

EXECUTION OF OFFER

The undersigned Proposer has carefully examined all instructions, requirements, specifications, terms and conditions of this RFP and the Agreement and certifies:

1. It is a responsible company regularly engaged in providing goods and/or services necessary to meet the requirements, specifications, terms and conditions of the RFP and the Agreement. See 2 CFR § 200.318(h).
2. It has the necessary experience, knowledge, abilities, skills, and resources to satisfactorily perform the requirements, specifications, terms and conditions of the RFP and the Agreement. Further, if awarded, the Proposer agrees to perform the requirements, specifications, terms and conditions of the RFP and the Agreement.
3. All statements, information, and representations prepared and submitted in response to this RFP are current, complete, true, and accurate. Proposer acknowledges that HCDE will rely on such statements, information, and representations in selecting the successful responsible Proposer(s).
4. It is not currently barred or suspended from doing business with the Federal government, any of the members represented, or any of their respective agencies.
5. It shall be bound by all statements, representations, warranties, and guarantees made in its proposal.
6. Submission of a proposal indicates the Proposer's acceptance of the evaluation technique and the Proposer's recognition that some subjective judgments may be made by HCDE and its membership as part of the evaluation.
7. That all of the requirements of this RFP and the Agreement have been read and understood. In addition, compliance with all requirements, terms and conditions will be assumed by HCDE if not otherwise noted in the proposal.
8. The individual signing below has authority to enter into this on behalf of Proposer.
9. Proposer acknowledges that the Agreement may be canceled if any conflict of interest or appearance of a conflict of interest is discovered by HCDE.
10. This Agreement is subject to purchase orders duly authorized and executed by HCDE and or CP Member.

CORPORATE NAME:	West Music Company		
AUTHORIZED SIGNATURE:	<i>Stephanie Adams</i>		
PRINT NAME:	Stephanie Adams		
TITLE:	Bid Coordinator		
DATE:	03/16/2023		
ADDRESS:	1212 5th Street, PO Box 5521		
CITY, STATE, ZIP CODE:	Coralville, IA 52241		
PHONE:	800-397-9378	FAX:	888-470-3942
EMAIL ADDRESS:	bids@westmusic.com		
WEBSITE URL	www.westmusic.com		

This Section to be Completed by HCDE

Contract Number: 23/025SG-05 Term of contract: 05/17/2023 to 05/16/2024

Vendor shall honor all CP Administrative Fees for any sales resulting from this Contract whether Vendor is awarded a renewal or not.

Approved by Harris County Department of Education as a best value, responsible vendor:

Jesus Amezcua

Jesus Amezcua (May 30, 2023 18:36 CDT)

Jesus J. Amezcua, PhD., CPA, RTSBA
Assistant Superintendent for Business Services

05/17/2023

Board Approval Date

5.0 CONTRACT TERMS AND CONDITIONS

These Contract Terms and Conditions are part of the final contract in each product and/or service contract awarded as a result of this RFP and are part of the terms and conditions of each Purchase Order or proposal forms issued in connection with this RFP. Vendors are responsible for identifying any exceptions to these terms and conditions. **ANY EXCEPTIONS MUST BE NOTED DIRECTLY BELOW EACH OF THE RESPECTIVE TERMS AND CONDITIONS, REDLINED IN “RED” AND UPLOADED INTO THE RESPONSE ATTACHMENTS SECTION OF THE EBID SUBMISSION.** Proposals that are qualified with conditional clauses, items not called for, or other irregularities may be considered non-responsive by HCDE/CP and eliminated from further consideration.

CONTRACT BETWEEN HARRIS COUNTY DEPARTMENT OF EDUCATION AND West Music Company (“VENDOR”) FOR MUSICAL INSTRUMENTS & RELATED ITEMS

This Contract is entered into between HCDE/CP and Vendor, having submitted a proposal in response to this RFP issued by HCDE/CP and whose proposal has been accepted and awarded by HCDE. In consideration of the mutual covenants and conditions contained in this Contract and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, HCDE/CP and Vendor, intending to be legally bound, and subject to the terms, conditions, and provisions of this Contract, agree as follows:

5.1. Definitions

The terms used in this Contract shall have the meanings assigned to them in **Section 1.0 Notice of Intent** of the RFP.

5.2. Use of Contract by CP members

Vendor agrees and understands that this RFP and Contract may be used to accomplish work for HCDE/CP, a local governmental entity. Vendor further agrees and understands that this RFP and Contract may also be utilized by CP members pursuant to the piggyback method, as contemplated in the U.S. Department of Agriculture Memorandum SP 35-2012, *Procuring Services of Purchasing Cooperatives, Group Purchasing Organizations, Group Buying Organizations, etc.* (“SP 35-2012”). Vendor agrees and understands that CP members include “school food authorities,” and or contracting entity (CE) as that term is used in SP 35-2012.

5.3. Contract Terms; Amendment

The terms and conditions of this Contract shall govern all procurements conducted hereunder. No pre-published terms on the Purchase Order, acknowledgments, invoices, or other forms shall have any force or effect unless expressly agreed to by the CP member and Vendor. No amendment of this Contract shall be permitted unless and until first approved in writing by HCDE/CP and, if necessary, the CP member(s), and no such amendment shall have any effect unless and until a written amendment to this Contract is executed by the HCDE Superintendent or his designee after any necessary approvals have been obtained from the HCDE Board of Trustees. In the event that a Vendor has an existing HCDE/CP contract in the same contract title, upon award the new contract will immediately supersede the older contract.

