in Vendor's judgment, or if further use shall be prevented by injunction, the Vendor agrees to take back any affected Software modifications, and refund any sums the State has paid Vendor for Services and the State shall then have the option of terminating the Agreement, or applicable portions thereof, without penalty or termination charge.
- c) Vendor will not be required to defend or indemnify the State if any claim by a third party against the State for infringement or misappropriation results from the State's alteration of any Vendor-branded Software, or from the continued use of the good(s) or Services after receiving notice they infringe on an intellectual property right of a third party.

### 3) **EXCLUSIVE REMEDIES AND LIMITATION OF LIABILITY**

- a) For purposes of the exclusive remedies and limitations of liability set forth herein, Vendor shall be deemed to include the Vendor and its employees, agents, representatives, subcontractors,

and suppliers and damages shall be deemed to refer collectively to all injuries, damages, losses, liabilities, expenses or costs incurred.

- b) The Vendor's liability for damages to the State arising under the contract shall be limited to two 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 Warranty compliance, or to claims for injury to persons or damage to tangible personal property caused by Vendor's 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 this Contract. 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.
- d) For delays in the delivery or successful Product or Software installation, whichever is applicable, Vendor shall have no liability unless the delivery or successful installation date is delayed by more than thirty (30) days by causes not attributable either to the State or to Force Majeure conditions, in which case the State shall have the right, as its remedies:
  - i) To recover direct costs including replacement Products, if any, attributable to Vendor's delay, and
  - ii) To cancel the order without incurring cancellation charges.
  - iii) Vendor shall have no liability unless the default in delivery of Services is occasioned by causes not attributable either to the State or to Force Majeure conditions

#### **4) SUPPORT AND MAINTENANCE**

- a) Except as specifically provided herein or in an approved attachment hereto, and unless otherwise consistently provided by Vendor's standard agreement for support, and except for the provisions in the Vendor License Agreements paragraph above, an order for support will constitute the State's acceptance of the terms of the standard agreement for Support in effect on the date of the order, subject to the order of precedence set forth in this Solicitation.
- b) To be eligible for support, Software must be in good operating condition and at then current specified revision levels, having all current enhancements, modifications, updates, or upgrades supplied by Vendor. Vendor may charge its standard rates in effect on the date support service is provided in addition to any other charges if the Software does not conform to the specified revision levels.
- c) Except as otherwise agreed in writing, and subject to the other terms and conditions of this solicitation, the Services shall include, at a minimum, during the term(s) of this Agreement, the following Maintenance/Support Services for at least the current version and one previous version of any Software identified in this solicitation:
  - (1) Basic Services. The Vendor will provide at least normal and usual software support and maintenance Services generally provided to customers in a similar program, position or setting consistent with and subject to the payment of the support and maintenance fees agreed upon in this Contract.
  - (2) Error Correction. Upon notice by State of a problem with the Software (which problem can be verified), Vendor shall use reasonable efforts to correct or provide a working solution for the problem. The State shall comply with all reasonable instructions or requests of Vendor in attempts to correct an error or defect in the Software. Vendor and the State shall act promptly and in a reasonably timely manner in communicating error or problem logs, other related information, proposed solutions or workarounds, and any action as may be necessary or proper to obtain or affect maintenance Services under this Paragraph.
  - (3) Notification of Errors. Vendor shall notify the State of any material errors or defects in the Software known, or made known to Vendor from any source during the term of this Agreement that could cause the production of inaccurate or otherwise materially incorrect,

results. Vendor shall initiate actions as may be commercially reasonable or proper to effect corrections of any such errors or defects.

- (4) Implementation of Updates. Vendor shall provide to the State, at no additional charge, implementation or application of all new releases and bug fixes (collectively referred to as "Changes") for any Software developed or published by the Licensor and made generally available to its other customers.
  - (5) Telephone Assistance. Vendor shall provide the State with telephone and Internet access to technical support engineers for assistance in the proper installation and use of the Software, and to report and resolve Software problems, during normal business hours, 8:00 AM - 5:00 PM Eastern Time, Monday-Friday. Vendor shall respond to the telephone requests for Software maintenance service within four hours, for calls made at any time.
  - (6) Custom Software. In the event Vendor provides for Custom programming herein at the request of the State, such programming will not become a part of the Licensor's licensed code unless the Licensor's License with the State so provides. Such custom programming will become the property of the State, with a perpetual and unlimited license of the custom programming back to the Vendor for its use.
  - (7) Security. The provision of onsite support or maintenance is subject to the standard security procedures of the facility or agency within which the onsite Services are to be provided.
  - (8) Online Services. If the Services involve one or more online elements (Online Services), the Vendor agrees:
    - (i) To maintain the confidentiality of any State Data which is or may be stored in the Vendor's online storage devices.
    - (ii) To prevent any malware or other harmful code from being transmitted to the State.
    - (iii) To provide the Online Services in a consistently available and commercially reasonable manner.
  - (9) Staff. Vendor shall maintain a trained support staff which shall professionally render the Services provided for in this contract.
  - (10) Training. If this solicitation so provides, the agency(ies) covered by this solicitation may enroll its users in any relevant training classes which may be offered by the Vendor at the fees which are mutually agreed upon by the State and Vendor.
- 5) VENDOR'S REPRESENTATION:** 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. Vendor agrees that it will not enter any agreement with a third party that might abridge any rights of the State under this Contract. Vendor will serve as the prime Vendor under this Contract. 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 Vendor may appear for purposes of convenience in Contract documents; and shall not limit Vendor's obligations hereunder. Third party subcontractors, if approved, may serve as subcontractors to Vendor. 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. Vendor has the right to provide the Services and Deliverables without violating or infringing any law, rule, regulation, copyright, patent, trade secret or other proprietary right of any third party. Vendor represents that its Services and 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, Deliverables, functions, or responsibilities not specifically described in this Contract are required for Vendor's proper performance, provision and delivery of the Service and Deliverables pursuant to this Contract, or are an inherent part of or necessary sub-task included within the Service, 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. Unless otherwise expressly provided in the Contract, 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 Deliverables

- c) Vendor warrants that it has the financial capacity to perform and to continue perform its obligations under the Contract; that Vendor has no constructive or actual knowledge of an actual or potential legal proceeding being brought against Vendor that could materially adversely affect performance of this Contract; and that entering into this Contract is not prohibited by any contract, or order by any court of competent jurisdiction
- d) Warranty as to Equipment; Hardware. Vendor warrants that the equipment and hardware that it provides pursuant to this Contract, if any, shall be free from defects in materials, in good working order and be maintained in good working order.

