

## **Clemson University Standard Terms of Purchase – Revision B Effective April 1, 2011**

This document contains standard terms and conditions that apply to all solicitations and procurements made by Clemson University. Any Supplier terms and conditions included with Supplier's invoice or any other document provided by Supplier shall be of no effect. Instructions and terms specific to an individual solicitation will also apply and are considered in addition to these standard terms. In case of conflict between terms of a specific solicitation and this document, the terms of the specific solicitation take precedence.

**DEFINITIONS - EXCEPT AS OTHERWISE PROVIDED HEREIN, THE FOLLOWING DEFINITIONS ARE APPLICABLE TO ALL PARTS OF THE CONTRACT.**

**AMENDMENT** – means a document issued to supplement the original solicitation document.

**BUYER** – means the Procurement Officer.

**BVB** – means Best Value Bid [Section 11-35-1528].

**CHANGE ORDER** - means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.

**CONTRACT** - See clause entitled "Contract Documents & Order of Precedence."

**CONTRACT MODIFICATION** – means a written order signed by the Procurement Officer, directing the contractor to make changes which the changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.

**CONTRACTOR** - means the Offeror receiving an award as a result of this solicitation.

**COVER PAGE** – means the top page of the original solicitation on which the solicitation is identified by number. Offerors are cautioned that Amendments may modify information provided on the Cover Page.

**FPB** – means Fixed Price Bid [Section 11-35-1525].

**IFB** – means Invitation For Bid [Section 11-35-1550].

**OFFER** – means the bid or proposal submitted in response this solicitation. The terms "Bid" and "Proposal" are used interchangeably with the term "Offer."

**OFFEROR** – means the single legal entity submitting the offer. The term "Bidder" is used interchangeably with the term "Offeror." See bidding provisions entitled "Signing Your Offer" and "Bid/Proposal As Offer To Contract."

**ORDERING ENTITY** - Clemson University.

**PAGE TWO** – means the second page of the original solicitation, which is labeled Page Two.

**PAGE THREE** – means the third age of the original solicitation, which is labeled Page Three.

**PROCUREMENT OFFICER** – means the person, or his successor, identified as such on the Cover Page.

**RFP** – means Request For Proposal [Section 11-35-1530].

**RFQ** – means Request For Qualification [Section 11-35-1530(4)].

**YOU and YOUR** – means Offeror.

**SEALED BID** – means Competitive Sealed Bid [Section 11-35-1520].

**SOLICITATION** – means the Cover Page, Page Two, Page Three and all parts, attachments, and any Amendments of the specific IFB, BVB, FPB, RFP, or RFQ which includes the Clemson University Standard Bidding Terms and Conditions and Clemson University Standard Terms of Purchase.

**SUBCONTRACTOR** – means any person having a contract to perform work or render service to Contractor as a part of the Contractor's agreement arising from this solicitation.

**UNIVERSITY** – means Clemson University.

**WORK** - means all labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations under the Contract.

**ASSIGNMENT:** No contract or its provisions may be assigned, sublet, or transferred without the written consent of the Procurement Officer.

**BACKGROUND CHECK:** If Vendor must bring one or more of its employees on to the Clemson University campus or other property in order to fulfill the terms of this agreement, Vendor is required to conduct a criminal background check on said employee(s) prior to bringing or sending the employee(s) to the Clemson University campus or other property. Vendor agrees that any employee with a criminal history that Vendor reasonably believes poses a threat to property or persons, will not be brought or sent to the Clemson University campus or other property. Vendor agrees to impose this same criminal background check requirement on any subcontractors used by Vendor to fulfill its responsibilities under this agreement. Clemson University reserves the right to verify compliance by Vendor upon request.

**BANKRUPTCY:** (a) Notice. In the event the Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Contractor agrees to furnish written notification of the bankruptcy to the University. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to the bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of all University contracts against which final payment has not been made. This obligation remains in effect until final payment under this Contract. (b) Termination. This contract is voidable and subject to immediate termination by the University upon the contractor's insolvency, including the filing of proceedings in bankruptcy.

**CHANGES:**

(1) Contract Modification. By a written order, at any time, and without notice to any surety, the Procurement Officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

(a) drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the University in accordance therewith;

(b) method of shipment or packing;

(c) place of delivery;

(d) description of services to be performed;

(e) time of performance (i.e., hours of the day, days of the week, etc.); or,

(f) place of performance of the services.