5.4. Term of Contract; Renewal of Contract

The initial term of this Contract is for a period of one (1) year, with HCDE/CP having the option to renew the Contract for four (4) additional one-year terms, at HCDE’s sole discretion, unless otherwise specified in **Section 6.0 Scope of Proposal**. Consequently, the total term of the Contract may be for a period of **five (5) years**. The phrase “Term” in this Contract shall mean the then-current Term of the Contract, whether an initial term or a renewal term.

5.5. Termination of Contract; Survival

This Contract shall remain in effect until (1) the Contract expires by its terms or (2) the Contract is terminated by mutual consent of HCDE/CP and Vendor. All Supplemental Contracts, purchase orders, and/or orders for goods or services issued by HCDE and/or CP members and accepted by Vendor shall survive the expiration or termination of this Contract. During the term of any Supplemental Contract entered into between Vendor and a CP member, all terms of this Contract shall continue to apply to the Supplemental Contract.

In the event of a breach or default of the Contract and/or the RFP by Vendor, HCDE/CP reserves the right to enforce the performance of the Contract in any manner prescribed by law or deemed to be in the best interest of HCDE/CP and/or CP members. HCDE/CP further reserves the right to terminate the Contract immediately in the event Vendor fails to: (1) meet schedules, deadlines, and/or delivery dates within the time specified in the RFP, this Contract, and/or a Purchase Order; (2) make any payments owed; or (3) otherwise perform in accordance with this Contract and/or the RFP. HCDE/CP also reserves the right to terminate the Contract immediately, with written notice to Vendor, if HCDE/CP believes, in its sole discretion that it is in the best interest of HCDE/CP and/or CP members to do so.

In the event that a material change to the terms of the Contract occurs, then the Contract shall be allowed to expire and shall not be renewed upon the conclusion of the Contract's term. The phrase "material change" in this paragraph shall mean a modification that substantially exceeds the terms of the original contract between HCDE/CP and Vendor. Upon the expiration of the Contract's term, HCDE/CP may issue a new RFP for the goods or services procured under the previous contract.

Vendor agrees that HCDE/CP shall not be liable for damages in the event that HCDE/CP declares Vendor to be in default or breach of this Contract and/or the RFP. Vendor further agrees that upon termination of the Contract for any reason, Vendor shall, in good faith and with reasonable cooperation, aid in the transition to any new arrangement and/or Vendor.

5.6. Prevailing Wage Rates – Construction/public works projects only

Vendor and all subcontractors of Vendor shall comply with all laws regarding prevailing wage rates, including, but not limited to, TEX. GOV'T. CODE Chapter 2258, applicable to the construction of a public work, and any related federal requirements, including the DAVIS-BACON ACT. In the event TEX. GOV'T. CODE Chapter 2258 applies to a product or service provided by Vendor to HCDE/CP or a CP member, Vendor and any subcontractor(s) shall comply with the prevailing wage rates set by HCDE/CP or the CP member.

5.7. Change Orders

Pursuant to TEX. EDUC. CODE § 44.0411(a), for HCDE/CP and CP members that are Texas school districts, if a change in plans or specifications is necessary after the performance of a Purchase Order has begun or if it is necessary to decrease or increase the quantity of work to be performed or of materials, equipment, or supplies to be furnished, the CP member may approve change orders making the changes. The total Purchase Order price may not be increased because of the changes unless additional money for increased costs is approved for that purpose from available money or is provided for by the authorization of the issuance of time warrants. The CP member may grant general authority to an administrative official to approve the change orders. A Purchase Order with an original contract price of \$1 million or more may not be increased under TEX. EDUC. CODE § 44.0411(a) by more than 25 percent. If a change order for a Purchase Order with an original contract price of less than \$1 million increases the contract amount to \$1 million or more, the total of the subsequent change orders may not increase the revised contract amount by more than 25 percent of the original contract price.

5.8. Compliance with Laws

Vendor shall comply with all applicable federal, state, and local laws, statutes, ordinances, standards, orders, rules, and regulations, including, as applicable, workers' compensation laws; minimum and maximum salary and wage statutes and regulations; prompt payment and licensing laws and regulations; anti-discrimination statutes and regulations (Title VI of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title 7 C.F.R. Parts 15, 15a, and 15b; the Americans with Disabilities Act; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement—Nutrition Programs and Activities); the Davis-Bacon Act (40 U.S.C. § 276a / 29 CFR Part 5); the Copeland "Anti-Kickback" Act (18 U.S.C. § 874 / 29 CFR Part 5); the Equal Opportunity Employment requirements (Executive Orders 11246 and 11375 / 41 CFR Chapter 60); the McNamara-O'Hara Service Contract Act (41 U.S.C. 351); Section 306 of the Clean Air Act (42 U.S.C. § 1857h); Section 508 of the Clean Water Act (33 U.S.C. § 1368); Executive Order 11738, Environmental Protection Agency regulations (40 CFR Part 15); the Contract Work Hours and Safety Act (40 U.S.C. § 3701-3708; 29 C.F.R. Part 5; the Solid Waste Disposal Act (Section 6002 as amended by the Resource Conservation and Recovery Act for procuring solid waste management services in a manner that maximizes energy and resource recovery when contract amount is in excess of \$10,000); the Education Department General Administrative Regulations ("EDGAR")/Uniform Guidance (2 C.F.R. Part 200); mandatory standards and policies contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871); and all applicable requirements and regulations, including those related to reporting, patent rights, copyrights, data rights, and those mandated by federal agencies making awards of federal funds to HCDE/CP