**6) SOFTWARE RETIREMENT**

- a) Unless otherwise provided in the Software License or in Vendor's standard agreement as agreed by the State, Vendor retains the right to retire support for a version of the Software and stop providing, for such version, Maintenance, Updates or Services, upon providing one-hundred and eighty (180) days written notice to the State of its intent to do so. The decision to stop maintaining a version of the Software is the sole business discretion of Vendor and shall not be deemed a breach of contract. If Vendor retires the version of the Software provided to the State and if the State has paid all applicable annual Maintenance Fees subsequent to executing this Agreement, the State shall be entitled to receive, at no additional charge, a newer version of the Software that supports substantially the same functionality as the licensed version of the Software. Newer versions of the Software containing substantially increased functionality will be made available to the State for an additional fee.
- b) Vendor may, at no additional charge, modify Software to improve operation and reliability or to meet legal requirements.
- c) Relocation of Software is the State's responsibility and may result in additional support charges and modified service response times as agreed. Software moved to another State facility or Agency may continue to be serviced subject to availability of a Vendor authorized support provider.
- d) Vendor is not required to provide support for non-qualified Software, or Software not identified in this Agreement. "Non-Qualified Products" are Software not supplied or approved by Vendor, and Software for which the State does not allow Vendor to incorporate modifications. The State is responsible, upon request of the Vendor, for removing non-qualified Software to allow Vendor to perform Software Support Services.
- e) Support does not cover any damage or failure caused by:
  - i) Media and supplies or use of items not designed or designated for use with Products; or
  - ii) Site conditions that do not conform to Vendor's previously established site specifications; or
  - iii) Neglect, improper use, fire or water damage, electrical disturbance, transportation by the State, work or modification by persons other than Vendor personnel, or other authorized parties.

**7) CONFIDENTIALITY OF DATA:** The State is responsible, as to data under the State's control, for the security of its proprietary or confidential information, for its data, and for maintaining a procedure and process to reconstruct lost or altered files, data or programs.

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

**9) 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 may be eligible to be reimbursed for travel expenses upon specific written request by the State arising under the performance of this Contract, reimbursement will be at the out-of-state rates set forth in GS §138-6; as amended from time to time. Vendor agrees to use the lowest available airfare not requiring a weekend stay and to use the lowest available rate for rental vehicles. All Vendor incurred travel expenses shall be billed on a monthly basis, shall be supported by receipt and shall be paid by the State within thirty (30) days after invoice approval. Travel expenses



exceeding the foregoing rates shall not be paid by the State. The State will reimburse travel allowances only for days on which the Vendor is required to be in North Carolina performing Services under this Agreement.

- 10) **PROHIBITION AGAINST CONTINGENT FEES AND GRATUITIES:** Vendor warrants that it has not paid, and agrees not to pay, any bonus, commission, fee, or gratuity to any employee or official of the State for the purpose of obtaining any contract or award issued by the State. Subsequent discovery by the State of non-compliance with these provisions shall constitute sufficient cause for immediate termination of all outstanding Agreements. Violations of this provision may result in debarment of the vendor(s) or Vendor(s) as permitted by 9 NCAC 06B.1206, or other provision of law.
- 11) **AVAILABILITY OF FUNDS:** Any and all payments by the State are expressly contingent upon and subject to the appropriation, allocation and availability of funds to the Agency for the purposes set forth in this Agreement. If this Agreement or any Purchase Order issued hereunder is funded in whole or in part by federal funds, the Agency's performance and payment shall be subject to and contingent upon the continuing availability of said federal funds for the purposes of the Agreement or Purchase Order. If the term of this Agreement extends into fiscal years subsequent to that in which it is approved such continuation of the Agreement *is expressly contingent upon* the appropriation, allocation, and availability of funds by the N.C. Legislature for the purposes set forth in the Agreement. If funds to effect payment are not available, the Agency will provide written notification to Vendor. If the Agreement is terminated under this paragraph, Vendor agrees to take back any affected Products and software not yet delivered under this Agreement, terminate any Services supplied to the Agency under this Agreement, and relieve the Agency of any further obligation thereof. The State shall remit payment for Services accepted prior to the date of the aforesaid notice in conformance with the payment terms.
- 12) **PAYMENT TERMS:** The total Software Support Services or Maintenance Fee (provided the State subscribes or purchases such Services) for the first year shall be invoiced upon execution of this contract. The Software Support Service or Maintenance Fee for subsequent contract renewal years, if any, will be invoiced annually sixty (60) days prior to the anniversary date beginning each subsequent year. Payment terms for Services are due and payable the month following the month for which charges accrue, or in accordance with the contract payment schedule.
- 13) **ACCEPTANCE CRITERIA FOR SOFTWARE MODIFICATIONS:** Acceptance testing is required for all Vendor supplied upgrades, enhancements, patches or modifications to the Software unless provided otherwise in the solicitation documents or a Statement of Work. The State may define such processes and procedures as may be necessary or proper, in its opinion and discretion, to ensure compliance with the State's specifications and Vendor's technical representations. Acceptance of such Services may be controlled by amendment hereto, or additional terms as agreed by the parties. In the event acceptance of such modifications to Software or the accompanying Services is not described in additional contract documents, the State shall have the obligation to notify Vendor, in writing and within ten (10) days following delivery of any such modifications or Software Services if such modifications or Services are unacceptable. Acceptance by the State shall not be unreasonably withheld; but may be conditioned or delayed as required for installation and/or testing of modifications to Software.
- 14) **CONFIDENTIALITY:** In accordance with 9 NCAC 6B.0103 and 6B.1001 and to promote maximum competition in the State competitive bidding process, 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. **Under no circumstances shall price information be designated as confidential.** 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 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. The State may serve as custodian of 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. In any event, the State shall have no liability to Vendor with respect to the disclosure of Vendor's confidential information ordered by a court of competent jurisdiction pursuant to N.C.G.S. §132-9.

- a) 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 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.
- b) All project materials, including software, data, and documentation created during the performance or provision of Services hereunder is 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 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, nonexclusive license to the State.

**15) 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 Agreement or to costs charged to this Agreement. The Vendor shall retain any such books, records, and accounts for a minimum of three (3) years after the completion of this Agreement. Additional audit or reporting requirements may be required by any Agency, if in the Agency's opinion, such requirement is imposed by federal or state law or regulation.