Subparagraphs (a) to (c) apply only if supplies are furnished under this contract. Subparagraphs (d) to (f) apply only if services are performed under this contract.

(2) Adjustments of Price or Time for Performance. If any such change increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made in the contract price, the delivery schedule, or both, and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract. Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the University promptly and duly make such provisional adjustments in payment or time for performance as may be

reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(3) Time Period for Claim. Within 30 days after receipt of a written contract modification under Paragraph (1) of this clause, unless such period is extended by the Procurement Officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the University is prejudiced by the delay in notification.

(4) Claim Barred After Final Payment. No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

**CHOICE-OF-LAW:** The Agreement, any dispute, claim, or controversy relating to the Agreement, and all the rights and obligations of the parties shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice of law rules. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the solicitation.

**CISG / UCITA.** Neither the UN Convention on the International Sale of Goods nor the Uniform Computer Information Transactions Act (nor any non-uniform version) shall apply to this Agreement or the Authorized EULAs.

**COMPLIANCE WITH LAWS:** During the term of the contract, contractor shall comply with all applicable provisions of laws, codes, ordinances, rules, regulations, and tariffs.

**CONFIDENTIALITY:** Any information or materials provided by the University should be considered to be confidential and/or proprietary to Clemson University. Contractor shall hold all such information or materials in confidence until University publicly releases the information or grants Contractor written permission to disclose

**CONTRACT ADMINISTRATION:** Questions or problems arising after award of this contract shall be directed to the Procurement Officer, Clemson University, Procurement Services, Administrative Services Building, Silas N. Pearman Blvd., Clemson, SC 29634.

**CONTRACT DOCUMENTS & ORDER OF PRECEDENCE:** (a) Any contract resulting from this solicitation, or purchase order where solicitation was not conducted, shall consist of the following documents: (1) a Record of Negotiations, if any, executed by you and the Procurement Officer, (2) documentation regarding the clarification of an offer [e.g., 11-35-1520(8) or 11-35-1530(6)], if applicable, (3) the solicitation, as amended, which includes the Clemson University Standard Bidding Terms and Conditions and Clemson University Standard Terms of Purchase documents (4) modifications, if any, to your offer, if accepted by the Procurement Officer, (5) your offer, (6) any statement reflecting the state's final acceptance (a/k/a "award"), and (7) purchase orders. These documents shall be read to be consistent and complimentary. Any conflict among these documents shall be resolved by giving priority to these documents in the order listed above. (b) The terms and conditions of documents (1) through (6) above shall apply notwithstanding any additional or different terms and conditions in either (i) a purchase order or other instrument submitted by the University or (ii) any invoice or other document submitted by Contractor. Except as otherwise allowed herein, the terms and conditions of all such documents shall be void and of no effect. (c) No contract, license, or other agreement containing contractual terms and conditions will be signed by the University. Any document signed or otherwise agreed to by persons other than the Procurement Officer shall be void and of no effect.

**CONTRACT LIMITATIONS:** No sales may be made pursuant to this contract for any item or service that is not expressly listed. No sales may be made pursuant to this contract after expiration of this contract. Violation of this provision may result in termination of this contract and may subject contractor to suspension or debarment.

**CONTRACTOR PERSONNEL:** (for service contracts only): The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

**CONTRACTOR'S OBLIGATION – GENERAL** (for service contracts only): The contractor shall provide and pay for all materials, tools, equipment, labor and professional and non-professional services, and shall perform all other acts and supply all other things necessary, to fully and properly perform and complete the work. The contractor must act as the prime contractor and assume full responsibility for any subcontractor's performance. The contractor will be considered the sole point of contact with regard to all situations, including payment of all charges and the meeting of all other requirements.

**CONTRACTOR'S USE OF UNIVERSITY PROPERTY:** Upon termination of the contract for any reason, the University shall have the right, upon demand, to obtain access to, and possession of, all University properties, including, but not limited to, current copies of all University application programs and necessary documentation, all data, files, intermediate materials and supplies held by the contractor. Contractor shall not use, reproduce, distribute, display, or sell any data, material, or documentation owned exclusively by the University without the University's written consent, except to the extent necessary to carry out the work.