and/or CP members, including, without limitation, the U.S. Department of Agriculture and/or Texas Department of Agriculture. Vendor understands that Vendor is ineligible to receive a contract award with HCDE/CP if Vendor or its principal(s) is listed on the government wide exclusions in the System for Award Management (Debarment and Suspension Orders Executive Orders 12549 and 12689) or is 30 days or more delinquent in paying child support (Tex. Fam. Code § 231.006). For the entire duration of this Contract, Vendor and all subcontractors shall maintain all required licenses, certifications, permits, and any other documentation necessary to perform this Contract. All permits will be acquired by Vendor and invoiced to the CP member at cost as part of the Purchase Order, unless the permits are provided by the CP member. For the entire duration of this Contract, Vendor and all subcontractors shall also comply with all requirements pertaining to local, state, or federal health and safety certifications, licensing, or regulations. Vendor must comply with all state and local building code requirements unless otherwise specifically provided in the CP member's Purchase Order, and Vendor must pay all fees and charges for connections to outside services and for use of property outside the project site. The states of individual CP members may have regulations and laws that govern payment retention and progress payments for public projects. Vendor is responsible for being acquainted with and complying with each state's requirements. When required or requested by HCDE/CP or a CP member, Vendor shall furnish HCDE/CP and/or the CP member with satisfactory proof of Vendor's compliance with this provision.

5.9. Confidentiality

Vendor and HCDE/CP agree to secure the confidentiality of all information and records in accordance with applicable federal and state laws, rules, and regulations. Vendor and HCDE/CP understand that the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, governs the privacy and security of educational records and information and agree to abide by FERPA rules and regulations, as applicable. Vendor also acknowledges that HCDE/CP and numerous CP members are subject to the Texas Public Information Act, and Vendor waives any claim against and releases from liability HCDE/CP and CP members, their respective officers, employees, agents, and attorneys with respect to disclosure of information provided under or in this Contract or otherwise created, assembled, maintained, or held by Vendor, HCDE, or a CP member and determined by HCDE/CP or the CP member, the Attorney General of Texas, or a court of law to be subject to disclosure under the Texas Public Information Act.

5.10. Performance and Payment Bonds – Construction/public works projects only

Vendor agrees to provide performance bonds and/or payment bonds as required by law, based on the amount or estimated amount of any Purchase Order for a public work contract, which is defined as a contract for constructing, altering, or repairing a public building or carrying out or completing any public work. TEX. GOV'T. CODE § 2253.001(4). Pursuant to TEX. GOV'T. CODE § 2253.021, a performance bond is required if a Purchase Order is in excess of \$100,000 for CP members that are governmental entities subject to Chapter 2253; a payment bond is required if a Purchase Order is in excess of \$25,000 for CP members that are governmental entities subject to Chapter 2253 and are not municipalities or a joint board created under Subchapter D, Chapter 22 of the Tex. Transp. Code, and a payment bond is required if a Purchase Order is in excess of \$50,000 for CP members that are governmental entities subject to Chapter 2253 and are municipalities or a joint board created under Subchapter D, Chapter 22 of the TEX. TRANSP. CODE.

5.11. Title and Risk of Loss

Whenever HCDE/CP or a CP member is purchasing (and not leasing) a product under this Contract, title and risk of loss shall pass upon the later of HCDE/CP or the CP member's acceptance of the product or payment of the applicable invoice.

5.12. Warranty Conditions

All product(s) and/or service(s) provided by the Vendor under this Contract must be warranted to be free from defects in material, workmanship, and free from such defects in design for a period of one (1) year upon the later of HCDE's or the CP member's acceptance of the product and/or service or payment of the applicable invoice. Vendor warrants that all products and/or services furnished under this Contract shall conform in all respects to the terms of this Contract, including any drawings, specifications, and/or standards incorporated herein, including, without limitation, those detailed in the RFP and Purchase Order. In addition, Vendor warrants that product and/or services are suitable for and will perform in accordance with the purposes for which they are intended. Vendor shall assume all liabilities incurred within the scope of consequential damages and incidental expenses, as set forth in the Vendor or manufacturer's warranty, which result from either delivery or use of product, which does not meet the specifications within this Contract, the RFP, or Purchase Order.

5.13. **Criminal History Review**

Section 10.0 Attachment–Ch. 22 Contractor Certification: Contractor Employees (Required) must be submitted with packet, if applicable.

Prior to commencing any work under the Contract, if Vendor contracts with HCDE/CP to provide services, Vendor must comply with all requirements relating to criminal history information required by TEX. EDUC. CODE Chapter 22. Vendor must also ensure subcontractors' compliance with TEX. EDUC. CODE, Chapter 22 requirements. Covered employees with disqualifying criminal history are prohibited from serving at HCDE/CP or at CP school district members' locations; Vendor and any subcontracting entity may not permit a "covered employee" to provide services at a school if the employee has a "disqualifying criminal history" (as those terms are defined below). If Vendor receives information that a covered employee has a reported disqualifying criminal history, then Vendor will immediately remove the covered employee from the project/contract and notify HCDE/CP member in writing within three (3) business days. If HCDE/CP member, in its sole discretion, objects to the assignment of a covered employee for any reason, including, but not limited to, on the basis of the covered employee's criminal history record information and/or insufficient qualifications, lack of experience, and the like, based on information gathered by HCDE/CP member through the procurement and/or contracting processes, Vendor (and each subcontractor) agrees to discontinue using that covered employee to provide services on HCDE/CP member's project/contract. "Covered employees" means employees, agents or subcontractors of Vendor or a subcontractor who has or will have continuing duties related to the services to be performed on HCDE/CP member's project/contract and has or will have direct contact with HCDE/CP member's students. "Disqualifying criminal history" means: (1) For employees of a contracting or subcontracting entity that is providing engineering, architectural, or construction services on a project to design, construct, alter, or repair a public work: (1) a conviction or other criminal history information designated by HCDE/CP member; (2) a felony or misdemeanor offense that would prevent a person from being employed under Texas Education Code § 22.08341(d), that is: conviction during the preceding 30 years (if at the time of the offense, the victim was under 18 or was enrolled in a public school) of: (a) a felony offense under Title 5, Texas Penal Code; (b) an offense on conviction of which a defendant is required to register as a sex offender under Chapter 62, Texas Code of Criminal Procedure; or (c) an offense under federal law or the laws of another state that is equivalent to (a) or (b); (2) For employees of all other contracting or subcontracting entities: (1) a conviction or other criminal history information designated by Owner; (2) a felony or misdemeanor offense that would prevent a person from being employed under Texas Education Code § 22.085(a), that is: (a) conviction of a felony offense under Title 5, Texas Penal Code if at the time of the offense, the victim was under 18; (b) conviction of or placement on deferred adjudication community supervision for an offense for which a defendant is required to register as a sex offender under Chapter 62, Texas Code of Criminal Procedure; or (c) conviction of an offense under federal law or the laws of another state that is equivalent to (a) or (b). HCDE/CP member shall be solely responsible for making the final determination of what constitutes direct contact with HCDE/CP member's students and what constitutes a disqualifying criminal history. The criminal history record information review obligation applies only if Vendor contracts with HCDE/CP to provide services; it does not apply to a contract for the purchase of goods, products or real estate.