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

**17) INSURANCE COVERAGE:** During the term of the Contract, 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 Contract. As 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 Contract. 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 Contract; 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 Contract. 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 this Contract. 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 this Contract. 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 Contract.
- 18) NOTICES:** Any notices required under this Agreement should be delivered to the Contract Administrator for each party. Unless otherwise specified in the Solicitation Documents, any notices shall be delivered in writing by U.S. Mail, Commercial Courier, facsimile or by hand.
- 19) TITLES AND HEADINGS:** Titles and Headings in this Agreement are used for convenience only and do not define, limit or proscribe the language of terms identified by such Titles and Headings.
- 20) AMENDMENT:** This Agreement may not be amended orally or by performance. Any amendment must be made in written form and signed by duly authorized representatives of the State and Vendor.
- 21) TAXES:** The State of North Carolina is exempt from Federal excise taxes and no payment will be made for any personal property taxes levied on the Vendor or for any taxes levied on employee wages. Agencies of the State may have additional exemptions or exclusions for federal or state taxes. Evidence of such additional exemptions or exclusions may be provided to Vendor by Agencies, as applicable, during the term of this Agreement. Applicable State or local sales taxes shall be invoiced as a separate item.
- 22) GOVERNING LAWS, JURISDICTION, AND VENUE:** This Agreement is made under and shall be governed and construed in accordance with the laws of the State of North Carolina. The place of this Agreement or purchase order, its situs and forum, shall be Wake County, North Carolina, where all matters, whether sounding in contract or in tort, relating to its validity, construction, interpretation and enforcement shall be determined. Vendor agrees and submits, solely for matters relating to this Agreement, to the jurisdiction of the courts of the State of North Carolina, and stipulates that Wake County shall be the proper venue for all matters.
- 23) 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, 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 Vendor fails to deliver or provide correct Services or other Deliverables within the time required by this Contract, the State shall provide written notice of said failure to Vendor, and by such notice require performance assurance measures pursuant to N.C.G.S. 143B-1340(f). 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 Vendor's performance is conditioned, Vendor shall not be in default for any delay, cost increase or other consequences due to the State's failure. Vendor will use reasonable efforts to mitigate delays, costs or expenses arising from assumptions in the Vendor's 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.

- 24) 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 this Contract, unless so stated in writing and signed by authorized representatives of the Agency and the Vendor, and made as an amendment to this Contract pursuant to Paragraph 20) (Amendment) herein.
- 25) 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.
- 26) 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.
- 27) EQUAL EMPLOYMENT OPPORTUNITY:** 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.
- 28) TERMINATION:** Any notice or termination made under this Contract shall be transmitted via US Mail, Certified Return Receipt Requested. The period of notice for termination shall begin on the day the return receipt is signed and dated. Should this contract be terminated for cause or for convenience, the fees paid for the current term of support or maintenance for the remaining portion of the term shall be rebated pro rata.
- a) The parties may mutually terminate this Contract by written agreement at any time.
  - b) The State may terminate this Contract, in whole or in part, pursuant to Paragraph 23) (Default), or pursuant to the Terms and Conditions in the Solicitation Documents, or pursuant to any of the following
    - i. Termination for Cause: In the event any goods, software, or service furnished by the Vendor during performance fails to conform to any material specification or requirement of the Contract, and the failure is not cured within the specified time after providing written notice thereof to Vendor, the State may cancel and procure the articles or Services from other sources; holding Vendor liable for any excess costs occasioned thereby, subject only to the limitations provided in Paragraph 3) (Indemnity). The rights and remedies of the State provided above shall not be exclusive and are in addition to any other rights and remedies provided by law or under the Contract. Vendor shall not be relieved of liability to the State for damages sustained by the State arising from Vendor's breach of this Contract; and the State may, in its discretion, withhold any payment due as a setoff until such time as the damages are finally determined or as agreed by the parties. Voluntary or involuntary Bankruptcy or receivership by Vendor shall be cause for termination.
    - ii. Termination For Convenience Without Cause: The State may terminate service contracts, in whole or in part by giving thirty (30) days prior notice in writing to the Vendor. Vendor shall be entitled to sums due as compensation for Services performed in conformance with the Contract. In the event the Contract is terminated for the convenience of the State the Agency will pay for all work performed and Services delivered in conformance with the Contract up to the date of termination.
- 29) DISPUTE RESOLUTION:** The parties agree that it is in their mutual interest to resolve disputes informally. A claim by the State shall be submitted in writing to the Vendor's Contract Administrator for decision. The Parties shall negotiate in good faith and use all reasonable efforts to resolve such dispute(s). During the time the Parties are attempting to resolve any dispute, each shall proceed diligently to perform their respective duties and responsibilities under this Contract. If a dispute cannot be resolved between the Parties within thirty (30) days after delivery of notice,

either Party may elect to exercise any other remedies available under this Contract, or at law. This term shall not constitute an agreement by either party to mediate or arbitrate any dispute.

- 30) SEVERABILITY:** In the event that a court of competent jurisdiction holds that a provision or requirement of this Agreement violates any applicable law, each such provision or requirement shall be enforced only to the extent it is not in violation of law or is not otherwise unenforceable and all other provisions and requirements of this Agreement shall remain in full force and effect. All promises, requirement, terms, conditions, provisions, representations, guarantees and warranties contained herein shall survive the expiration or termination date unless specifically provided otherwise herein, or unless superseded by applicable federal or State statute, including statutes of repose or limitation.
- 31) ADVERTISING/PRESS RELEASE:** The Vendor absolutely shall not publicly disseminate any information concerning the Contract without prior written approval from the State or its Agent. For the purpose of this provision of the Contract, the Agent is the Purchasing Agency Contract Administrator unless otherwise named in the solicitation documents.
- 32) 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.
- 33) ELECTRONIC PROCUREMENT:** Purchasing shall be conducted through the Statewide E-Procurement Service. The State's third party agent shall serve as the Supplier Manager for this E-Procurement Service. The Vendor shall register for the Statewide E-Procurement Service within two (2) business days of notification of award in order to receive an electronic purchase order resulting from award of this contract.
- a) The Supplier Manager will capture the order from the State approved user, including the shipping and payment information, and submit the order in accordance with the E-Procurement Service. Subsequently, the Supplier Manager will send those orders to the appropriate Vendor on State Contract. The State or State approved user, not the Supplier Manager, shall be responsible for the solicitation, offers received, evaluation of offers received, award of contract, and the payment for goods delivered.
  - b) Vendor agrees at all times to maintain the confidentiality of its user name and password for the Statewide E-Procurement Services. If a Vendor is a corporation, partnership or other legal entity, then the Vendor may authorize its employees to use its password. Vendor shall be responsible for all activity and all charges for such employees. Vendor agrees not to permit a third party to use the Statewide E-Procurement Services through its account. If there is a breach of security through the Vendor's account, Vendor shall immediately change its password and notify the Supplier Manager of the security breach by e-mail. Vendor shall cooperate with the state and the Supplier Manager to mitigate and correct any security breach.

## Attachment A

North Carolina State  
Addendum  
To the  
**OpenText End User Software License Agreement (US) dated July 2016**

Certain terms and conditions are required by applicable North Carolina law and regulation, and are set forth below. Such terms supersede all conflicting terms in the OpenText End User Software License Agreement (US) dated July 2016 (Licensor's Agreement) from the date of execution set forth below.

The State acknowledges that the Licensor's Agreement may include terms and conditions, hyperlinks, or similar references to additional license agreements, and that such additional license agreements address the proprietary and intellectual property rights of third parties for software or software services owned by parties other than the Licensor ("Third Parties"). The Agency further acknowledges that the proprietary and intellectual property rights of the Third Party are subject to a software license agreement. The Reseller shall provide the Agency with copies of all documentation and warranties for the Third Party software and related services offered.