**CONTRACTOR'S LIABILITY INSURANCE:** (1) Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in South Carolina such insurance as will protect the contractor from the types of claims set forth below which may arise out of or result from the contractor's operations under the contract and for which the contractor may be legally liable, whether such operations be by the contractor or by a subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable: (a) claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the work to be performed; (b) claims for damages because of bodily injury, occupational sickness or disease, or death of the contractor's employees; (c) claims for damages because of bodily injury, sickness or disease, or death of any person other than the contractor's employees; (d) claims for damages insured by usual personal injury liability coverage; (e) claims for damages, other than to the work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom; (f) claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle; (g) claims for bodily injury or property damage arising out of completed operations; and (h) claims involving contractual liability insurance applicable to the Contractor's obligations under the provision entitled Indemnification – Third Party Claims.

(2) Coverage shall be written on an occurrence basis and shall be maintained without interruption from date of commencement of the work until date of final payment. Coverage must include the following on a commercial basis: (i) Premises – Operations, (ii) Independent Contractor's Protective, (iii) Products and Completed Operations, (iv) Personal and Advertising Injury, (v) Contractual, including specific provision for contractor's obligations under the provision entitled Indemnification – Third Party Claims, (vi) Broad Form Property Damage including Completed Operations, and (vii) Owned, Non-owned and Hired Motor Vehicles.

(3) The insurance required by this paragraph shall be written for not less than the following limits of liability or as required by law, whichever coverage is greater:

**COMMERCIAL GENERAL LIABILITY:**  
General Aggregate (per project) \$1,000,000  
Products/Completed Operations \$1,000,000

Each Occurrence \$1,000,000  
Fire Damage (Any one fire) \$ 50,000

Personal and Advertising Injury \$1,000,000 Medical Expense (Any one person) \$ 5,000

BUSINESS AUTO LIABILITY (including All Owned, Nonowned, and Hired Vehicles):

Combined Single Limit \$1,000,000 OR Bodily Injury & Property Damage (each) \$750,000

WORKER'S COMPENSATION:

State Statutory Employers Liability \$100,000 Per Acc. \$500,000 Disease, Policy Limit; \$100,000 Disease, Each Employee

(4) Required Documentation. (a) Prior to commencement of the work, contractor shall provide to the state a signed, original certificate of liability insurance (ACORD 25). The certificate shall identify the types of insurance, state the limits of liability for each type of coverage, include a provision for 30 days notice prior to cancellation, name Clemson University as a Certificate Holder, provide that the general aggregate limit applies per project, and provide that coverage is written on an occurrence basis. (b) Prior to commencement of the work, contractor shall provide to the state a written endorsement to the contractor's general liability insurance policy that (i) names Clemson University as an additional insured, (ii) provides that no material alteration, cancellation, non-renewal, or expiration of the coverage contained in such policy shall have effect unless Clemson University has been given at least thirty (30) days prior written notice, and (iii) provides that the Contractor's liability insurance policy shall be primary, with any liability insurance of the state as secondary and noncontributory. (c) Both the certificate and the endorsement must be received directly from either the contractor's insurance agent or the insurance company.

(5) Contractor shall provide a minimum of thirty (30) days written notice to Clemson University of any proposed reduction of coverage limits (on account of revised limits or claims paid under the General Aggregate) or any substitution of insurance carriers.

(6) The state's failure to demand either a certificate of insurance or written endorsement required by this paragraph is not a waiver of contractor's obligations to obtain the required insurance.

**DEFAULT – SHORT FORM:** The state may terminate this contract, or any part hereof, for cause in the event of any default by the contractor, or if the contractor fails to comply with any contract terms and conditions, or fails to provide the state, upon request, with adequate assurances of future performance. In the event of termination for cause, the state shall not be liable to the contractor for any amount for supplies or services not accepted, and the contractor shall be liable to the state for any and all rights and remedies provided by law. If it is determined that the state improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

**DELIVERY:** Deliveries shall be made and all services provided to the location specified by the University in its purchase order. All items shall be delivered, or services completed, no later than the date specified on the purchase order or best delivery date indicated by Offeror on Page Two of the associated solicitation, unless there is a delivery date specified in Section III of the solicitation, in which case that date becomes the required delivery date. If the University requests delivery sooner than the time specified, contractor may invoice the ordering entity any additional shipping charges approved by the ordering entity on the purchase order.

