


STATE OF NORTH CAROLINA	Request for Best & Final Offer (BAFO) No. 05 of Vendor's Offer in response to REQUEST FOR PROPOSAL (RFP) # 40-IT00114-15
NC DEPARTMENT OF PUBLIC INSTRUCTION (NCDPI)	For: Public Consulting Group Inc. (PCG) Attn: Amy Smith Email: amysmith@pcgus.com
	Offers will be received until: November 22, 2016
Refer <u>ALL</u> inquiries regarding this BAFO to: Mike Beaver Michael.Beaver@dpi.nc.gov Telephone No. 919-807-3683	Issue Date: November 18, 2016
	Commodity: Exceptional Children Accountability Tracking System
	Using Agency: NC Dept. of Public Instruction
See page 2 for mailing instructions.	Requisition No.: RQ18365871

NOTICE TO VENDOR

Offers, subject to the conditions made a part hereof, will be received at this office, NCDPI Purchasing, 301 N. Wilmington Street, Room B04, Raleigh, NC 27601 until 12:00PM ET (noon) on the day of opening and then opened, for furnishing and delivering the goods and services as described herein. Refer to page 2 for proper mailing instructions. Bids submitted via facsimile (fax) machine in response to this Best and Final Offer (BAFO) will not be accepted. Bids are subject to rejection unless submitted on this form.

EXECUTION OF BAFO (05)

In compliance with this Request for Best and Final Offer (BAFO), and subject to all the conditions herein, the undersigned offers and agrees to furnish any or all goods and services which are offered, at the prices agreed upon and within the time specified herein. Pursuant to N.C.G.S. §143B-1354 and under penalty of perjury, the undersigned Vendor certifies that this offer has not been arrived at collusively or otherwise in violation of Federal or North Carolina law and this offer is made without prior understanding, agreement, or connection with any firm, corporation, or person submitting an offer for the same commodity, and is in all respects fair and without collusion of fraud. **Failure to execute/sign offer prior to submittal shall render offer invalid. Late offers are not acceptable.**

OFFEROR: Public Consulting Group, Inc.		
STREET ADDRESS: 5511 Capital Center Drive, Suite 550	P.O. BOX:	ZIP: 27606
CITY & STATE & ZIP: Raleigh, North Carolina 27606	TELEPHONE NUMBER: (919) 576-2200	TOLL FREE TEL. NO
PRINT NAME & TITLE OF PERSON SIGNING: Amy Smith, Manager	FAX NUMBER: (919) 576-2201	
AUTHORIZED SIGNATURE: 	DATE: 11/21/2016	E-MAIL: amysmith@pcgus.com

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

ACCEPTANCE OF OFFER

If the State accepts any or all parts of this offer, an authorized representative of NCDPI shall affix his/her signature to the Vendor's response to this Request for BAFO No. 5. The acceptance shall include the response to this BAFO, BAFO 1, BAFO 2, BAFO 3, and BAFO 4; any provisions and requirements of the original RFP, BAFO 1, BAFO 2, BAFO 3, and BAFO 4 which have not been superseded by this BAFO No. 5; and the Department of Information Technology Terms and Conditions. These documents shall then constitute the written agreement between the parties. A copy of this acceptance will be forwarded to the successful vendor(s).

FOR DEPARTMENT OF PUBLIC INSTRUCTION USE ONLY	
Offer accepted and contract awarded this ____ day of _____, 20____, as indicated on attached certification, by _____ (Authorized representative of Department of Public Instruction)	
State Superintendent of Public Instruction	
Date of signature: _____	
by _____ (Authorized representative of Department of Public Instruction).	
Chief Financial Officer	
Date of signature: _____	
FOR DEPARTMENT OF PUBLIC INSTRUCTION USE ONLY	

Instructions: **Sealed offers**, subject to the conditions made a part hereof, will be received at the address below, for furnishing and delivering the goods, software, and/or services as described herein.

DELIVER TO:
40-IT00114-15 BAFO 05 NCDPI Attn: Mike Beaver 301 N. Wilmington Street, Room B04 Raleigh, NC 27601

It is the responsibility of the Vendor to deliver the offer in this office by the specified time and date of opening, regardless of the method of delivery. Address envelope and include IFB/RFQ number as shown above. Vendors are cautioned that offers sent via U.S. Mail, including Express, Certified, Priority, Overnight, etc., may not be delivered in time to meet the deadline.

Deliver one (1) signed original executed offer, and one (1) copy of the executed offer response, and one (1) signed, executed electronic copy of its offer on a USB Flash Drive. The files must not be password-protected and must be capable of being copied to other media. Offers submitted via facsimile (FAX) machine, telephone or electronically in response to this will not be accepted.

SOLICITATION REQUEST FOR BEST AND FINAL OFFER (BAFO)

This request is to acquire a best and final offer from Vendor for an Exception Children Accountability Tracking System. The offer should integrate the previous response to the RFP, BAFO 1, BAFO 2, BAFO 3, and BAFO 4 and any changes listed below. Any individual vendor can receive a different number of requests for BAFOs than other offerors.

NOTE: This bid is still in the evaluation period. During this period and prior to award, possession of the BAFO, original bid response and accompanying information is limited to personnel of the Department of Information Technology (DIT) IT Strategic Sourcing Office, and to agencies responsible for participating in the evaluation. Bidders 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.

DESCRIPTION of Requested Best & Final Offer to Solicitation's Information. Specifications. or Terms and Conditions:

(A) The following is a description of the State's desire to communicate with and request a best and final offer from a vendor.