5.14. **Customer Support**

Vendor shall provide timely and accurate technical advice and sales support to HCDE/CP staff, and CP members. Vendor shall respond to requests for customer support within one (1) business day after receipt of the request. Vendor shall provide training to HCDE/CP staff and/or CP members regarding products and/or services supplied by Vendor, at no additional charge or as defined in the vendor's Supplemental Contract (see Section 1.2.6), if requested by HCDE/CP or a CP member.

5.15. **HCDE/CP and/or CP members' Property**

In the event of loss, damage, or destruction of any property owned by or loaned by HCDE/CP or a CP member that is caused by Vendor or Vendor's representative, agent, employee, or contractor, Vendor shall indemnify HCDE/CP or the CP member and pay to HCDE/CP or the CP member the full value of or the full cost of repair or replacement of such property, whichever is greater, within thirty (30) days of Vendor's receipt of written notice of HCDE's or the CP member's determination of the amount due. If Vendor fails to make timely payment, HCDE/CP or the CP member may obtain such money from Vendor by any means permitted by law, including, without limitation, offset or counterclaim against any money otherwise due to Vendor by HCDE/CP or the CP member.

5.16. **Tax Exempt Status**

HCDE/CP and all CP members that are Texas governmental entities or agencies are exempt from payment of Texas State Sales Taxes under TEXAS TAX CODE§ 151.310 for the purchase of tangible personal property. Laws of other

states govern the tax status of CP members in states other than Texas. Vendor represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, without limitation, any federal, state, or local income, sales or excise taxes of Vendor or its employees. HCDE/CP and CP members shall not be liable for any taxes resulting from this Contract, except where otherwise required by law.

5.17. Other State Tax Requirements

5.17.1. Payment of Taxes by CP members Outside of Texas – CP members outside of Texas will pay only the rate and/or amount of taxes identified in Vendor's proposal submitted in response to the RFP as appropriate to the specific CP member.

5.17.2. State and Local Transaction Privilege Taxes – The CP member is subject to all applicable state and local transaction privilege taxes. Transaction privilege taxes apply to the sales of products and are the sole responsibility of Vendor, as the seller, to remit. Failure to remit taxes from HCDE/CP and/or the CP member, as the buyer, does not relieve Vendor, as the seller, from its obligation to remit taxes.

5.18. State of Texas Franchise Tax

By submitting a proposal in response to the RFP, Vendor certifies that Vendor is not currently delinquent in Vendor's payment of any franchise taxes or other taxes owed to the State of Texas.

5.19. Tax Responsibilities of Vendor and Indemnification for Taxes

Vendor is responsible for complying with the tax laws of states and the federal government. Vendor and all subcontractor(s) of Vendor shall pay all federal, state, and local taxes applicable to Vendor's operation, any persons employed by Vendor, and all subcontractors of Vendor. Vendor shall require all subcontractors to hold HCDE/CP and the CP member harmless from any responsibility for taxes, damages, and interest. If applicable, contributions required under federal, state, and/or local laws and regulations and any other costs, including, but not limited to, transaction privilege taxes, unemployment compensation insurance, Social Security, and Worker's Compensation, shall be the sole responsibility of Vendor.

5.20. IRS W-9

To receive payment under this Contract, Vendor shall have a current I.R.S. W-9 Form on file with the CP member.

5.21. Assignment of Contract

Vendor may not assign this Contract or any of its rights, duties, or obligations hereunder without the prior written approval of HCDE. Any attempted assignment of this Contract by Vendor shall be null and void. Any Purchase Order made as a result of this Contract may not be transferred, assigned, subcontracted, mortgaged, pledged, or otherwise disposed of or encumbered in any way by Vendor without the prior written approval of HCDE/CP and, if applicable, the CP member.

5.22. Notification of Material Change

Vendor is required to notify HCDE/CP when any material change in operations occurs, including changes in distribution rights for awarded products, bankruptcy, material changes in financial condition, change of ownership, and the like, within three (3) business days of such change.

5.23. Performance

Vendor agrees to use commercially reasonable best efforts to provide the product(s) and/or service(s) subject to this Contract. Vendor shall furnish all supervision, labor, tools, equipment, permits, licenses, transportation, insurance, material, and supplies necessary to complete any scope of work, Purchase Order under this Contract. Vendor shall use skilled, trained personnel, who shall be supervised by Vendor.