**DISCOUNT FOR PROMPT PAYMENT:**

(a) Discounts for prompt payment will not be considered in the evaluation of offers. However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a discount for prompt payment in conjunction with the offer, offerors awarded contracts may include discounts for prompt payment on individual invoices.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. If the Contractor has not placed a date on the invoice, the due date shall be calculated from the date the designated billing office receives a proper invoice, provided the state annotates such invoice with the date of receipt at the time of receipt. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or, for an electronic funds transfer, the specified payment date. When the discount date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day.

**DISPUTES:** (1) Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. Contractor agrees that any act by the Government regarding the Agreement is not a waiver of either the Government's sovereign immunity or the Government's immunity under the Eleventh Amendment of the United State's Constitution. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the solicitation. (2) Service of Process. Contractor consents that any papers, notices, or process necessary or proper for the initiation or continuation of any disputes, claims, or controversies relating to the Agreement; for any court action in connection therewith; or for the entry of judgment on any award made, may be served on Contractor by certified mail (return receipt requested) addressed to Contractor at the address provided as the Notice Address on Page Two or by personal service or by any other manner that is permitted by law, in or outside South Carolina. Notice by certified mail is deemed duly given upon deposit in the United States mail.

**EQUAL OPPORTUNITY:** Contractor is referred to and shall comply with all applicable provisions, if any, of Title 41, Part 60 of the Code of Federal Regulations, including but not limited to Sections 60-1.4, 60-4.2, 60-4.3, 60-250.5(a), and 60-741.5(a), which are hereby incorporated by reference.

**ESTIMATED QUANTITY - PURCHASES FROM OTHER SOURCES:** The University may bid separately any unusual requirements or large quantities of supplies covered by this contract.

**FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA):** (a) Vendor warrants that it will not make available or distribute any student education records it receives from Clemson University in violation of the federal Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. section 1232g. Vendor agrees to limit access to records provided by Clemson University to its employees with a legitimate need to know in order for Vendor to fulfill its obligations under this agreement. Vendor warrants that it has procedures in place to prevent unauthorized access to data provided by Clemson University, and the procedures will be documented and available to Clemson University upon request. Vendor will notify Clemson University immediately in the event of a security breach that could or does impact Clemson University records or data. (b) Vendor agrees that Clemson University data will not be shared or sold to third parties without prior written authorization from Clemson University. Vendor agrees to notify Clemson University immediately if it receives a subpoena, court order or other request for Clemson University data so Clemson University can take appropriate action if needed.

**FALSE CLAIMS:** According to the S.C. Code of Laws § 16-13-240, "a person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty" of a crime.

**FIXED PRICING REQUIRED:** Any pricing provided by contractor shall include all costs for performing the work associated with that price. Except as otherwise provided in this solicitation, contractor's price shall be fixed for the duration of this contract, including option terms. This clause does not prohibit contractor from offering lower pricing after award.

**FORCE MAJURE:** The contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the contractor. Such causes may include, but are not restricted to acts of God or of the public enemy, acts of the government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, pandemics, strikes, freight embargoes, and unusually severe weather but in every case the failure to perform must be beyond the control and without the fault or negligence of the contractor. If the failure to perform is caused by default of a subcontractor, and if such default arises out of causes beyond the control of both the contractor and subcontractor, and without the fault or negligence of either of them, the contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the contractor to meet required delivery schedule.

**HOLD HARMLESS:** Clemson University, its officers, agents, and employees shall be held harmless from liability from any claims, damages, and actions of any nature arising from the use of any materials furnished by the contractor, provided that such liability is not attributable to negligence on the part of the University or failure of the University to use the materials in the manner outlined by the contractor in descriptive literature or specifications submitted with the contractor's proposal.

**INDEMNIFICATION - THIRD PARTY CLAIMS:** Notwithstanding any limitation in this agreement, Contractor shall defend and indemnify the State of South Carolina, its instrumentalities, agencies, departments, boards, political subdivisions and all their respective officers, agents and employees against all suits or claims of any nature (and all damages, settlement payments, attorneys' fees, costs, expenses, losses or liabilities attributable thereto) by any third party which arise out of, or result in any way from, any defect in the goods or services acquired hereunder or from any act or omission of Contractor, its subcontractors, their employees, workmen, servants or agents. Contractor shall be given written notice of any suit or claim. University shall allow Contractor to defend such claim so long as such defense is diligently and capably prosecuted through legal counsel. University shall allow Contractor to settle such suit or claim so long as (i) all settlement payments are made by (and any deferred settlement payments are the sole liability of) Contractor, and (ii) the settlement imposes no non-monetary obligation upon University. University shall not admit liability or agree to a settlement or other disposition of the suit or claim, in whole or in part, without the prior written consent of Contractor. University shall reasonably cooperate with Contractor's defense of such suit or claim. The obligations of this paragraph shall survive termination of the parties' agreement.