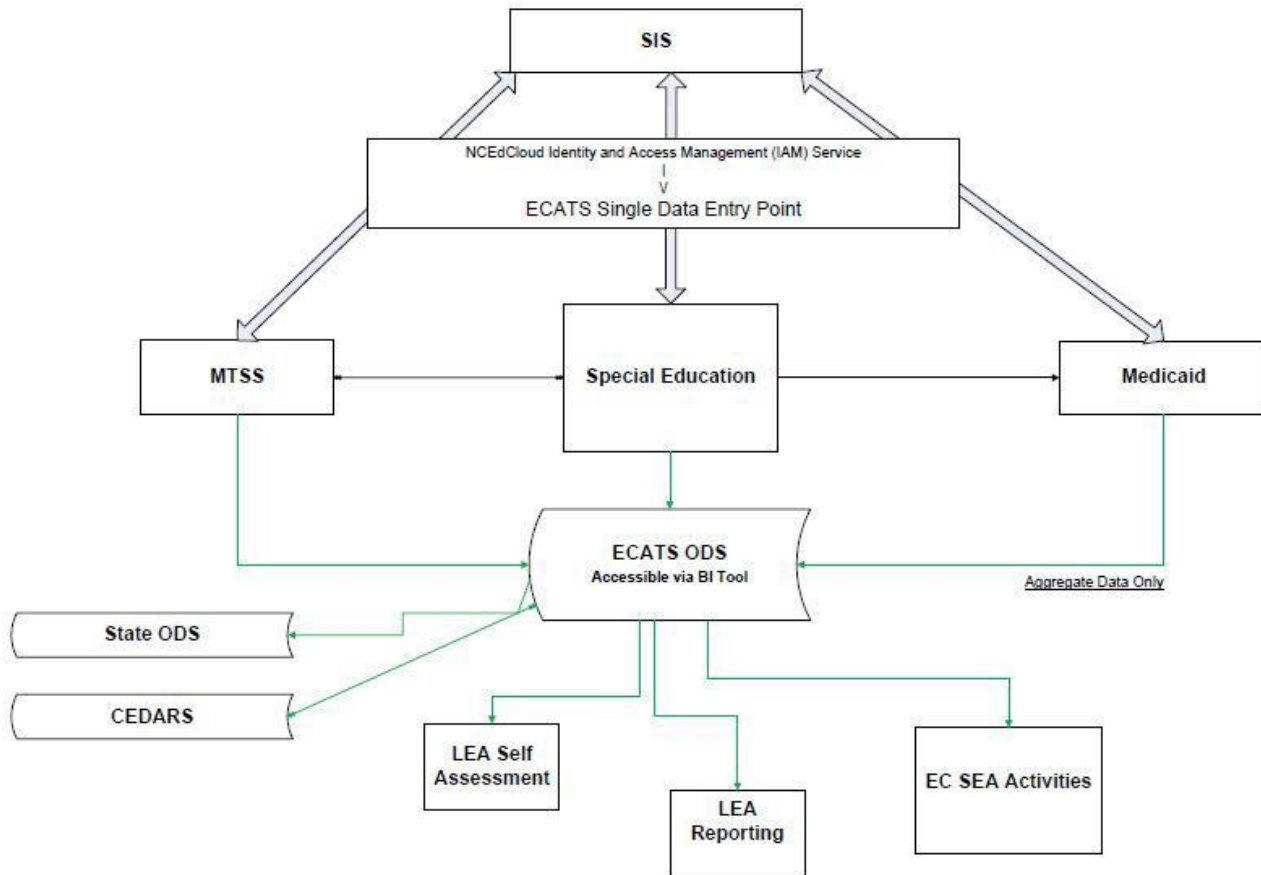
This BAFO shall integrate the vendor's previous response and offer to the solicitation and any changes listed below. **Furthermore, the State also encourages the bidder to supply more competitive pricing herein; vendor should submit its most competitive price(s) in response to this request for BAFO.**

With submission of a response to this *Request for Best and Final Offer (BAFO) #05*, vendor hereby agrees to modify its original Proposal Response and Offer to the solicitation in accordance with the items that follow.

Via submission of a response, vendor hereby agrees that this **language supersedes the original, published solicitation, vendor’s original response and offer, and any prior clarifications, communications, or negotiations, for the respective area(s), described.**

Vendor must specifically respond to each item as requested below and provide any explanations or exceptions in each response:

1. In reference to BAFO 4 Clarification 11 and RFP 40-IT00114-15 Attachment A - Data Flow diagram, please respond to the updated diagram below.



Vendor Response to (A) (1):

Accept or Not Accept (circle your response for A 1)

2. Please acknowledge your agreement to the Contract Year 1 deliverable based payment plan in the table below.

Contract Year 1 - Payment plan based upon deliverables

Payment Percentage	Description	Environment
20	Base Code	QA
20	Base Code	Prod
20	Custom code	QA
15	Pilot	
10	Custom Code	Prod
15	Retainage	
100 – total		
Base Code is all requirements responded - 1		
Custom Code is all requirements responded - 2		
Pilot scope mutually defined after contract award, dependent upon timeline		

Accept or Not Accept (circle your response for A 2)

3. In reference to the BAFO #4 Question 2, regarding the conversion of the September Child Count, October Indicator 11 Timely Placement Count, and the Indicator 7 COSF Count data, DPI rejects PCG’s stipulation #2 that in lieu of the financial penalties set forth in the SLA, PCG proposed that the penalties result in additional no-cost development and consulting hours be levied. DPI has thoroughly reviewed the count requirements and determined that there is no basis for the exclusion of the September Child Count, October Indicator 11 Timely Placement Count, nor the Indicator 7 COSF Count from the current scope of importing historical data. RFP 40-IT00114-15 Addendum #2 Question #4 states that potential vendor is to convert ‘Special Education data’ from CECAS. RFP 40-IT00114 Appendix A – Module Service Specification Business Rules BR-1.1.94 defines the Special Education Module Counts as the following: ‘Child counts include Active child counts, Exited child counts, Child Outcome Summary Form (COSF Indicator 7) child count, Timely Placement (Indicator 11) counts and Timely Transition (Indicator 12)’. DPI will not pay additional fees for the conversion of the September Child Count, October Indicator 11 Timely Placement Count, nor the Indicator 7 COSF Count data. Please respond to this requirement whether you agree the conversion of count data referenced above is within scope of RFP-40-IT00114-15 and will be completed by PCG at no additional cost to DPI.

Accept or Not Accept (circle your response for A 3)

4. In reference to BAFO #4 question 8, please acknowledge your understanding of unlimited user accounts as defined in the mandatory requirement OLS-6 in RFP 40-IT00114-15 Appendix: B Module Technical Specifications “The ECATS Service shall provide for an unlimited number of user accounts” as the ECATS service will be available to NCDPI and all its authorized state or LEA level users without any limit on the number of those user accounts and this requirement is included in the proposed solution at no additional cost to DPI. Please respond to this requirement.

Vendor Response to (A) (18): PCG acknowledges this understanding of unlimited user accounts as defined in the mandatory requirement OLS-6 of RFP 40-IT00114-15 Appendix B.