5.24. Subcontractors

If Vendor uses subcontractors in the performance of any part of this Contract, Vendor shall be fully responsible to HCDE/CP and CP members for all acts and omissions of the subcontractors. Nothing in this Contract shall create for the benefit of any such subcontractor any contractual relationship between HCDE/CP and any such subcontractor, nor shall it create any obligation on the part of HCDE/CP or CP members to pay or to see to the payment of any monies due any such subcontractor except as may otherwise be required by law. Vendor represents and warrants that it is willing,

able, and capable of obtaining, supervising, and being responsible for any subcontractors who perform and/or provide products and services related to this Contract.

5.25. Non-Appropriation

Renewal of this Contract, if any, will be in accordance with TEX. LOCAL GOV'T. CODE § 271.903 concerning non-appropriation of funds for multi-year contracts. Notwithstanding any other provision of this Contract or obligation imposed on HCDE/CP or any CP member by this Contract, HCDE/CP and CP members shall have the right to terminate this Contract, any Supplemental Contract, or Purchase Order without default or liability to Vendor resulting from such termination, effective as of the expiration of each budget period of HCDE/CP or any CP member if it is determined by HCDE/CP or any CP member, at their sole discretion, that there are insufficient funds to extend this Contract, any Supplemental Contract, any Purchase Order. The parties agree that this Contract, any Supplemental Contract, and/or any Purchase Order are commitments of the current revenue of HCDE/CP and CP members only.

5.26. Ordering Procedures

Purchase Orders are issued by HCDE/CP and/or CP members to the Vendor according to this Contract and any Supplemental Contract between HCDE/CP and the CP member. HCDE/CP may request confirmation of receipt of the Purchase Order from Vendor.

HCDE/CP also may elect to require e-commerce functionality, in which Purchase Orders are sent directly to Vendor and reported by the CP member to HCDE/CP on a specified basis. The e-commerce approach must be approved by HCDE/CP prior to the start date of any Term of the Contract.

5.27. Invoices; Payments

5.27.1. Vendor shall submit invoices, in duplicate, directly to HCDE/CP or the CP member at the appropriate location(s) specified by HCDE/CP or the CP member. Each invoice shall include HCDE's or the CP member's Purchase Order number and HCDE/CP Contract Number. All invoices shall be itemized to include the type of product(s) and/or service(s) rendered. Vendor shall submit invoices within a timely manner during HCDE's or the CP member's fiscal year in which the product(s) and/or service(s) are purchased. The shipment tracking number or pertinent information for verification of HCDE's or the CP member's receipt shall be made available upon request by HCDE/CP or the CP member.

5.27.2. HCDE/CP or the CP member will make payments directly to Vendor. HCDE/CP or the CP member placing the Purchase Order with Vendor shall alone be liable and/or responsible for payment for product(s) and/or service(s) ordered and must be invoiced directly by Vendor. Neither HCDE/CP nor any CP member shall be liable for the indebtedness of any one CP member.

5.27.3. TEX. GOV'T. CODE § 2251.021 shall govern when payments are due to the Vendor. Payments are due to Vendor by HCDE/CP and any CP member whose governing body meets only once a month or less frequently, **within forty-five (45) days** after the later of the following: (1) the date HCDE/CP or the CP member receives the products and services under the Contract; (2) the date the performance of the service under the Contract is completed; or (3) the date HCDE/CP or the CP member receives an invoice for the products or service. For CP members whose governing bodies meet more than once a month or more often, payments are due by those CP members **within thirty (30) days** after the later of the following: (1) the date the CP member receives product(s) under the Contract; (2) the date the performance of the service under the Contract is completed; or (3) the date the CP member receives an invoice for product(s) or service(s). Vendor agrees to pay any subcontractors the appropriate share of the payment received from HCDE/CP or the CP member not later than the **tenth (10th) day** after the date the Vendor receives the payment from HCDE/CP or the CP member.

The exceptions to payments made by HCDE, a CP member, and/or Vendor listed in TEX. GOV'T. CODE § 2251.002 shall apply to this Contract.

5.27.4. In addition to all other rights and remedies that HCDE may have, HCDE shall have the right to setoff, against any and all amounts due to Vendor by HCDE, whether due under this Contract or any other agreement between HCDE (including any division of HCDE) and Vendor, any sums for which HCDE is entitled to under this Contract, as determined by HCDE in its sole discretion, including, without limitation, sums due by Vendor to HCDE as a result of indemnification obligations, warranty claims, and/or HCDE/CP Administrative Fee(s).

5.28. **Reporting**

The Vendor shall report to HCDE/CP the total dollar volume of all sales under this Contract for the previous month. Reports are due, at a minimum, monthly and no later than the fifteenth (15th) day of the month following the sale. Reporting shall be itemized by Purchase Order number and list the CP contract number, CP member name, date, and Purchase Order total dollar amount. Vendor is responsible for collecting and compiling all sales under this Contract from all CP members.

The Vendor shall provide HCDE/CP with velocity/usage reports within five (5) business days of any request by HCDE/CP for such reports.

Reports shall be submitted to HCDE/CP by logging on to the Vendor Portal on the choicepartners.org website and using the "Monthly Reporting" tool to add Purchase Order information in the online form or via bulk upload using .xlsx files. Months without sales shall be reported on the same webpage.