- 1) The License Agreement is modified by this Addendum, and therefore, conflicts arising among the terms of the License Agreement and the terms of this Addendum shall be resolved by the following order of precedence:
  - a) This Addendum
  - b) The License Agreement
  - c) Terms and other documents incorporated by reference in the License Agreement.
- 2) Notwithstanding terms and conditions, hyperlinks, or similar references to additional license agreements of Third Parties presented in Licensor's Agreement, the State shall not be obligated under the Licensor's Agreement, or other agreements, to indemnify or hold harmless the Vendor, its licensors, successors or assigns, nor arbitrate any dispute, nor pay late fees, legal fees, termination costs, costs of audits, or other similar costs.
- 3) General Modifications to the OpenText End User Software License Agreement:
  - a) Third Party Software, Open Source Software, and flow down terms: Notwithstanding terms and conditions, hyperlinks, or similar references to additional license agreements of Third Parties presented in Licensor's Agreement, the State has no financial obligation or liability to Vendor or such Third Parties under such additional license agreements. The State will not knowingly violate the licensing limitations stated in such additional license agreements.
  - b) Clickwrap / universal license by use or installation: Notwithstanding terms of the Licensor's Agreement conditioning the license grant upon acceptance of terms when downloading, installing, using, etc. the software (e.g. by using the software, you accept and agree to the terms and conditions of this agreement), such conditions shall not bind the State or its agencies, and such conditions shall be superseded by this Addendum to the License Agreement.

Notwithstanding any payment terms in the Licensor's Agreement, the State's payment obligations in its contracts with resellers pursuant to this contract (IFB 54-11909298-LH) shall supersede the payment terms in the Licensor's Agreement, and the State shall have

no payment obligation to Licensor pursuant to the payment terms in the Licensor's Agreement.

- c) IP Indemnity- notwithstanding the Licensor's rights to defend its IP and its obligations to indemnify the State, the State shall have the right to participate in any litigation, alternative dispute resolution and settlement of such claims to the extent the State seeks to assert any immunities or defenses applicable to the State as a sovereign government.
  - d) Neither party to this Agreement is entitled to obtain judgment from the other party for attorney fees it has incurred in any litigation between the parties or in defense of any claim asserted by a third party. Either party may seek such equitable relief, reasonable costs and fees as permitted by applicable law. Applicable law, for the purpose of this Agreement and all services shall exclude laws of non-US jurisdictions, including but not limited to the European Union General Data Protection Regulation and its implementation in European Countries.
  - e) Notwithstanding any term in the License Agreement prohibiting assignment or transfer of the agreement, transfers authorized by N.C.G.S. §143A-6 are not prohibited or limited.
  - f) Notwithstanding any merger clauses in the License Agreement, this Addendum shall be read together with the License Agreement as the agreement of the Parties.
  - g) Notwithstanding any term in the License Agreement providing for data transfers, no data or records may be transferred outside of the United States unless specifically authorized by the State.
- 4) Certain terms and conditions are required by applicable North Carolina law and regulation and are set forth below. Such terms supersede all conflicting terms in the Licensor's Agreement from the date of execution set forth below. State Terms and Conditions:
- a) By executing this Addendum, the undersigned Vendor certifies that: the Licensor's Agreement and this Addendum are entered without collusion (G.S. 143B-1354; False certification is a Class I felony), that none of its officers, directors, or owners of an unincorporated business entity has been convicted of any violations of Chapter 78A of the General Statutes, the Securities Act of 1933, or the Securities Exchange Act of 1934 (G.S. 143-59.2), and that it is not an ineligible Vendor as set forth in G.S. 143-59.1. Furthermore, by executing this Addendum, the undersigned certifies to the best of Vendor's knowledge and belief, that it and its principals are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from covered transactions by any Federal or State department or agency.
  - b) **VENDOR UTILIZATION OF WORKERS OUTSIDE U.S.**  
In accordance with N.C.G.S. §1438-1361(b), Vendor must identify 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:  
  
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  
  
The corporate structure and location of corporate employees and activities of the Vendors, its affiliates or any other subcontractors.

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.

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 \_\_\_\_\_

c) 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 £-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 £-Verify to the awarding agency, and on a periodic basis thereafter as may be required by the State.

d) EXCLUSIVE REMEDIES AND LIMITATION OF LIABILITY

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

The Vendor's liability for damages to the State arising under the contract shall be limited to two times the annual value of the Contract. Annual value is defined as the total cost of goods, software and services procured by the State from one or more of Licensor's resellers pursuant to the State's contract.

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 Warranty compliance, or to claims for injury to persons or damage to tangible personal property caused by Vendor's 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 this Contract. 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.

For delays in the delivery or successful Product or Software installation, whichever is applicable, Vendor shall have no liability unless the delivery or successful installation date is delayed by more than thirty (30) days by causes not attributable either to the State or to Force Majeure conditions, in which case the State shall have the right, as its remedies. To recover direct costs including replacement Products, if any, attributable to Vendor's delay, and

To cancel the order without incurring cancellation charges.

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



- e) **TRANSPORTATION:** Transportation charges for any software or other Deliverable shall be FOB Destination unless delivered by internet or file-transfer as agreed by the State, or otherwise specified in the solicitation document or purchase order.
- f) **TRAVEL EXPENSES:** In the event that the Vendor may be eligible to be reimbursed for travel expenses arising under the performance of this Contract, reimbursement will be at the out-of-state rates set forth in GS §138-6; as amended from time to time.
- g) **PROHIBITION AGAINST CONTINGENT FEES AND GRATUITIES:** Vendor warrants that it has not paid, and agrees not to pay, any bonus, commission, fee, or gratuity to any employee or official of the State for the purpose of obtaining any contract or award issued by the State. Subsequent discovery by the State of non-compliance with these provisions shall constitute sufficient cause for immediate termination of all outstanding Agreements. Violations of this provision may result in debarment of the vendor(s) or Vendor(s) as permitted by 9 NCAC 06B.1206, or other provision of law.
- h) **AVAILABILITY OF FUNDS:** Any and all payments by the State are expressly contingent upon and subject to the appropriation, allocation and availability of funds to the Agency for the purposes set forth in this Agreement. If this Agreement or any Purchase Order issued hereunder is funded in whole or in part by federal funds, the Agency's performance and payment shall be subject to and contingent upon the continuing availability of said federal funds for the purposes of the Agreement or Purchase Order. If the term of this Agreement extends into fiscal years subsequent to that in which it is approved such continuation of the Agreement is expressly contingent upon the appropriation, allocation, and availability of funds by the N.C. Legislature for the purposes set forth in the Agreement. If funds to effect payment are not available, the Agency will provide written notification to Vendor. If the Agreement is terminated under this paragraph, Vendor agrees to take back any affected Products and software not yet delivered under this Agreement, terminate any Services supplied to the Agency under this Agreement, and relieve the Agency of any further obligation thereof. The State shall remit payment for Services accepted prior to the date of the aforesaid notice in conformance with the payment terms.
- i) **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 Agreement or to costs charged to this Agreement. The Vendor shall retain any such books, records, and accounts for a minimum of three (3) years after the completion of this Agreement. Additional audit or reporting requirements may be required by any Agency, if in the Agency's opinion, such requirement is imposed by federal or state law or regulations.
- j) **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 the NC Public Records Act: 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. Materials must be identified 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 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 Vendor with respect to the disclosure of Vendor's confidential information ordered by a court of competent jurisdiction pursuant to N.C.G.S. §132-9 or other applicable law.