5. **The ECATS Service Level Agreement (SLA) is attached to this BAFO 5 as Attachment B, and is the result of mutual agreement between NCDPI and PCG. Please indicate the PCG agreement to this SLA in the response below.**

Accept or Not Accept (circle your response for A 20)

6. **Recent legislation (see N.C.G.S. 143B-1350(h1), created by Session Law 2016-85) has led to changes in the State's standard terms and conditions for information technology contracts. Accordingly, Paragraphs 6, 7, and 25 of the North Carolina Department of Information Technology SAAS Terms and Conditions in Section VII of the RFP are hereby revised as follows:**

Paragraph 6) Indemnity: Remove Paragraph 6) in its entirety and replace with the following:

6) 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 Software, Products or Services supplied by the Vendor, their use or operation infringes on a patent, copyright, trademark or violates a trade secret in the United States. The Vendor shall pay those costs and damages finally awarded or agreed in settlement against the State in any such action. Damages shall be limited as provided in 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) Should any Services, Products or Software supplied by the Vendor become the subject of a claim of infringement of a patent, copyright, Trademark or a trade secret in the United States, the Vendor, shall at its option and expense, either procure for the State the right to continue using the Services, Products or Software, or replace or modify the same to become noninfringing. If neither of these options can reasonably be taken in the Vendor's judgment, or if further use shall be prevented by injunction, the Vendor agrees to cease use of any affected Services, Products or Software, and refund any sums the State has paid the Vendor less any reasonable amount for use or damage. If, in the sole opinion of the State, the cessation of use of any such Services, Products or Software due to infringement issues makes the continuation of this Agreement impractical, the State shall then have the option of terminating the Agreement, or applicable portions thereof, without penalty or termination charge; and the Vendor agrees to refund any sums the State paid.
- c) The Vendor will not be required to defend or indemnify the State if any claim by a third party against the State for infringement or misappropriation results from the State's (a) alteration of any Services, Products or Software or (b) continued use of the good(s) or Services, Products or Software after the State receives notice they infringe on a trade secret of a third party.

Paragraph 7) Exclusive Remedies and Limitation of Liability: Remove Paragraph 7) in its entirety and replace with the following: [7 and 7A]

7) LIMITATION OF LIABILITY: Limitation of Vendor's Contract Damages Liability:

- a) Where Services are under the State's exclusive management and control, the Vendor shall not be liable for direct damages caused by the State's failure to fulfill any State responsibilities of assuring the proper use, management and supervision of the Services and programs, audit controls, operating methods, office procedures, or for establishing all proper checkpoints necessary for the State's intended use of the Services.
- b) The Vendor's liability for damages to the State arising under the contract shall be limited to the annual value of this Agreement.
- 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 Warranty compliance, or to claims for injury to persons or damage to tangible personal property, gross negligence or willful or wanton conduct. This limitation of liability does not apply to contributions among joint tortfeasors under N.C.G.S. 1B-1 *et seq.*, the receipt of court costs or attorney's fees that might be awarded by a court in addition to damages after litigation based on this Agreement.

7A) Vendor's Liability for Injury to Persons or Damage to Property:

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

Paragraph 25) Default: Remove Paragraph 25) Default in its entirety and replace with the following:

25) DEFAULT: In the event Services or other Deliverable furnished or performed by the Vendor during performance of any Agreement term fail to conform to any material requirement(s) of the Agreement specifications, if the failure is not cured within ten (10) days after the Vendor receives written notice of the failure from the State, or the Vendor fails to meet the material requirements and specifications herein, the State may terminate the Agreement. 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 Agreement.

- a) If the Vendor fails to deliver or provide Services within the time required by this Agreement, the State shall provide written notice of said failure to the Vendor, and by such notice require performance assurance measures pursuant to N.C.G.S. 143B-1340(f). The Vendor is responsible for the delays resulting from its failure to deliver or provide Services as provided herein.
- b) Should the State fail to perform any of its obligations upon which the Vendor's performance is conditioned, the Vendor shall not be in default for any delay, cost increase or other consequences resulting from the State's failure. The Vendor will use reasonable efforts to mitigate delays, costs or expenses arising from assumptions in the Vendor's offer documents that prove erroneous or are

otherwise invalid. Any deadline that is affected by any such failure in assumptions or performance by the State shall be extended by an amount of time reasonably necessary to compensate for the effect of such failure. The Vendor shall provide a plan to cure any delay or default if requested by the State. The plan shall state the nature of the delay or default, the time required for cure, any mitigating factors causing or tending to cause the delay or default, and such other information as the Vendor may deem necessary or proper to provide.

Does PCG accept the foregoing revisions to the North Carolina Department of Information Technology SAAS Terms and Conditions set forth in Section VII of the RFP with the foregoing revisions?

Vendor Response:

Accept or Does Not Accept

In addition to the foregoing, revised terms and conditions required by Session Law 2016-85, the Parties agree that Section VII of the RFP, the North Carolina Department of Information Technology SAAS Terms and Conditions, is hereby replaced in its entirety with the revised and negotiated terms and conditions set forth at the end of this BAFO 5 document as Attachment A.

Does PCG accept the revised and negotiated North Carolina Department of Information Technology SAAS Terms and Conditions set forth at the end of this BAFO document as Attachment A?

Vendor Response:

Accept or Does Not Accept

1. PCG included its EdPlan License Agreement on page J 2 of PCG's response to the RFP. The State does not accept the EdPlan License Agreement. Accordingly, the Parties agree that the EdPlan License Agreement is hereby deleted in its entirety from PCG's response to the RFP.

Vendor Response:

Accept or Does Not Accept

Attachment A to BAFO No. 5

VII. Department of Information Technology SAAS Terms and Conditions

1) DEFINITIONS:

- a) "Agency" means the Agency purchasing the ECATS Services, together with PK-13 Educational Institutions.
- b) "Data" means recorded information, regardless of form or method of recording.
- c) "End User" means user(s) from the Agency.
- d) "PK-13 Educational Institution" means all current and future North Carolina Local Education Agencies (LEAs), Charter Schools, Regional Schools, Educational Services for the Deaf and Blind Schools (ESDB), and other public schools and entities under their purview as the need may arise (individually or collectively).
- e) "Services" shall mean the duties and tasks undertaken to fulfill the requirements and specifications of this solicitation or any extension term.
- f) "Software" or "Software Application" shall mean the Web-based Software Application provided by the Vendor as Software as a Service ("SaaS") under this solicitation.
- g) "Support" includes Software updates, maintenance and support Services conducted by the Vendor on its own Web-based Software, and consulting, training and other support Services provided by or through Vendor for the State.
- h) "Use," in the context of Computer Software execution and operation in Sections 1 and 2 hereinbelow, means storing, loading, installing, executing or displaying Software or its Data on a Computer, processor or controller.
- i) Software as a Service shall mean the Vendor Software applications residing or provided on the Vendor's system and accessed by authorized users through a web browser and shall include Vendor-hosted storage, databases, related documentation, and other functionalities or services provided with the Software to facilitate the use of the Software.