5.29. **Pricing Changes**

All prices and discount percentages in Vendor's proposal shall be firm for the Term of this Contract. Pricing may be negotiated during the Contract renewal period. In the event Proposer's prices will be adjusted or escalated upon a renewal (if any) of the fixed-price contract awarded pursuant to this RFP, Proposer must indicate such in its proposal. Indicate any list price adjustment Vendor intends on providing during the Term of this Contract and on what it is based. For example: CPI, MSRP, Price List, Website Pricing. Vendor agrees to promptly lower the proportionate price of any product purchased through this Contract following a reduction in the price the Vendor is paying suppliers. All pricing submitted to HCDE/CP in Vendor's proposal shall include the administrative fee to be remitted to HCDE/CP by Vendor. It is Vendor's responsibility to keep all pricing up-to-date and on file with HCDE/CP. For all pricing changes, including at renewal and during the Term, all price changes shall be presented to HCDE/CP for acceptance or rejection by HCDE/CP, in its sole discretion, using the same format as was accepted in Vendor's original proposal; all price changes for products and/or services provided under this Contract must be approved, in writing, by HCDE/CP prior to taking effect.

The following documentation shall be provided to support a request for a price change:

- 5.29.1. justification for change/increase
- 5.29.2. terms and conditions
- 5.29.3. market conditions
- 5.29.4. manufacturers'/distributors' impact, if any

All price decreases shall be allowed for all products and/or services.

5.30. **HCDE/CP Administrative Fee**

HCDE/CP will invoice Vendor for the HCDE/CP Administrative Fee of 2%, subject to the Administrative Incentive Clause, below. HCDE/CP reserve the right to decrease the Administrative Fee at any time, upon notice to Vendor. The invoice for the Administrative Fee will be based on total sales made through this Contract. Vendor shall remit payment of the HCDE/CP Fee to HCDE/CP no later than **thirty (30) days** following the end of the month. Failure to pay the HCDE/CP Administrative Fee in a timely manner may result in Vendor breaching this Contract and may result in HCDE/CP suspending or terminating this Contract. Vendor shall honor and pay HCDE/CP the HCDE/CP Administrative Fee for any sales resulting from this Contract that occurred within **thirty (30) days** of the expiration or termination of this Contract. All rebates, discounts, and other applicable credits granted by Vendor as a result of any Supplemental Contracts entered into between Vendor and CP members shall accrue exclusively to CP member(s).

Administrative Fee Incentive Clause. The following incentives will be determined in the sole discretion of HCDE/CP and will be based on amounts actually billed by Vendor. Vendor's failure to abide by the Contract's terms and conditions, including, without limitation, Vendor's requirement to report sales to HCDE/CP, may result in HCDE/CP voiding the Administrative Fee Incentive, in HCDE/CP's sole discretion.

Aggregate Year

- Gross sales above \$5M invoiced by Choice Partners = 1.5% for remainder of the then-current Contract Term
- Subsequent renewal 1-year Term = 1.75% and Vendor must maintain production of \$5M to keep 1.75% fee for the next subsequent renewal 1-year Term

Task Orders/Job Orders

- \$2M or above - 1.5% only in the Contract Term in which they are invoiced
- \$1M or above - 1.75% only in the Contract Term in which they are invoiced

NOTE: FAILURE TO REPORT WILL VOID THIS ADMINISTRATIVE FEE INCENTIVE**5.31. Records Retention**

Vendor shall maintain its records and accounts in a manner that shall assure a full accounting for all product(s) and/or service(s) provided by the Vendor to HCDE/CP and/or CP members under this Contract. These records and accounts shall be retained by Vendor and made available for review and copying by HCDE/CP and CP members for a period of **not less than three (3) years** from the date of completion of the service(s), receipt of product(s), the date of the receipt by HCDE/CP or the CP member of Vendor's final invoice or claim for payment in connection with this Contract, or the date HCDE/CP or the CP member makes final payments and closes pending matters in connection with a federal grant, whichever is later. If an audit or a compliance review has been announced, the Vendor shall retain its records and accounts until such audit or compliance review has been completed.

When federal funds are expended by HCDE or any CP member pursuant to this Contract, Vendor certifies that it will comply with the record retention requirements detailed in 2 CFR § 200.334. Vendor further certifies that Vendor will retain all records as required by 2 CFR § 200.334 for a period of three years after grantees or subgrantees submit final expenditure reports or quarterly or annual financial reports, as applicable, and all other pending matters are closed.

5.32. Right to Review, Audit and Inspect

HCDE/CP, CP members, any federal agency that has awarded federal funds/grant(s) to HCDE/CP or a CP member, and the Comptroller General of the United States, and/or any of their authorized representatives, shall, upon written notice, have the right to audit and examine all of Vendor's records and accounts relating to this Contract and inspect any project performed by the Vendor relating to this Contract. Records subject to audit/review shall include, but are not limited to, all Purchase Orders resulting from this Contract and records which may have a bearing on matters in connection with the Vendor's work for HCDE/CP and/or CP members, and shall be open to inspection and subject to audit/review and/or reproduction by HCDE/CP, CP member, and/or their authorized representative(s) to the extent necessary to adequately permit evaluation and verification of:

5.32.1. Vendor's compliance with this Contract and the requirements of the RFP.

5.32.2. Compliance with procurement laws, policies, and procedures, including, without limitation, reviewing/comparing pricing on invoices for HCDE/CP and/or CP members.

5.32.3. Compliance with provisions for computing billings to HCDE/CP and/or to CP members.

5.32.4. Any other matter related to this Contract.

5.33. Indemnification

VENDOR SHALL INDEMNIFY AND HOLD HARMLESS HCDE/CP AND EACH CP MEMBER, INCLUDING HCDE'S AND CP MEMBERS' TRUSTEES, OFFICERS, ADMINISTRATORS, EMPLOYEES, AND AGENTS, FROM ALL CLAIMS, LIABILITIES, COSTS, SUITS OF LAW OR IN EQUITY, EXPENSES, ATTORNEYS' FEES, FINES, PENALTIES OR DAMAGES ARISING FROM ACTS OR OMISSIONS OF VENDOR, VENDOR'S EMPLOYEES, AGENTS, OR SUBCONTRACTORS, IN CONNECTION WITH THIS CONTRACT, INCLUDING WITHOUT LIMITATION, THOSE ARISING FROM CLAIMED INFRINGEMENT OF ANY PATENTS, TRADEMARKS, COPYRIGHT OR OTHER CORRESPONDING RIGHT(S) WHICH IS RELATED TO ANY ITEM VENDOR IS REQUIRED TO DELIVER. VENDOR'S OBLIGATIONS UNDER THIS CLAUSE SHALL SURVIVE ACCEPTANCE AND PAYMENT BY HCDE/CP OR THE CP MEMBER.