- i) 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 Department of Information Technology or the N.C. Department of Revenue pursuant to future statutory or regulatory requirements.
- ii) 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 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.
- k) **ASSIGNMENT:** Vendor may not assign this Agreement or its obligations hereunder except as permitted by 09 NCAC 06B.1003 and this Paragraph. Any assignee shall affirm this Agreement accepting the terms and conditions and duties as previously agreed, and that Vendor shall affirm that the assignee is fully capable of performing all obligations of Vendor under this Agreement. An assignment may be made, if at all, in writing by the Vendor, Assignee and the State setting forth the foregoing obligation of Vendor and Assignee.
- l) **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.

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

- m) **GOVERNING LAWS, JURISDICTION, AND VENUE:** This Agreement is made under and shall be governed and construed in accordance with the laws of the State of North Carolina. The place of this Agreement or purchase order, its situs and forum, shall be Wake County, North Carolina where all matters, whether sounding in contract or in tort, relating to its validity, construction, interpretation, and enforcement shall be determined. Vendor agrees and submits, solely for matters relating to this Agreement, to the jurisdiction of the courts of the State of North Carolina and stipulates that Wake County shall be the proper venue for all matters.
- n) **ELECTRONIC PROCUREMENT:** Purchasing shall be conducted through the Statewide E-Procurement Service. The State's third-party agent shall serve as the Supplier Manager for this E-Procurement Service. The Vendor shall register for the Statewide E-Procurement Service within two (2) business days of notification of award in order to receive an electronic purchase order resulting from award of this contract.


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

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

Executed by authorized officials as set of the day and date indicated on the following page below.

Executed by authorized officials as of the date and date indicated below:

OpenText, Inc.

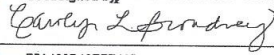
By: 

Name: Mike Kucharski

Title: SVP, Sales, ECS Americas

Date: September 9, 2019

North Carolina Department of Transportation

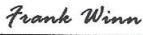
By: 

Name: Carolyn E. Broadney

Title: IT Project Portfolio Director

Date: 9/10/2019 | 8:01 AM EDT

North Carolina Department of Transportation

By: 

Name: Frank Winn

Title: Chief Information Officer

Date: 9/11/2019 | 7:31 AM EDT

## Attachment B

# OpenText

## End User License Agreement - US

This End User License Agreement ("**EULA**") is between the OpenText entity specified in the signature block below ("**OT**") and the licensee specified in the signature block below "**C'Licensee**", and is effective on the last signature date ("**Effective Date**").

OT and Licensee agree as follows:

### **1.0**      **Definitions**

**"Affiliate"** means any entity controlled by, controlling, or under common control with a party to this EULA. Control exists through ownership, directly or indirectly, of a majority of the outstanding equity capital and of the voting interests of the subject entity. If an entity ceases to meet these criteria, it will cease to be an Affiliate under this EULA;

**"Claim"** means claims, suits, actions or proceedings brought against Licensee in a court of competent jurisdiction in a Covered Country by a third party which allege an infringement of the third party's patent, copyright, or trade secret rights of which OT is aware existing under the laws of the Covered Countries;

**"Covered Countries"** means Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, New Zealand, Norway, Spain, Sweden, Switzerland, the Netherlands, the United Kingdom and the United States.

**"Documentation"** means user guides, operating manuals, and release notes in effect as of the date of delivery of the applicable Software, made generally available by OT;

**"License Documents"** means this EULA including any addenda, the License Model Schedule, all Transaction Documents (including pricing information), Documentation, the document entitled Third Party Notifications available at [www.opentext.com/agreements](http://www.opentext.com/agreements), and any other documents provided by OT setting out permitted uses of the Software;

**"License Fees"** means all non-refundable fees payable by Licensee to OT with respect to the granting of Software Licenses;

**"License Model"** means the description of the conditions, limitations and restrictions associated with the Software License which govern the use of the Software;

**"License Model Schedule"** for each individual Software License means the schedule entitled "License Model Schedule" posted at <http://www.opentext.com/agreements> in effect on the date of the applicable Transaction Document. The License Model Schedule is incorporated into this EULA;

**"Physical Media"** means the physical media or hardware containing or enabling Software;

**"Reseller"** means an authorized OT reseller;

**"Software"** includes software products, Documentation, and Support Software licensed to Licensee under this EULA, including all copies made by Licensee and may, Where the meaning so implies, refer to all of the Software or portions thereof;

**"Software License"** means a license for the Software granted under this EULA to the Licensee;

**"Support Software"** means all maintenance and support software, updates, upgrades, patches, fixes, modifications, ported versions, or new versions of the Software provided to Licensee pursuant to an OT maintenance and support program, together with all related Documentation provided to Licensee pursuant to such program;

**"Taxes"** means the sales, use, consumption, goods and services, and value-added taxes imposed by the appropriate governments arising out of granting of licenses and delivery of Software under this EULA, except taxes imposed on OT's income;

**"Third Party Software"** means software products owned and licensed directly by third parties to the end user;

**"Transaction Document"** includes: a) a written order schedule signed by both parties which references this EULA, b) a quotation issued by OT and signed by the Licensee, c) an invoice issued by OT, or d) any other document that references this EULA and is agreed to by OT in writing. If and to the extent of any inconsistency between two or more Transaction Documents, the priority of the Transaction Documents will be interpreted in the order listed above. All Transaction Documents are governed by this EULA.

## **2.0 Ownership of the Software**

**2.1 Ownership.** None of the Software is being sold. All ownership, intellectual property, and other rights and interests in the Software remain solely with Open Text Corporation, its Affiliates or its licensors. The source code of the Software is trade secret of Open Text Corporation, its Affiliates or its licensors, and is their confidential information.

## **3.0 License Grant**

**3.1 Grant of License.** Except as otherwise stated in the License Documents and subject to Licensee's payment of the License Fees and Taxes in full, OT grants to Licensee a worldwide, nonexclusive, perpetual (unless stated to be a time limited term), internal business use license (unless otherwise stated in the License Model Schedule) to download, install and execute the Software identified in the applicable Transaction Document subject to the License Models, restrictions, quantities, conditions, and limitations stated in the License Documents. OT reserves all rights not expressly granted to Licensee in a written document signed by both parties.