2) USE OF SAAS SERVICES:

a) Vendor grants the State, the Agency, and PK-13 Educational Institutions a personal non-transferable and non-exclusive right and license to use and access, during the term(s) of this Agreement and paid subscription, for the number of State users agreed or as may be agreed, all Web-Based Software Applications and related storage, databases, documentation (defined as all technical information, training materials, instructions, manuals, and diagrams (in printed, electronic, or other media)), and other functionalities or Services provided with the Software to facilitate the use of the Software furnished or accessible under this Agreement. The Agency is authorized to access Agency Data and Vendor provided data as specified herein and to transmit revisions, updates, deletions, enhancements, or modifications to the Agency Data and shall include the right to, and access to, any upgrades, updates, releases or other enhancements or modifications made generally available to Vendor's customers or tenants of the same or similar Web-Based Software Applications and Services provided herein without the Vendor requiring a separate maintenance or support agreement. The Agency may use the Web-based Software Applications with any computer, computer system, server, or desktop workstation owned or utilized by the Agency. User access to the Web-Based Software Applications Services shall be routinely provided by the Vendor. The Agency shall notify the Vendor immediately of any unauthorized use of any password or account, or any other known or suspected breach of security access. The Agency also agrees to refrain from taking any steps, such as reverse engineering, reverse assembly or reverse compilation to derive a source code equivalent to the Web-Based Software Applications or any portion thereof. Use of the Web-Based Software Applications to perform Services for commercial third parties (so-called "service bureau" uses) is not permitted, but the State may utilize the Services to perform its usual and governmental functions. If the Web-based Software Application fees are based upon the number of Users and/or hosted instances, the number of Users/hosted instances available may be adjusted at any time (subject to the restrictions on the maximum number of Users specified in the Furnish and Deliver Table herein above) by mutual agreement and State Procurement approval. The Agency's users that access the Software shall only do so for authorized Agency purposes and at locations authorized by the Agency. The Agency's users also shall maintain the confidentiality of their password in compliance with State information technology security standards and policies, specifically those contained in the

Statewide Information Security Manual (<http://it.nc.gov/statewide-resources/policies>), and will change their password as may be required by the Agency in consultation with the Vendor in order to comply with said security standards and policies.

b) The Agency's license for the Web-based Software Application and its associated Services neither transfers, vests, nor infers any title or other ownership right in any intellectual property rights of the Vendor or any third party, nor does this license transfer, vest, or infer any title or other ownership right in any source code associated with the Web-based Software Application unless otherwise agreed to by the parties. The provisions of this section will not be construed as a sale of any ownership rights in the Web-Based Software Application unless, and only to the extent, Custom Software is being developed as a Work for Hire in response to the Agency's solicitation documents. Any Web-based Software Applications or technical and business information owned by Vendor or its suppliers or licensors made accessible or furnished to the Agency shall be and remain the property of the Vendor or other party, respectively.

c) The Web-Based Software Applications shall be in good working order and operating in conformance with Vendor's standard specifications and functions. The State shall notify the Vendor if the Web-Based Software Applications are not in good working order or inaccessible during the term of the Agreement. Vendor shall, at its option, either repair or replace any Web-Based Software Applications reported or discovered as not being in good working order during the applicable contract term without cost to the State. The Web-Based Software Applications shall be available 24 x 7, with the exception of scheduled outages for maintenance, except as may be mutually agreed in any SLA or other document by the parties.

d) Support. Vendor or its suppliers shall at minimum, and except as otherwise agreed, provide telephone assistance to the State for all Software or Services procured hereunder during the State's normal business hours. Vendor warrants that its support and customer service and assistance will be performed in accordance with generally accepted industry standards.

e) Acceptance. Successful access by the Agency's users to the Vendor's Web-Based Software Applications is required. The Agency shall notify the Vendor in writing within ten days that the Agency's Users cannot successfully access the implemented Web-Based Software Applications. Final acceptance is expressly conditioned upon such successful access and other requirements as specified herein.

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

g) The State has the right to receive the benefit of upgrades, updates, maintenance releases or other enhancements or modifications made generally available to Vendor's SaaS licensees. Vendor's right to a new use agreement for new version releases of the Software shall not be abridged by the foregoing.

3) USE OF SOFTWARE AND INFORMATION:

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

b) All Software Modifications and Information furnished to the State under this Agreement:

i) Shall be used by the State only to install, operate or maintain the Product for which they were originally furnished;

ii) Shall not be reproduced or copied, in whole or in part, except as necessary for use as authorized under this agreement; and

iii) Shall, together with any copies except copies for the Agency's and State's archival purposes containing the State's business records, be returned or destroyed when no longer needed or permitted for use with the Product for which they were initially furnished; and

c) All Software and Information designated as "confidential" or "proprietary" shall be kept in confidence except as may be required by the North Carolina Public Records Act: NCGS §132-1, et seq.

d) The State acknowledges that the Vendor represents that it is and shall remain the owner of all right, title, and interest in and to each of the Vendor's Trademarks in any form or embodiment thereof, and is also the owner

of all goodwill associated with the Vendor's Trademarks. All goodwill generated by the State's use of the Services, Product or Software with respect to the Vendor's Trademarks shall inure exclusively to the benefit of the Vendor.

e) The State shall promptly notify the Vendor of any third-party infringements of any of the Vendor's Trademarks used in connection with the Vendor's Services, Product or Software, or any act of unfair competition by third parties relating to the Vendor Trademarks, within a reasonable time of the State's knowledge of such infringements or acts.

f) The State, the Agency, and PK-13 Educational Institutions shall not remove, modify, or suppress any confidentiality legends or proprietary notices placed on or contained within the Vendor's Software, Products, or Services, and shall not permit any authorized user to do so.