5.34. Governing Law and Exclusive Venue

The laws of the State of Texas, without regard to its provisions on conflicts of laws, govern this Contract. Any dispute under this Contract involving HCDE/CP must be brought exclusively in the state and federal courts located in Houston, Harris County, Texas. Any dispute not involving HCDE/CP but involving a CP member and Vendor shall be governed by the laws of the state of the CP member, without regard to its provisions on conflicts of laws, and exclusive jurisdiction and venue shall lie in the city, county, and state of the CP member.

5.35. Multiple Contract Awards; Non-Exclusivity

HCDE/CP reserves the right to award multiple contracts under the RFP, including multiple contracts for each product/service category. Product/Service categories are established at the sole discretion of HCDE/CP. HCDE/CP will base a recommendation for contract award, including whether to award a single or multiple contracts, based on the evaluation factors listed in this RFP; contracts will be awarded to proposers with a minimum score of 70 to be considered for award.⁷ Nothing in this Contract may be construed to imply that Vendor has the exclusive right to provide products and/or services to HCDE/CP and/or CP members. During the Term of this Contract, HCDE/CP and CP members reserve the right to use all available resources to procure other products and/or services as needed and doing so will not violate any rights of Vendor. If a vendor has an existing HCDE/CP contract in the same contract title, upon award the new contract will immediately supersede the older contract.

5.36. New Products

New products that meet the specifications detailed in the RFP may be added to this Contract, with prior written approval from HCDE/CP. Pricing of any new products shall be equivalent to the percentage discount or proposed prices for other similar products. Vendor may replace or add products to the contract if: the replacing products are equal to or superior to the original products offered or discounted in a similar degree or to a greater degree and the products meet the requirements of the RFP. No products may be added to avoid competitive procurement procedures. HCDE/CP may reject any proposed additions, without cause, in its sole discretion.

5.37. No Substitution; Product Recall

Any Purchase Order issued pursuant to this Contract shall conform to the specifications and descriptions identified in this Contract and the RFP. Vendor shall not deliver substitutes without prior written authorization from HCDE/CP or the CP member.

If a product recall is instituted on any good that has been furnished and delivered to HCDE/CP or any CP member, Vendor must immediately (i.e., within 24 hours but preferably sooner) notify the purchasing agent of HCDE/CP and the purchasing CP member by e-mail or in writing and must include all pertinent information relating to the recall. If Vendor is unable to contact the purchasing agent, Vendor must contact the Director of Purchasing of HCDE/CP and the purchasing CP member. Vendor will be responsible for all costs associated with replacing the recalled product, including replacement cost, shipping charges, etc. This requirement shall survive payment and acceptance of the goods.

5.38. Penalties

If the Vendor is unable to provide the product(s) or services at the prices quoted in Vendor's proposal or if Vendor fails to fulfill or abide by the terms and conditions of the Contract, the RFP, or a Supplemental Contract, HCDE/CP or the CP member may take the following action(s), in the sole discretion of HCDE/CP or the CP member, and Vendor agrees to comply with the chosen action(s):

- 5.38.1 Insist that the Vendor honor the quoted price(s) specified in Vendor's proposal or the Supplemental Contract, as applicable;
- 5.38.2 Have the Vendor pay the difference between the Vendor's price and the price of the next acceptable proposal, as determined by HCDE/CP or the CP member;
- 5.38.3 Have the Vendor pay the difference between Vendor's price and the actual purchase price of the product or service on the open market; and/or
- 5.38.4 Recommend to HCDE Board of Trustees that the Vendor no longer be given the opportunity to submit a proposal to HCDE/CP and/or that this Contract be terminated.

⁷ HCDE/CP has the option to adjust (increase or decrease) the minimum score to be considered for award in the best interest of HCDE/CP and its members.

5.39. **Promotion of Contract Marketing Plan**

The marketing of Vendor's company, product, and/or services shall be the sole responsibility of Vendor. HCDE/CP may only supply Vendor with CP members' contact lists that contain name, address, phone numbers, and/or email addresses. Other items geared toward the joint-marketing of HCDE/CP and Vendor's company, product, and/or services shall be at HCDE/CP's sole discretion. Encouraging CP members to circumvent this Contract by purchasing directly from Vendor may result in suspension or termination of this Contract. For so long as this Contract is valid and enforceable between the parties, Vendor agrees to display the CP seal in its marketing collateral materials, such as Vendor's website and related marketing materials. Vendor shall submit all promotional materials to HCDE/CP and obtain written approval before Vendor finalizes or publishes promotional material bearing the HCDE/CP or HCDE/CP name or seal. Vendor may not release any press release or other publication regarding this Contract or HCDE/CP unless and until HCDE/CP first approves the press release or publication in writing.

5.40. **Website Support**

Vendor agrees to cooperate with HCDE/CP in publicizing contract particulars on the CP website. Vendor also agrees to work with HCDE/CP in updating and maintaining current information on Vendor activities related to the Contract on the CP website. Vendor agrees to provide an electronic version of its logo for use on the CP website upon Contract award and provide other information as reasonably requested by HCDE/CP to help ensure that the CP website is current and consistently updated.