**INSPECT/REJECT:** Clemson University reserves the right to inspect any equipment offered or completed service and to reject equipment or service if it is not acceptable as determined by Clemson University.

**INTELLECTUAL PROPERTY INFRINGEMENT:** (a) Without limitation and notwithstanding any provision in this agreement, Contractor shall, upon receipt of notification, defend and indemnify the University, its instrumentalities, agencies, departments, boards, political subdivisions and all their respective officers, agents and employees against all actions, proceedings or claims of any nature (and all damages, settlement payments, attorneys' fees (including inside counsel), costs, expenses, losses or liabilities attributable thereto) by any third party asserting or involving an IP right related to an acquired item. University shall allow Contractor to defend such claim so long as the defense is diligently and capably prosecuted. University shall allow Contractor to settle such claim so long as (i) all settlement payments are made by Contractor, and (ii) the settlement imposes no non-monetary obligation upon University. University shall reasonably cooperate with Contractor's defense of such claim. (b) In the event an injunction or order shall be obtained against University's use of any acquired item, or if in Contractor's opinion, the acquired item is likely to become the subject of a claim of infringement or violation of an IP right, Contractor shall, without in any way limiting the foregoing, and at its expense, either: (1) procure for University the right to continue to use, or have used, the acquired item, or (2) replace or modify the acquired item so that it becomes non-infringing but only if the modification or replacement does not adversely affect the specifications for the acquired item or its use by University. If neither (1) nor (2), above, is practical, University may require that Contractor remove the acquired item from University, refund to University any charges paid by University therefore, and take all steps necessary to have University released from any further liability. (c) Contractor's obligations under this paragraph do not apply to a claim to the extent (i) that the claim is caused by Contractor's compliance with specifications furnished by the University unless Contractor knew its compliance with the University's specifications would infringe an IP right, or (ii) that the claim is caused by Contractor's compliance with specifications furnished by the University if the University knowingly relied on a third party's IP right to develop the specifications provided to Contractor and failed to identify such product to Contractor. (d) As used in this paragraph, these terms are defined as follows: "IP right(s)" means a patent, copyright, trademark, trade secret, or any other proprietary right. "Acquired item(s)" means the rights, goods, or services furnished under this agreement. "Specification(s)" means a detailed, exact statement of particulars such as a statement prescribing materials, dimensions, and quality of work. (e) Contractor's obligations under this clause shall survive the termination, cancellation, rejection, or expiration of this Agreement.

**LICENSES AND PERMITS:** During the term of the contract, the Contractor shall be responsible for obtaining, and maintaining in good standing, all licenses (including professional licenses, if any), permits, inspections and related fees for each or any such licenses, permits and /or inspections required by the State, county, city or other government entity or unit to accomplish the work specified in this solicitation and the contract.

**MATERIAL AND WORKMANSHIP:** Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose intended.

**NON-INDEMNIFICATION:** Any term or condition is void to the extent it requires the University to indemnify anyone.

**NOTICE:** (A) After award, any notices shall be in writing and shall be deemed duly given (1) upon actual delivery, if delivery is by hand, (2) upon receipt by the transmitting party of automated confirmation or answer back from the recipient's device if delivery is by telex, telegram, facsimile, or electronic mail, or (3) upon deposit into the United States mail, if postage is prepaid, a return receipt is requested, and either registered or certified mail is used. (B) Notice to contractor shall be to the address identified as the Notice Address on Page Two. Notice to the state shall be to the Procurement Officer's address on the Cover Page. Either party may designate a different address for notice by giving notice in accordance with this paragraph.

**OWNERSHIP OF DATA & MATERIALS:** All data, material and documentation either prepared for the state pursuant to this contract shall belong exclusively to the University.