4) ACCESS AVAILABILITY AND WARRANTY:

a) SAAS ACCESS AVAILABILITY STANDARDS. Vendor agrees that the SaaS will be available 24/7 (except for scheduled maintenance windows) and in accordance with the highest standards of the Vendor's industry and more specifically in accordance with any specific Service Level Agreement (SLA) or service level standards negotiated and agreed between the parties.

b) MINIMUM WARRANTIES FOR ANY REQUIRED AGENCY SOFTWARE MODIFICATIONS or other Software implemented or provided by the Vendor shall include:

i) The Software will be in good working order (operating in conformance with Vendor's standard specifications and functions and the agreed Software Performance Guarantees herein) and the SaaS Services shall remain accessible 24/7 or as specified herein.

ii) The warranty shall be as provided or specified in the State's solicitation documents and shall begin upon successful production use and acceptance by Agency. If no warranty period is specified, the warranty period shall be Vendor's standard warranty period for the Software, commencing the day of successful use.

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

iv) In addition to the warranty exclusions stated in Paragraph 4, Vendor does not warrant that the operation of the Software will be uninterrupted or error free, or that the Software functions will meet the State's requirements unless developed as Customized or Modified Software. The State assumes the risk of any damage or loss from its misuse or inability to use the Software.

v) For any Configurations, Customized or Modified Software, if any, provided pursuant to this Agreement, Vendor warrants that for a period of one (1) year after the State accepts said Software, it will operate and perform in accordance with the functions and specifications set forth in the solicitation and error free as the solution for the Agency. This express warranty applies only if the State implements the Customized or Modified Software.

vi) Unless otherwise required by the State: Vendor warrants that its support and customer service and assistance will be performed in accordance with generally accepted industry standards. This warranty shall be valid for ninety (90) days from the date support is provided or performance of the service.

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

(1) The licensed Software or Modifications, if any, and associated materials do not infringe any intellectual property rights of any third party;

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

(3) The Services will be provided consistent with and under the Software Performance guarantees herein.

5) WARRANTY EXCLUSIONS:

a) Except as stated in Section 3 above, Vendor and its parent, subsidiaries and affiliates, subcontractors and suppliers make no warranties, express or implied, as to Software Modifications, and specifically disclaim warranties of merchantability or fitness for a particular purpose as provided by N.C.G.S. §§25-2-316, 25-2-313 and 25-2-315; and as may be amended.

b) The warranty provided in Section 3 above does not cover repair for damages, malfunctions or service

failures caused by:

- i) Actions of non-Vendor personnel;
- ii) Failure to follow Vendor's operation or maintenance instructions and/or Services provided to the State;
- iii) Attachment to the Products or non-Vendor products or failure of Products not maintained by Vendor unless such installation or use procedures are provided in documentation or approved in writing by the Vendor; or
- iv) Force Majeure conditions set forth hereinbelow.

6) 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 Software, Products or Services supplied by the Vendor, their use or operation infringes on a patent, copyright, trademark or violates a trade secret in the United States. The Vendor shall pay those costs and damages finally awarded or agreed in settlement against the State in any such action. Damages shall be limited as provided in 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) Should any Services, Products or Software supplied by the Vendor become the subject of a claim of infringement of a patent, copyright, Trademark or a trade secret in the United States, the Vendor, shall at its option and expense, either procure for the State the right to continue using the Services, Products or Software, or replace or modify the same to become noninfringing. If neither of these options can reasonably be taken in the Vendor's judgment, or if further use shall be prevented by injunction, the Vendor agrees to cease use of any affected Services, Products or Software, and refund any sums the State has paid the Vendor less any reasonable amount for use or damage. If, in the sole opinion of the State, the cessation of use of any such Services, Products or Software due to infringement issues makes the continuation of this Agreement impractical, the State shall then have the option of terminating the Agreement, or applicable portions thereof, without penalty or termination charge; and the Vendor agrees to refund any sums the State paid.

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

7) LIMITATION OF LIABILITY: Limitation of Vendor's Contract Damages Liability:

a) Where Services are under the State's exclusive management and control, the Vendor shall not be liable for direct damages caused by the State's failure to fulfill any State responsibilities of assuring the proper use, management and supervision of the Services and programs, audit controls, operating methods, office procedures, or for establishing all proper checkpoints necessary for the State's intended use of the Services.

b) The Vendor's liability for damages to the State arising under the Agreement shall be limited to the annual value of this Agreement.

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 Warranty compliance, or to claims for injury to persons or damage to tangible personal property, gross negligence or willful or wanton conduct. This limitation of liability does not apply to contributions among joint tortfeasors under N.C.G.S. 1B-1 *et seq.*, the receipt of court costs or attorney's fees that might be awarded by a court in addition to damages after litigation based on this Agreement.

7A) Vendor's Liability for Injury to Persons or Damage to Property:

a) The Vendor shall be liable for damages arising out of personal injuries and/or damage to real or tangible

personal property of the State, employees of the State, persons designated by the State for training, or person(s) other than agents or employees of the Vendor, designated by the State for any purpose relating to the use of the Software and Services, prior to, during, or subsequent to delivery, installation, acceptance, and use of the Services either at the Vendor's site or at the State's place of business, provided that the injury or damage was caused by the fault or negligence of the Vendor.

b) The Vendor agrees to indemnify, defend and hold the Agency and the State and its Officers, employees, agents and assigns harmless from any liability relating to personal injury or injury to real or tangible personal property of any kind, accruing or resulting to any other person, firm or corporation furnishing or supplying work, Services, materials or supplies in connection with the performance of the Vendor under this Agreement, whether tangible or intangible, arising out of the ordinary negligence, willful or wanton negligence, or intentional acts of the Vendor, its officers, employees, agents, assigns or subcontractors.

c) The Vendor shall not be liable for damages arising out of or caused by an alteration or an attachment not made or installed by the Vendor.

8) SAAS AND OTHER SUPPORT AND MAINTENANCE:

Vendor will provide to the State the same Services for updating, maintaining and continuing optimal performance for the Software Services as provided to other similarly situated users of the Software Services, but minimally as provided for and specified herein.

Support will also be provided for any other (e.g., third-party) Software needed to implement the solution that may be located as an application on State client computers.