**3.2 Applicable License Models.** The License Model and any restrictions for the Software will be stated in the Transaction Document. If no License Model or restrictions are specified in the Transaction Document, the License Model (and any capacities) for which OT has been paid License Fees will apply.

**3.3 Allocation of Licenses to Affiliates.** Unless prohibited under the applicable License Document, the Licensee may allocate Software Licenses to its Affiliates, provided: (a) the Licensee remains responsible for the Affiliate's compliance with the License Documents; and (b) the Licensee is liable for any breach of the License Documents by an Affiliate.

## **4.0 Authorized Copies**

**4.1 Software and Documentation.** Licensee may make as many copies of the Software necessary for it to use the Software as licensed. Each copy of the Software made by Licensee must contain the same copyright and other notices that appear on the original copy. Licensee will not modify the Documentation. Documentation may: (a) only be used to support Licensee's use of the Software; (b) not be republished or redistributed to any unauthorized third party; and (c) not be distributed or used to conduct training for which Licensee, or any other party, receives a fee. Licensee will not copy any system schema reference document related to the Software.

## **5.0 Restrictions**

**5.1 General Restrictions.** Except as provided in the License Documents, Licensee will not and will not permit any other party to: (a) assign, transfer, give, distribute, reproduce, transmit, sell, lease, license, sublicense, publicly display or perform, redistribute or encumber the Software by any means, to any party; (b) rent, loan or use the Software for service bureau or time-sharing purposes, or permit other individuals or entities to create Internet "links" to the Software or "frame" or "mirror" the Software on any other server or wireless or Internet-based device, or in any other way allow third parties to access, use, and/or exploit the Software; (c) use the Software, in whole or in part, to create a competitive offering; (d) charge a fee to any party for access to or use of the Software; (e) use the Software in a manner inconsistent with the License Documents.

**Further Restrictions.** Licensee will not disclose results of any benchmark or other performance, evaluation, or test run on or related to the Software. Licensee acknowledges that the Software is not fault-tolerant and not designed, manufactured, or intended for use or resale as online control equipment in hazardous environments requiring fail-safe performance and consequently will not use the Software for (w) the on-line control of aircraft, air traffic, aircraft navigation, or aircraft communications; (x) in the design, construction, operation or maintenance of any nuclear facility; (y) medical or surgical applications; or (z) any other application in which failure could cause personal injury or death. Except as expressly permitted under applicable law, Licensee will not modify, adapt, translate, reverse engineer, decompile, disassemble, decrypt, port, emulate the functionality, reverse compile, reverse assemble, or otherwise reduce or attempt to discover any source code or underlying structures, ideas, or algorithms of the Software or any confidential information or trade secret.

**5.2 Derivative Works/ Improvements.** Licensee is prohibited from creating any change, translation, adaptation, arrangement, addition, modification, extension, upgrade, update, improvement, (including patentable improvements), new version, or other derivative work based on, incorporating, or using, the Software. Notwithstanding, if any of the Software is provided to the Licensee in source code format (or any other format that can be modified), the Licensee may modify such portion of the Software for the sole purpose of using the Software in accordance with this EULA and OT will solely own all modified portions and Licensee will irrevocably assign to OT in perpetuity all worldwide intellectual property and any other proprietary rights in and to any modifications of the Software.

**5.3 Interfacing and Interactive Software.** Licensee may not permit any software products not licensed by OT to interface or interact with the Software, unless accomplished through the use of application program interfaces provided by OT.

## **6.0 Ordering Software Licenses**

**6.1 Direct Orders.** If Licensee orders Software directly from OT, the Software must be identified on a Transaction Document acceptable to OT.

**6.2 Orders through an OT Reseller.** Software Licenses ordered through a Reseller are governed by the license grant set out in this EULA and the License Model description set out in the License Model Schedule.

The License Model will be stated in an order document between Licensee and Reseller. If Reseller does not notify Licensee of the correct License Model, then the License Model for which OT has been paid License Fees will apply.

**6.3 Risk of Loss and Shipping Terms.** The Software is deemed delivered on the earlier of (a) when it is made available by OT for electronic download, or (b) when OT delivers the Software on Physical Media. Title to the Physical Media and all risk of loss for the Physical Media will pass to Licensee when delivered by OT to the shipping dock of the OT shipping facility.

**6.4 Invoicing And Payment** OT may invoice Licensee for License Fees and Taxes upon delivery of Software. All License Fees and Taxes due to OT by Licensee are due and payable upon Licensee's receipt of an invoice from OT. License Fees do not include Taxes which are the responsibility of Licensee. If OT is obligated to pay Taxes on behalf of Licensee, Licensee will reimburse OT in full promptly following receipt of OT's invoice. Licensee is responsible for paying the full Licensee Fees to OT regardless of any Taxes Licensee is required to withhold or deduct. All License Fees and Taxes due to OT under this EULA are payable in the currency specified in the Transaction Document. All License Fees and Taxes due to OT which are not paid in full within 30 days following its due date will bear interest at a rate of 1.5% per month (18% per annum) or the maximum amount allowed by law, if less, on the unpaid portion until fully paid. This subsection does not apply if Software is purchased through an OT reseller.

**6.5 Over Usage.** OT may invoice Licensee for fees and Taxes payable by Licensee due to use of or access to the Software in excess of the number or type of Software Licenses granted by OT.

**6.6 Licensee Affiliate Orders.** Licensee's Affiliates that order Software Licenses are bound by the terms and conditions of this EULA as if it were the Licensee. Licensee and its Affiliates are jointly and severally liable to OT for any breach of this EULA.

**6.7 OT Affiliate Orders.** OT Affiliates may fulfill orders pursuant to a Transaction Document in which case the OT Affiliate is bound by all of the terms and conditions of this EULA as if it were OT.

## **7.0 OT Support and Maintenance.**

**7.1 OT Support and Maintenance Program.** All Support Software provided to Licensee under an OT maintenance or support program is governed by this EULA. The provision of maintenance and support services by OT will be governed by the then-current version of the applicable OT software maintenance program handbook (available upon request or at [www.opentext.com/agreements](http://www.opentext.com/agreements)).

## **8.0 Audits and Noncompliance.**

**8.1 Audit.** During the term of this EULA and for 24 months after, Licensee will maintain electronic and other records sufficient for OT to confirm that Licensee has complied with this EULA. Licensee will promptly and accurately complete and return (no less than 30 days) any self-audit questionnaires, along with a certification by an authorized representative of Licensee confirming that Licensee's responses to the questionnaire accurately and fully reflect Licensee's usage of the Software. Furthermore OT may once per year audit Licensee's records and computer systems (including servers, databases, and all other applicable software and hardware) to ensure Licensee has complied with this EULA. Licensee shall cooperate with OT's audit team and promptly and accurately respond to, database queries, location information, system reports, and other reports requested by OT and provide a certification by an authorized representative of Licensee confirming that information provided by Licensee accurately reflects Licensee's usage of the Software

**8.2 Conduct.** Audits will be conducted during regular business hours and will not interfere unreasonably with Licensee's business. OT will provide Licensee with 7 days prior notice of each audit. Licensee will allow OT to make copies of relevant Licensee records. OT will comply with all applicable data protection regulations.