**PAYMENT:** (a) Unless prearranged by Clemson University Procurement Services, all payments will be NET 30. Payments will be issued 30 days from the date the goods were received by the ordering department, or 30 days from the date a valid original invoice is received by the University, whichever is later. (b) In addition, unless prearranged by Clemson University Procurement Services, all payments made by paper check will incur an administrative fee of .5% of the payment amount. This fee will be automatically deducted from the overall payment amount of any vendor payment made by the University via paper check. (c) Unless otherwise specified in this contract, including the purchase order, payment shall not be made on partial deliveries accepted by the Government. (d) Payment and interest shall be made in accordance with S.C. Code Section 11-35-45. Contractor waives imposition of an interest penalty unless the invoice submitted specifies that the late penalty is applicable.

**PRICE ADJUSTMENT - LIMITED - AFTER INITIAL TERM ONLY:** Upon approval of the Procurement Officer, prices may be adjusted for any renewal term. Prices shall not be increased during the initial term. Any request for a price increase must be received by the Procurement Officer at least ninety (90) days prior to the expiration of the applicable term and must be accompanied by sufficient documentation to justify the increase. If approved, a price increase becomes effective starting with the term beginning after approval. Contractor may terminate this contract at the end of the then current term if a price increase request is denied. Notice of termination pursuant to this paragraph must be received by the Procurement Officer no later than fifteen (15) days after the Procurement Officer sends contractor notice rejecting the requested price increase.

**PRICE ADJUSTMENTS – LIMITED BY CPI “All Items”:** Upon request and adequate justification, the Procurement Officer may grant a price increase up to, but not to exceed, the unadjusted percent change for the most recent 12 months for which data is available, that is not subject to revision, in the Consumer Price Index (CPI) for all urban consumers (CPI-U), “all items” for services, as determined by the Procurement Officer. The Procurement Officer, at their sole discretion, may choose an alternate index if it is deemed more appropriate to the specific procurement. The Bureau of Labor and Statistics publishes this information on the web at [www.bls.gov](http://www.bls.gov).

**PRICING DATA – AUDIT – INSPECTION:** [Clause Included Pursuant to § 11-35-1830, - 2210, & -2220] (a) Cost or Pricing Data. Upon Procurement Officer's request, you shall submit cost or pricing data, as defined by 48 C.F.R. § 2.101 (2004), prior to either (1) any award to contractor pursuant to 11-35-1530 or 11-35-1560, if the total contract price exceeds \$500,000, or (2) execution of a change order or contract modification with contractor which exceeds \$100,000. Your price, including profit or fee, shall be adjusted to exclude any significant sums by which the state finds that such price was increased because you furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between parties. (b) Records Retention. You shall maintain your records for three years from the date of final payment, or longer if requested by the chief Procurement Officer. The state may audit your records at reasonable times and places. As used in this subparagraph (b), the term "records" means any books or records that relate to cost or pricing data submitted pursuant to this clause. In addition to the obligation stated in this subparagraph (b), you shall retain all records and allow any audits provided for by 11-35-2220(2). (c) Inspection. At reasonable times, the state may inspect any part of your place of business which is related to performance of the work. (d) Instructions – Certification. When you submit data pursuant to subparagraph (a), you shall (1) do so in accordance with the instructions appearing in Table 15-2 of 48 C.F.R. § 15.408 (2004) (adapted as necessary for the state context), and (2) submit a Certificate of Current Cost or Pricing Data, as prescribed by 48 CFR § 15.406-2(a) (adapted as necessary for the state context). (e) Subcontracts. You shall include the above text of this clause in all of your subcontracts. (f) Nothing in this clause limits any other rights of the state.

**PUBLICITY:** Contractor shall not publish any comments or quotes by University employees, or include the University in either news releases or a published list of customers, or use University trademarks without the prior written approval of the Procurement Officer or University Public Affairs office.

**PURCHASE ORDERS:** Contractor shall not perform any work prior to the receipt of a purchase order from the using governmental unit. The University shall order any supplies or services to be furnished under this contract by issuing a purchase order. Purchase orders may be used to elect any options available under this contract, e.g., quantity, item, delivery date, payment method, but are subject to all terms and conditions of this contract. Purchase orders may be electronic. No particular form is required. An order placed pursuant to the purchasing card provision qualifies as a purchase order. Purchase order requirement may be waived if approved in writing by University Procurement Services.

**PURCHASING CARD:** Contractor agrees to accept payment by the South Carolina Purchasing Card for no extra charge. The Purchasing Card is issued by Visa. The purchasing card allows state agencies to make authorized purchases from a vendor without the requirement to issue a purchase order.