9) SOFTWARE VERSION RETIREMENT:

a) Unless otherwise provided in the Vendor's standard agreement, Vendor retains the right to retire a version of the Web-based Software and stop providing subscription support or annual 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 substantially retires the version of the Web-based Software Services Software provided to the State and if the State has paid all applicable annual Subscription Fees (or other annual maintenance fees) subsequent to executing this Agreement, the State shall be entitled to receive, at no additional charge, access to a newer version of the Web-based Software Services that supports substantially the same functionality as the then accessible version of the Web-based Software Services. Newer versions of the Software containing substantially increased functionality may be made available to the State for an additional subscription fee.

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

10) **STATE DATA:** The State is responsible for the security of its proprietary or confidential information, for its data, and for maintaining a procedure and process to reconstruct lost or altered files, data or programs hosted onsite at the State. However, the Vendor will protect State Data in its hands from unauthorized disclosure, loss, damage, destruction by natural event, or other eventuality and will promptly provide the State Data back to the State in the event of termination of this Agreement or cessation of business by the Vendor or other major event preventing Vendor from continuing to provide the Services.

11) **TRANSPORTATION:** Transportation charges for any Deliverable sent to the State other than electronically or by download, 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.

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 specifically agreed to in writing and arising under the performance of this Agreement, reimbursement will be at the out-of-state rates set forth in G.S. §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.

12) **PROHIBITION AGAINST CONTINGENT FEES AND GRATUITIES:** Vendor warrants that it has not paid, and agrees not to pay, any bonus, commission, fee, or gratuity to any employee or official of the State for the purpose of obtaining any contract or award issued by the State. Subsequent discovery by the State of non-compliance with these provisions shall constitute sufficient cause for immediate termination of all outstanding Agreements. Violations of this provision may result in debarment of the Vendor(s) or Vendor(s) as permitted by 9 NCAC 06B.1030, or other provision of law.

13) **AVAILABILITY OF FUNDS:** Any and all payments by the State are expressly contingent upon and subject to the appropriation, allocation and availability of funds to the Agency for the purposes set forth in this Agreement. If this Agreement or any Purchase Order issued hereunder is funded in whole or in part by federal funds, the Agency's performance and payment shall be subject to and contingent upon the continuing availability of said federal funds for the purposes of the Agreement or Purchase Order. If the term of this Agreement extends into fiscal years subsequent to that in which it is approved such continuation of the Agreement *is expressly contingent upon* the appropriation, allocation, and availability of funds by the N.C. Legislature for the purposes set forth in the Agreement. If funds to effect payment are not available, the Agency will provide written notification to Vendor. If the Agreement is terminated under this paragraph, Vendor agrees to take back any affected Products and Software not yet delivered under this Agreement, terminate any Services supplied to the Agency under this Agreement, and relieve the Agency of any further obligation thereof. The State shall remit payment for Products and Services accepted prior to the date of the aforesaid notice in conformance with the payment terms.

14) **PAYMENT TERMS:** No payment shall be made by the State in advance of or in anticipation of Services actually performed and/or supplies furnished under the Agreement. Payment terms are Net 30 days after receipt of correct invoice or acceptance of the Deliverables, whichever is later. Payments are subject to retainage requirements herein. The Purchasing State Agency is responsible for all payments under the Agreement. No additional charges to the Agency will be permitted based upon, or arising from, the Agency's use of a Business Procurement Card. The State may exercise any and all rights of Set Off as permitted in Chapter 105A-1 *et seq.* of the N.C. General Statutes and applicable Administrative Rules.

a) Upon Vendor's written request of not less than 30 days and approval by the State or Agency, the Agency may:

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

b) For any third party software licensed by Vendor or its subcontractors for use by the State, a copy of the software license including terms acceptable to the State, an assignment acceptable to the State, and documentation of license fees paid by the Vendor shall be provided to the State before any related license fees or costs may be billed to the State.

c) **Equitable Adjustment.** The Agency may, in its sole discretion, make an equitable adjustment in the Agreement terms or pricing if pricing or availability of supply is affected by extreme and unforeseen volatility in the marketplace, that is, by circumstances that satisfy all the following criteria: (1) the volatility is due to causes wholly beyond the Vendor's control, (2) the volatility affects the marketplace or industry, not just the particular Agreement source of supply, (3) the effect on pricing or availability of supply is substantial, and (4) the volatility so affects the Vendor that continued performance of the Agreement would result in a substantial loss.

d) An undisputed invoice shall be limited to the following: an undisputed invoice is an invoice for which the State and/or the Purchasing Agency has not disputed the invoice in writing sent to the Vendor on the grounds of an invoice error within thirty (30) days from the invoice date. That is, in order for the State or the applicable Purchasing Agency to dispute any invoice under this Agreement, such dispute must be made in writing to Vendor within thirty (30) days of the invoice date. Upon Vendor's receipt of such disputed invoice notice, Vendor will work to correct the applicable invoice error, provided that such dispute notice shall not relieve the State or the applicable Purchasing Entity from its payment obligations for the undisputed items on the invoice or for any disputed items that are ultimately corrected. The Purchasing Agency is not required to pay the Vendor for any goods and/or services provided without a written purchase order from the appropriate Purchasing Agency. In addition, all goods and/or services provided must meet all terms, conditions, and specifications of the Agreement and purchase order and be accepted as satisfactory by the Purchasing Agency before payment will be issued.

15) **ACCEPTANCE CRITERIA:** Acceptance testing is required for all Vendor supplied Software and Services unless provided otherwise in the solicitation documents or a Statement of Work. The State may define such processes and procedures as may be necessary or proper, in its opinion and discretion, to ensure compliance with the State's specifications and Vendor's technical representations. Acceptance of Software and Services may be controlled by amendment hereto, or additional terms as agreed by the parties. In the event acceptance of Software and 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 provision of any Deliverable described in this Agreement if it is not acceptable. The notice shall specify in reasonable detail the reason(s) a Deliverable is unacceptable. Acceptance by the State shall not be unreasonably withheld; but may be conditioned or delayed as required for installation and/or testing of Software or Services.