**8.3 Noncompliance.** If Licensee is not in compliance with the Software Licenses, Licensee will be deemed to have acquired additional Software Licenses at OT's then-current list price to bring Licensee into compliance, and Licensee must immediately pay: (a) the applicable License Fees and Taxes, and (b) maintenance and support fees covering (i) the period Licensee was not in compliance with the Software License; and (ii) the first year maintenance and support fees on any additional Software Licenses. If Licensee has failed to comply with the License Documents, Licensee will reimburse all costs incurred by OT in performing the audit. Compliance with the License Documents is the sole responsibility of Licensee.

## **9.0 Limited Warranties**

**9.1 Limited Software Warranty.** OT warrants to Licensee that Software: (a) will be free of all known viruses at the time of first delivery; and (b) will perform substantially in accordance with its accompanying Documentation for 60 days from the date of first delivery. OT's entire liability, and Licensee's sole remedy, for each breach by OT of the warranty in: (i) clause (a) is limited to requiring OT to deliver a replacement copy of the Software to Licensee free of known viruses; and (ii) clause (b) is limited to requiring OT to correct or work around the portion of the Software giving rise to such breach within a commercially reasonable time, failing which OT will refund all License Fees attributable to the portion of the Software giving rise to the breach.

**9.2 Warranty Exclusions.** The warranties do not apply to any breach caused by: (a) any change to the Software, except where the changes were made by OT through Support Software; (b) Licensee's failure to provide a suitable installation or operating environment for the Software; (c) use of the Software on or caused by software, firmware, computer systems, data, technology or a hardware platform not approved by OT in writing; (d) any telecommunications medium used by Licensee; (e) failure of Licensee or user to comply with the Documentation; or (f) failure of Licensee to report a warranty claim within the warranty period. OT does not warrant that the Software is error-free or will operate without interruption.

**9.3. WARRANTY DISCLAIMER EXCEPT FOR THE EXPRESS LIMITED WARRANTIES PROVIDED IN THIS SECTION, OT AND OT'S LICENSORS MAKE NO REPRESENTATIONS AND DISCLAIM ANY AND ALL EXPRESS, IMPLIED, OR STATUTORY WARRANTIES, WRITTEN OR ORAL, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON- INFRINGEMENT, OR THE ADEQUACY OF THE SOFTWARE TO PRODUCE A PARTICULAR RESULT**

**Inability to Exclude Warranties.** If a jurisdiction applicable to this EULA restricts the exclusion of certain implied warranties, limitations on how long an implied warranty may last, or the exclusion or limitation of incidental, consequential, or special damages: (a) each warranty which cannot be excluded is limited in time to 60 days from the date of first delivery of the Software; and (b) OT's total liability to Licensee for breach of all such warranties are limited to the amount stated in the Limitation of Liability section.

## **10.0 OT Infringement Indemnity**

**10.1 Infringement Claims.** OT will defend Licensee from any Claim, to the extent the Claim arises solely as a result of Licensee's use of the Software in accordance with the License Documents, and provided the alleged infringement was not caused by: (a) Licensee's failure to incorporate a Software update or upgrade that would have avoided the alleged infringement; (b) the modification of the Software by any party other than OT; (c) the combination or use of the Software with software, hardware, firmware, data, or technology not licensed to Licensee by OT or approved by OT in writing; or (d) unlicensed activities of the Licensee.

**10.2 Exclusions.** OT's obligations in the this section are conditioned upon: (a) Licensee notifying OT in writing within 10 days of Licensee becoming aware of a Claim; (b) Licensee not making an admission against OT's interests unless made pursuant to a judicial request or order; (c) Licensee not agreeing to any settlement of any Claim without the prior written consent of OT; and (d) Licensee, at the request of OT, providing all reasonable assistance to OT in connection with the defense, litigation, and settlement by OT of the Claim; and (e) OT having sole control over the selection and retainer of legal counsel, and over the litigation or the settlement of each Claim. OT will indemnify Licensee from any judgment finally awarded, for which all avenues of appeal have been exhausted, or any final settlement in connection with any Claims, provided all the conditions of this section are satisfied.

**10.3 Licensee's Continued Use.** If the Software becomes the subject of a Claim, OT will, in its absolute discretion, either (a) obtain a license for Licensee to continue using the Software, (b) replace or modify the Software without unreasonable degradation in functionality or (c) terminate the Software License to the infringing portion of the Software and refund the unamortized portion of the License Fees received by OT and attributable to the infringing portion of the Software, based on a 3 year straight line amortization. OT's entire liability and Licensee's sole and exclusive remedy with respect to any Claims are limited to the remedies set out in the OT Infringement Indemnity section.

#### **11.0 Limitation of Liability**

**11.1 EXCLUSION OF DAMAGES. NOTWITHSTANDING ANY BREACH BY OT (INCLUDING FUNDAMENTAL BREACH) OR TERMINATION OF THIS EULA, OT IS NOT LIABLE TO LICENSEE OR TO ANY OTHER PARTY FOR: (A) ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, AGGRAVATED, EXEMPLARY, OR PUNITIVE DAMAGES; OR (B) ANY LOST SALES, LOST REVENUE, LOST PROFITS, LOST OR CORRUPTED DATA, OR REPROCUREMENT AMOUNT.**

**11.2 LIMITATION OF LIABILITY. OT'S AGGREGATE LIABILITY TO LICENSEE WILL NOT EXCEED THE TOTAL AMOUNT OF LICENSE FEES PAID TO OT UNDER THE RELEVANT TRANSACTION DOCUMENT. THE PARTIES WOULD NOT HAVE ENTERED INTO THIS EULA WITHOUT THIS SECTION.**

**11.3 DISCLAIMER. THE LIMITATIONS IN THIS SECTION APPLY: (A) TO LIABILITY FOR NEGLIGENCE; (B) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, EQUITY, AT LAW, STRICT PRODUCT LIABILITY, OR OTHERWISE; (C) EVEN IF OT IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (D) EVEN IF LICENSEE'S REMEDIES FAIL IN THEIR ESSENTIAL PURPOSE. IF THE APPLICATION OF THIS SECTION IS LIMITED BY LAW OT'S LIABILITY WILL BE LIMITED TO THE EXTENT PERMITTED BY LAW.**

#### **12.0 Termination**

**Termination for Default** Either party may terminate this EULA if the other party: (a) becomes insolvent; and (b) has a receiver or receiver manager appointed with respect to it or any of its assets. Without prejudice to each right or remedy of a non-breaching party, either party may terminate this EULA for material breach by written notice, effective 10 days after notice unless the other party first cures the breach.