**RELATIONSHIP OF THE PARTIES:** Neither party is an employee, agent, partner, or joint venturer of the other. Neither party has the right or ability to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party.

**SETOFF:** The state shall have all of its common law, equitable, and statutory rights of set-off. These rights shall include, but not be limited to, the University's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the state with regard to this contract, any other contract with any state department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the state for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto.

**SHIPPING / RISK OF LOSS:** F.O.B. Destination. Destination is the shipping dock of the University's designated receiving site, or other location, as specified herein. (See Delivery clause)

#### **SOFTWARE LICENSES:**

**Proprietary Software:** Proprietary software is non-custom written, non-made for hire computer software supplied by the contractor and documentation used to describe, maintain and use the software.

**License:** The University is hereby granted a non-exclusive, fully paid perpetual license to use the proprietary software acquired hereunder.

**Title:** Title to any proprietary software provided by the Contractor to the University will remain with the Contractor.

**Trade Secrets:** The University agrees that the proprietary software is a trade secret of the contractor. The University agrees to take reasonable precautions to protect the trade secret nature of the proprietary software and to prevent its disclosure to unauthorized personnel. The license herein granted cannot be transferred, assigned, or made available by the University for use by any other individual, firm, partnership, or legal entity not affiliated, associated, or connected with the University without the prior expressed written consent of the contractor, which consent will not be unreasonably withheld. Such transfer shall also be conditioned upon the execution by the transferee of a written declaration agreeing to be bound by the terms and conditions of confidentiality provided for in this section.

**Source Code:** Source code includes files used by assembly, basic, c or other language compatibles to produce object modules for linkage into applications programs. The source code media will contain source code, files for compiling and linking software, and any other files and documentation available in machine-readable form to facilitate compiling and linking the code.

In the event the contractor, at any point during the continued installation and operation of the products acquired under this contract, discontinues the conduct of business, or for any reason fails to continue to support its proprietary software, it will either make provision for the continued support under the same terms and conditions or provide the University with a copy of the source code for said proprietary software, at no expense to the University.

**Export Control:** The University acknowledges that the products acquired hereunder may be licensable by the U. S. Government. It further acknowledges that a valid export license must be obtained from the Department of Commerce prior to export of said products.

**Customized Software:** Customized software is made-for-hire, custom written and customer specific software or customizations to proprietary software developed for the University by contractor and documentation used to describe, maintain and use the software.

**Title:** Title to the customized software vests in the University as set forth herein. Contractor shall thereafter have no right, title or interest in any customized software. As herein used, title includes providing to the University all intellectual elements of the customized software including, but not

limited to, developmental work product, notes, object and source codes, documentation, and any other items which would aid the University in understanding, using, maintaining, and enhancing said customized software.

**Software Tools:** The contractor shall provide to the University, simultaneous with its initial installation, and any subsequent enhancements, upgrades, fixes, etc., software tools (including, but not limited to compilers, editors, etc.) that the University would require to maintain or enhance the customized software. The price for said tools and the cost to train University personnel to maintain and/or to enhance the customized software shall be noted separately and included in the contractor's cost proposal submitted to the University in response to the University's solicitation.

**Escrow for Source Code:** In the event the contractor at any point during the continued installation and operation of the software herein acquired discontinues the conduct of business or for any other reason fails to continue to support the software, the state shall be provided a copy of the source code for said software within thirty days at no expense to the University.

For the effective term of this contract, contractor will provide, to a mutually agreed upon escrow agent in the United States, the most recent version of the source code on magnetic media.

Proprietary source code shall be deposited into the escrow account within fifteen (15) days of the initiation of the contract, or any major update, non-customized enhancement, version or release of said licensed software.

The source code may be accessed only upon the following conditions:

a. Contractor refuses to provide software maintenance, bug fixes, upgrades, updates and/or enhancement services under the terms set forth in this contract or as generally provided similarly situated customers; or

b. Contractor ceases to do business or exist as a valid business entity, as evidenced by an adjudication of bankruptcy or other definitive measure of cessation of operations.

With regards to proprietary software, the state may not sell, assign lease, or otherwise provide said source code(s) to any other person or entity, regardless of modification, without the express written consent of contractor, its successors, and assigns.

**STORAGE OF MATERIALS:** Absent approval of the using governmental unit, Contractor shall not store items on the premises of the using governmental unit prior to the time set for installation.