16) **CONFIDENTIALITY AND DATA SECURITY:** 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. Vendor may designate information, Products, Software or appropriate portions of its response as confidential, consistent with and to the extent permitted under the Statutes and Rules set forth above, by marking the top and bottom of pages containing confidential information with a legend in boldface type "**CONFIDENTIAL.**" By so marking any page, the Vendor warrants that it has formed a good faith opinion, having received such necessary or proper review by counsel and other knowledgeable advisors that the portions marked confidential meet the requirements of the Rules and Statutes set forth above. **However, under no circumstances shall price information be designated as confidential.** The State acknowledges that the Vendor claims ownership of the Software and SaaS provided pursuant to this Agreement, that Vendor does not generally publish such Software or SaaS, and that Vendor claims the Software and SaaS are exempt from disclosure under the Public Records Act (N.C.G.S. §132-1 et seq.). The State agrees to promptly notify the Vendor in writing of any action seeking to compel the disclosure of Vendor's confidential information. If an action is brought pursuant to N.C.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 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.

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) Protection of Personal Identifying Information. Vendor acknowledges its responsibility for securing personal identifying information collected by the State and stored in any Vendor site or other Vendor housing systems, including but not limited to computer systems, networks, servers, or databases, maintained by

Vendor or its agents or subcontractors in connection with the Services. Vendor warrants, at its sole cost and expense, that it shall implement processes and maintain security of personal identifying information; provide reasonable care and efforts to detect fraudulent activity involving personal identifying information; and promptly notify the Agency of any breaches of security involving personal identifying information.

c) All materials, including Software, Data, information and documentation provided by the State to the Vendor during the performance or provision of Services hereunder is the property of the State of North Carolina and must be kept returned to the State. 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.

d) Vendor shall not withhold the State Data or any other State confidential information or refuse for any reason (including the State's actual or alleged breach of the Agreement) to promptly return to the State the State Data and any other State confidential information (including copies thereof) if requested to do so on such media as reasonably requested by the State, even if the State is then or is alleged to be in breach of the Agreement. As a part of Vendor's obligation to provide the State Data pursuant to this Section, Vendor will also provide the State any data maps, documentation, software, or other materials necessary, including, without limitation, handwritten notes, materials, working papers or documentation, for the State to use, translate, interpret, extract and convert the State Data and any other State confidential information for use by the State or any third party.

17) SECURITY BREACH; DELIVERABLES: "Security Breach" means (1) any circumstance pursuant to which applicable Law (as defined in Section 26) (Compliance with Laws) requires notification of such breach to be given to affected parties or other activity in response to such circumstance; or (2) any actual, attempted, suspected, threatened, or reasonably foreseeable circumstance that compromises, or could reasonably be expected to compromise, either Physical Security or Systems Security (as such terms are defined below) in a fashion that either does or could reasonably be expected to permit unauthorized Processing (as defined below), use, disclosure or acquisition of or access to any the State Data or state confidential information. "Physical Security" means physical security at any site or other location housing systems maintained by Vendor or its agents or subcontractors in connection with the ECATS Services. "Systems Security" means security of computer, electronic or telecommunications systems of any variety (including data bases, hardware, software, storage, switching and interconnection devices and mechanisms), and networks of which such systems are a part or communicate with, used directly or indirectly by Vendor or its agents or subcontractors in connection with the ECATS Services. "Processing" means any operation or set of operations performed upon the State Data or State confidential information, whether or not by automatic means, such as creating, collecting, procuring, obtaining, accessing, recording, organizing, storing, adapting, altering, retrieving, consulting, using, disclosing or destroying.

i) Breach Notification. In the event Vendor becomes aware of any Security Breach due to Vendor acts or omissions other than in accordance with the terms of the Agreement, Vendor shall, at its own expense, (1) immediately notify the State's Agreement Administrator of such Security Breach and perform a root cause analysis thereon, (2) investigate such Security Breach, (3) provide a remediation plan, acceptable to the State, to address the Security Breach and prevent any further incidents, (4) conduct a forensic investigation to determine what systems, data and information have been affected by such event; and (5) cooperate with the State, and any law enforcement or regulatory officials, credit reporting companies, and credit card associations investigating such Security Breach. The State shall make the final decision on notifying the State's persons, entities, employees, service providers and/or the general public of such Security Breach, and the implementation of the remediation plan. If a notification to a customer is required under any Law or pursuant to any of the State's privacy or security policies, then notifications to all persons and entities who are affected by the same event (as reasonably determined by the State) shall be considered legally required.

ii) Notification Related Costs. Vendor shall reimburse the State for all Notification

Related Costs incurred by the State arising out of or in connection with any such Security Breach due to Vendor acts or omissions other than in accordance with the terms of the Agreement resulting in a requirement for legally required notifications. "Notification Related Costs" shall include the State's internal and external costs associated with addressing and responding to the Security Breach, including but not limited to: (1) preparation and mailing or other transmission of legally required notifications; (2) preparation and mailing or other transmission of such other communications to customers, agents or others as the State deems reasonably appropriate; (3) establishment of a call center or other communications procedures in response to such Security Breach (e.g., customer service FAQs, talking points and training); (4) public relations and other similar crisis management services; (5) legal and accounting fees and expenses associated with the State's investigation of and response to such event; and (6) costs for credit reporting services that are associated with legally required notifications or are advisable, in the State's opinion, under the circumstances. In the event that Vendor becomes aware of any Security Breach which is not due to Vendor acts or omissions other than in accordance with the terms of the Agreement, Vendor shall immediately notify the State of such Security Breach, and the parties shall reasonably cooperate regarding which of the foregoing or other activities may be appropriate under the circumstances, including any applicable Charges for the same.

DELIVERABLES: Deliverables, as used herein, shall comprise all Vendor Services, professional services, modifications to the web-based software and access portal, and incidental materials, including any goods, software access license, data, reports and documentation created during the performance or provision of Services hereunder. Proprietary Vendor materials licensed to the State shall be identified to the State by Vendor prior to use or provision of Services hereunder and shall remain the property of the Vendor. Deliverables include "Work Product" and means any expression of Licensor's findings, analyses, conclusions, opinions, recommendations, ideas, techniques, know-how, designs, programs, enhancements, and other technical information; but not source and object code or software. "Deliverable," in context may only mean "Services."

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

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

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

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

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

23) **TAXES:** The State of North Carolina is exempt from Federal excise taxes and no payment will be made for

any personal property taxes levied on the Vendor or for any taxes levied on employee wages. Agencies of the State may have additional exemptions or exclusions for federal or state taxes. Evidence of such additional exemptions or exclusions may be provided to Vendor by Agencies, as applicable, during the term of this Agreement. Applicable State or local sales taxes shall be invoiced as a separate item.