**12.1 Effect of Termination or Expiration.** Upon any termination of this EULA, or license granted pursuant to this EULA, or upon expiration of a term license: (a) all Software Licenses will immediately terminate; (b) Licensee will immediately cease all use of the Software; and (c) Licensee must either deliver to OT or destroy all copies of Software, Documentation, and OT confidential information in Licensee's possession or control. Within 15 days after termination, an authorized representative of Licensee must certify in writing that all copies have been delivered to OT or destroyed. Any terms in this EULA which by their nature extend beyond termination or expiration of this EULA will remain in effect until fulfilled.

### **13.0 Miscellaneous Provisions**

**13.1 Confidentiality.** Information exchanged under this EULA will be treated as confidential if identified as such at disclosure or if the circumstances of disclosure would reasonably indicate such treatment. Confidential information may only be used for the purpose of fulfilling obligations or exercising rights under this EULA and may only be shared with employees, agents, or contractors with a need to know such information. Confidential information will be protected using a reasonable degree of care to prevent unauthorized use or disclosure during the period the information remains confidential or a trade secret. These obligations do not cover information that (a) was known or becomes known to the receiving party without obligation of confidentiality; (b) is independently developed by the receiving party or (c) is required to be disclosed by law or a governmental agency.

**13.2 Automated Verification.** The Software may contain or require a license key to prevent unauthorized installation or to enforce limits of the Software License, and may contain devices or functionality to monitor Licensee's compliance with this EULA.

**13.3 Developer Tools.** OT is not responsible or liable for Licensee's development or use of additional software code or software products ("Licensee Software") using software developer tools licensed by OT and Licensee will defend and indemnify OT against any claims, damages, costs, losses or expenses related to the development or use of the Licensee Software.

**13.4 Independent Contractors.** OT and Licensee are independent contractors. Neither party has any authority to bind the other in any manner.

**13.5 Waiver, Amendment, Assignment** Any amendment of this EULA must be in writing and signed by both parties. Licensee may not assign, transfer, or sublicense any portion of its interests, rights, or obligations under this EULA by written agreement, merger, consolidation, change of control, operation of law, or otherwise, without the prior written consent of OT. Neither party will be deemed to have waived any of its rights under this EULA by lapse of time or by any statement or representation other than by a written waiver by a duly authorized representative. No waiver of a breach of this EULA will constitute a waiver of any prior or subsequent breach of this EULA. An assignment in contravention of this section will be null and void. Except to the extent identified in this subsection, this EULA will be binding upon and inure to the benefit of the respective successors and assigns of the parties.

**13.6 Governing Law.** This EULA is governed by the laws of the State of Delaware excluding (a) its conflicts or choice of law rules, and (b) the United Nations Convention on Contracts for the International Sale of Goods. Except for a request by OT for injunctive or other equitable relief, any dispute arising out of this EULA will be subject to the exclusive jurisdiction of the courts located in the State of Delaware. The prevailing party in any litigation related to this EULA will be entitled to its reasonable attorneys' fees and court costs. The Uniform Computer Information Transactions Act, or any version, adopted by any state, does not apply to this EULA.

**13.7 Force Majeure.** Except for payment and confidentiality obligations, or protection of intellectual property, neither party is responsible for any delay or failure in performance of this EULA to the extent due to causes beyond its reasonable control.

**Severability.** If any provision of this EULA is deemed contrary to applicable law or unenforceable by a court of competent jurisdiction, the provision will be severed from this EULA and all remaining provisions will continue in full force.

**13.8 Export Laws.** The Software, including Documentation, is subject to U.S. export control laws, including the

U.S. Export Administration Act and its associated regulations, and may be subject to export or import regulations in other countries. Licensee will comply strictly with all regulations and has the responsibility to obtain any licenses required to export, re-export, or import Software or Documentation.

**13.9 Press Release.** OT may refer to Licensee's relationship with OT in a public press release or marketing materials.

**13.10 Attribution Notices.** Licensee will not remove, modify, obscure, resize, or relocate any ownership, attribution, or branding notices from the Software.

**13.11 Resale of Third Party Software.** The use of any Third Party Software resold by OT to the Licensee will be governed by a license agreement between the Third Party Software owner and the Licensee. OT does not provide any warranties related to the Third Party Software. OT has no liability or obligation to the Licensee related to the Third Party Software.

**13.12 US Government End Users-Restricted Rights Legend.** If the Software is being licensed directly or indirectly on behalf of the United States government, the following applies. For civilian agencies and departments: the Software was developed at private expense and is "restricted computer software" submitted with restricted rights in accordance with subparagraphs (a) through (d) of the Commercial Computer Software-Restricted Rights clause of FAR 52.227-19 and its successors, and it is unpublished and all rights are reserved under the copyright laws of the United States. For units of the Department of Defense, the Software is "commercial computer software" and "commercial computer software documentation" under the Rights in Computer Software and Computer Software Documentation clause of DFAR 227.7202-3 (a) and its successors, and all use, duplication or disclosure is subject to the license and restrictions set forth in this EULA.

**13.13 Entire License Agreement.** The License Documents set forth the entire agreement between the parties with respect to this subject matter, and supersede all other related oral and written agreements and communications between the parties. Neither party has relied upon such other agreements or communications. Any purchase order terms which purport to amend or modify terms of the License Documents, or which conflict with the License Documents are void.

**13.14 Third Party Rights.** This EULA does not confer a benefit on, and is not enforceable by, any person or entity who is not a party to this EULA.

**13.15 Legal Review and Interpretation.** Both parties have had an opportunity for legal review of the License Documents. The parties agree that the License Documents result from negotiation between the parties. The License Documents will not be construed in favor of or against either party by reason of authorship. The headings used in this EULA are for convenience only. The term section refers to all subsections below a section heading (i.e. 3.0) and the term subsection refers to sequentially numbered subsections following a section (i.e. 3.1). Les parties aux presentes confirment leur volonte que cette convention, de meme que tous les documents et avis qui s'y rattachent ou qui s'y rattacheront, soient rediges en langue anglaise. The parties confirm that this Agreement and all related documentation is and will be in the English language.

**13.16 Notices.** Any notice under this EULA that must be given by a party in writing is deemed effective when sent either: (a) via certified or registered mail, postage prepaid, or (b) via express mail or nationally recognized courier service to the other party's address specified in this EULA or on the most recent Transaction Document. Notices to OT will also be sent to OT's general counsel at 275 Frank Tampa Drive, Waterloo, Ontario Canada, N2L 0A1.

**13.17 Hardware.** IF HARDWARE IS IDENTIFIED ON A TRANSACTION DOCUMENT, THE SALE AND USE OF THE HARDWARE WILL BE GOVERNED BY TERMS OTHER THAN THIS EULA. OT DISCLAIMS ALL WARRANTIES AND LIABILITY WITH RESPECT TO THE HARDWARE.