**SURVIVAL OF OBLIGATIONS:** The Parties' rights and obligations which, by their nature, would continue beyond the termination, cancellation, rejection, or expiration of this contract shall survive such termination, cancellation, rejection, or expiration, including, but not limited to, the rights and obligations created by the following clauses: Indemnification - Third Party Claims, Intellectual Property Indemnification, and any provisions regarding warranty or audit.

**TAXES:** Any tax the contractor may be required to collect or pay upon the sale, use or delivery of the products shall be paid by the University, and such sums shall be due and payable to the contractor upon acceptance. Any personal property taxes levied after delivery shall be paid by the University. It shall be solely the University's obligation, after payment to contractor, to challenge the applicability of any tax by negotiation with, or action against, the taxing authority. Contractor agrees to refund any tax collected, which is subsequently determined not to be proper and for which a refund has been paid to contractor by the taxing authority. In the event that the contractor fails to pay, or delays in paying, to any taxing authorities, sums paid by the University to contractor, contractor shall be liable to the University for any loss (such as the assessment of additional interest) caused by virtue of this failure or delay. Taxes based on Contractor's net income or assets shall be the sole responsibility of the contractor.

**TERM OF CONTRACT – EFFECTIVE DATE:** The effective date of this contract is the first day of the Maximum Contract Period as specified on the final statement of award. For bids where award statement is not required, the effective date of the contract will be the issue date on the Purchase Order.

**TERM OF CONTRACT – INITIAL CONTRACT PERIOD / OPTION TO RENEW:** For continuing contracts the initial term of this agreement is one (1) year from the effective date as stated on the award document. At the end of the initial term, and at the end of each renewal term, this contract shall automatically renew for a period of one year, unless contractor receives notice that the University elects not to renew the contract at least thirty (30) days prior to the date of renewal. Said renewals may be less than, but will not exceed, four (4) additional one year periods. Regardless, this contract expires no later than the last date stated on the final statement of award.

**TERM OF CONTRACT – TERMINATION BY CONTRACTOR:** Contractor may terminate this contract at the end of the initial term, or any renewal term, by providing the Procurement Officer notice of its election to terminate under this clause at least ninety (90) days prior to the expiration of the then current term.

**TERMINATION DUE TO UNAVAILABILITY OF FUNDS:** Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled. In the event of a cancellation pursuant to this paragraph, contractor will be reimbursed the resulting unamortized, reasonably incurred, nonrecurring costs. Contractor will not be reimbursed any costs amortized beyond the initial contract term.

**TERMINATION FOR CONVENIENCE – SHORT FORM:** The Procurement Officer may terminate this contract in whole or in part, for the convenience of the University. In such a termination, the Procurement Officer may require the contractor to transfer title and deliver to the University in the manner and to the extent directed by the Procurement Officer: (a) any completed supplies; and (b) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract. Upon such termination, the contractor shall (a) stop work to the extent specified, (b) terminate any subcontracts as they relate to the terminated work, and (c) be paid the following amounts without duplication, subject to the other terms of this contract: (i) contract prices for supplies or services accepted under the contract, (ii) costs incurred in performing the terminated portion of the work, and (iii) any other reasonable costs that the contractor can demonstrate to the satisfaction of the University, using its standard record keeping system, have resulted from the termination. The contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided. As a condition of payment, contractor shall submit within three months of the effective date of the termination a claim specifying the amounts due because of the termination. The absence of an appropriate termination for convenience clause in any subcontract shall not increase the obligation of the University beyond what it would have been had the subcontract contained such a clause.

**THIRD PARTY BENEFICIARY:** This Contract is made solely and specifically among and for the benefit of the parties hereto, and their respective successors and assigns, and no other person will have any rights, interest, or claims hereunder or be entitled to any benefits under or on account of this Contract as a third party beneficiary or otherwise.

**UNIFORM COMMERCIAL CODE:** The applicable provisions of the Uniform Commercial Code shall govern this contract.

**WAIVER:** The University does not waive any prior or subsequent breach of the terms of the Contract by making payments on the Contract, by failing to terminate the Contract for lack of performance, or by failing to strictly or promptly insist upon any term of the Contract. Only the Procurement Officer has actual authority to waive any of the University's rights under this Contract. Any waiver must be in writing.

WARRANTY – STANDARD: Contractor must provide the manufacturer's standard written warranty upon delivery of product. Contractor warrants that manufacturer will honor the standard written warranty provided.