24) **GOVERNING LAWS, JURISDICTION, AND VENUE:** 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 State courts in the State of North Carolina, and stipulates that those State courts with jurisdiction over Wake County shall be the proper venue for all matters.

25) **DEFAULT:** In the event Services or other Deliverable furnished or performed by the Vendor during performance of any Agreement term fail to conform to any material requirement(s) of the Agreement specifications, if the failure is not cured within ten (10) days after the Vendor receives written notice of the failure from the State, or the Vendor fails to meet the material requirements and specifications herein, the State may terminate the Agreement. 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 Agreement.

a) If the Vendor fails to deliver or provide Services within the time required by this Agreement, the State shall provide written notice of said failure to the Vendor, and by such notice require performance assurance measures pursuant to N.C.G.S. 143B-1340(f). The Vendor is responsible for the delays resulting from its failure to deliver or provide Services as provided herein.

b) Should the State fail to perform any of its obligations upon which the Vendor's performance is conditioned, the Vendor shall not be in default for any delay, cost increase or other consequences resulting from the State's failure. The Vendor will use reasonable efforts to mitigate delays, costs or expenses arising from assumptions in the Vendor's offer documents that prove erroneous or are otherwise invalid. Any deadline that is affected by any such failure in assumptions or performance by the State shall be extended by an amount of time reasonably necessary to compensate for the effect of such failure. The Vendor shall provide a plan to cure any delay or default if requested by the State. The plan shall state the nature of the delay or default, the time required for cure, any mitigating factors causing or tending to cause the delay or default, and such other information as the Vendor may deem necessary or proper to provide.

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

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

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

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

b) The State may terminate this Agreement, in whole or in part, pursuant to Paragraph 24), or pursuant to the Special Terms and Conditions in the Solicitation Documents, if any, or for any of the following

i) Termination for Cause: In the event any goods, Software, or service furnished by the Vendor during performance fails to conform to any material specification or requirement of the Agreement, 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 6). 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 Agreement. Vendor shall not be relieved of liability to the State for damages sustained by the State arising from Vendor's breach of this Agreement; and the State may, in its discretion, withhold any payment due as a setoff until such time as the damages are finally determined or as agreed by the parties. Voluntary or involuntary Bankruptcy or receivership by Vendor shall be cause for termination.

ii) **Termination for Convenience Without Cause:** The State may terminate service and indefinite quantity contracts, in whole or in part by giving thirty (30) days prior notice in writing to the Vendor. Vendor shall be entitled to sums due as compensation for Deliverables provided and Services performed in conformance with the Agreement. In the event the Agreement is terminated for the convenience of the State the Agency will pay for all work performed and products delivered in conformance with the Agreement 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 Agreement. If a dispute cannot be resolved between the Parties within thirty (30) days after delivery of notice, either Party may elect to exercise any other remedies available under this Agreement, 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) **INDEPENDENT CONTRACTORS.** Vendor and its employees, officers and executives, and subcontractors, if any, shall be independent Vendors and not employees or agents of the State. This Agreement shall not operate as a joint venture, partnership, trust, agency or any other business relationship.

32) **E-VERIFY:** Pursuant to N.C.G.S. §143B-1323(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 shall 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.

33) **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.

34) **ELECTRONIC PROCUREMENT: (Applies to all contracts that include E-Procurement and are identified as such in the body of the solicitation document):** Purchasing shall be conducted through the Statewide E-Procurement Service. The State's third party agent shall serve as the Supplier Manager for this E-Procurement Service. The Vendor shall register for the Statewide E-Procurement Service within two (2) business days of notification of award in order to receive an electronic purchase order resulting from award of this Agreement. *Subparagraphs a) and b) may apply only to any goods procured herein, but not to Services.*

a) **Reserved.**

b) Reserved.

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

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

BAFO COST:

Note: NCDPI is requesting a two-fold updated cost on Medicaid: 1) fee for service cost for NCDPI, and 2) Contingency fee percentage for LEAs. Please incorporate both costs accordingly, when completing the ECATS Cost Template below, as discussed.

Section IV. Cost Proposal

- A. The vendor must list and describe any applicable proposal costs which may include the following:
1. Future customization for customer requested enhancements
 2. Training including training materials
 3. Updates to supplemental files
 4. New functionality
 5. Other costs (*provide details of each proposed cost*)
 6. The consulting and other value added service hourly rates or costs shall be listed separately by type of service. Travel and lodging expenses, if any, must be thoroughly described; and are limited by the State’s SAAS Terms and Conditions.

Our response to this Section IV, Paragraph A remains unchanged from our initial proposal and BAFO 01, 02, 03, and 04 responses except for additional pricing indicated in this BAFO 05 as noted below.

In summary, the combined savings and/or discounts included in all five BAFOs equate to more than \$2.7 million over the three-year contract term in cost adjustments to NCDPI and LEAs.

ECATS Cost Template					
Item #	Cost Description	Special Ed Module Cost	MTSS Module Cost	Medicaid Module Cost	ECATS Service Total Cost
1	The Firm Fixed Price Subscription Fee for the module’s <u>Statewide Implementation</u> of the Vendor proposed solution: *This is the year one (1) and year two (2) subscription fee which is to be inclusive of all Deployment, Integration, Implementation, Data Migration, Maintenance and Technical Support for the module’s ECATS Service solution.	\$4,060,000	\$2,380,000	\$0	\$6,440,000
2	The optional year three (3) Firm Fixed Price Subscription Fee for the module’s Implementation of the Vendor proposed solution: *This is the subscription fee inclusive of any additional Integration, Implementation, Data Migration, Maintenance and Technical Support for the modules ECATS Service solution.	\$2,030,000	\$1,190,000	\$0	\$3,220,000

3	Import of child count data: total size approximate 877.567 MB • September Child Count (585.083 MB) • October Indicator 11/Timely Placement Count (218.89 MB) • August Indicator 7/COSF Count (73.594 MB)	**	**	**	
4	Any other proposed fee for the module's ECATS Service.				
Additional Comments					
** See comments above					

- B. Payment Plan Proposal - If the Vendor has a specific payment schedule or installment payment plan or percentage payment plan, etc. it must be detailed here.
- C. Vendors who propose an Alternative cost response must submit a separate document labeled "ALTERNATIVE COST RESPONSE".
- D. **Optional.** A Cost Response Form may be used to summarize the Vendors' pricing responses to specifications.

-End of Document -