5.41. **Safety**

Vendor, its subcontractor(s), and their respective employees shall comply fully with all applicable federal, state, and local safety and health laws, ordinances, rules, and regulations in the performance of services under this Contract, including, without limitation, those promulgated by HCDE/CP, CP members, and by the Occupational Safety and Health Administration ("OSHA"). In case of conflict, the most stringent safety requirements shall govern. Vendor shall comply with all other safety guidelines and standards as required by HCDE/CP or CP members. Vendor shall indemnify and hold HCDE/CP and/or the CP member harmless from and against all claims, demands, suits, actions, judgments, fines, penalties, and liability of every kind arising from the breach of Vendor's obligations under this provision.

5.42. **Workforce**

Vendor shall employ only orderly and competent workers, skilled in the performance of the services, if any, which shall be performed under this Contract. Vendor, its employees, subcontractors, and subcontractor's employees may not use or possess any firearms, alcoholic or other intoxicating beverages, illegal drugs or controlled substances while on the job or on HCDE/CP and CP members' property, nor may such workers be intoxicated or under the influence of alcohol or drugs on HCDE/CP and CP members' property.

5.43. **Supplemental Contracts**

A CP member and Vendor may enter into a separate, Supplemental Contract. Any Supplemental Contract developed as a result of this Contract and/or the RFP is exclusively between the CP member and Vendor and shall have no effect or impact on HCDE, any other CP member, or this Contract. Any Supplemental Contract between Vendor and a CP member is exclusively between that specific CP member and Vendor and will be subject to immediate cancellation by the CP member (without penalty to the CP member) if, in the opinion of the CP member, the quality, service, and specification requirements, and/or the terms and conditions are not maintained as stated in the Supplemental Contract. Vendor shall promptly notify HCDE/CP of any Supplemental Contract executed between Vendor and a CP member.

5.44. **Insurance**

Vendor is required to provide HCDE/CP and/or the CP member with copies of certificates of insurance, naming HCDE/CP and/or the CP member as additional insured's for Texas Workers Compensation and General Liability Insurance, **within 14 business days of contract award and prior to the commencement of any work under this Contract at insurance@choicepartners.org**. Certificates of Insurance, name and address of Vendor, the limits of liability, the effective dates of each policy, and policy number shall be delivered to HCDE/CP and/or the CP member prior to commencement of any work under this Contract. The insurance company insuring Vendor shall be licensed in the State of Texas or the state in which the CP member is located, and shall be acceptable to HCDE/CP and/or the CP member. Vendor shall give HCDE/CP or the CP member a **minimum of ten (10) days'** notice prior to any modifications or cancellation of said policies of insurance. Vendor shall require all subcontractors performing any work under or relating to this Contract to maintain coverage as specified below. Vendor shall, at all times during the Term of this Contract, maintain insurance coverage with not less than the type and requirements shown below. If the CP member has

higher insurance requirements than those listed below, such may be added to the Purchase Order. Such insurance is to be provided at the sole cost of the Vendor. These requirements do not establish limits of Vendor's liability.

All policies of insurance shall waive all rights of subrogation against HCDE, CP members, and HCDE/CP and CP members' officers, employees and agents.

Upon request, certified copies of original insurance policies shall be furnished to HCDE/CP and/or to CP members.

HCDE/CP and the CP member, as requested, shall be named as an "additional insured" on insurance policies.

HCDE/CP and the CP member reserve the right to require additional insurance should HCDE/CP or the CP member deem additional insurance necessary, in their sole discretion.

- Workers Compensation (with waiver of subrogation to HCDE/CP and the CP member) Employer's Liability, including all states, U.S. Longshoremen, Harbor Workers and other endorsements.
- Statutory, and Bodily Injury by Accident: \$100,000 each employee. Bodily Injury by Disease: \$500,000, policy limit \$100,000 each employee.
- Commercial General Liability Occurrence Form including, but not limited to, Premises and Operations, Products Liability Broad Form Property Damage, Contractual Liability, Personal and Advertising Injury Liability and where the exposure exists, coverage for watercraft, blasting collapse, and explosions, blowout, cratering and underground damage. \$300,000 each occurrence Limit Bodily Injury and Property Damage combined. \$300,000 Products-Completed Operations Aggregate Limit \$500,000 per Job Aggregate. \$300,000 Personal and Advertising Injury Limit.
- Automobile Liability Coverage: \$300,000 Combined Liability Limits Bodily Injury and Property Damage Combined.

5.45. **Participation in HCDE/CP**

Vendor acknowledges and agrees that continued participation in the HCDE/CP cooperative purchasing program is subject to HCDE/CP's sole discretion and that Vendor may be removed from the HCDE/CP program at any time, with or without cause, in HCDE/CP's sole discretion. All work resulting from this Contract must cease immediately after completion of the final accepted Purchase Order. Nothing in this Contract or in any other communication between HCDE/CP and Vendor may be construed as a guarantee that HCDE/CP or CP members will submit any Purchase Order to Vendor at any time.

At a minimum, to continue participation in the HCDE/CP cooperative purchasing program, Vendor must:

- Submit detailed monthly reports of all sales activity, including all sales and contracts where HCDE is the lead agency (such report is required even if there is no sales activity for a given month);
- Timely remit Administrative Fee(s) to HCDE/CP;
- Market Choice Partners, including inclusion of CP seal on Vendor's website, development and execution of marketing plan, and participation in at least 3 marketing events (such as trade shows and conferences) annually;
- Maintain a minimum annual sales activity of \$15,000;
- Completion of all required forms (such as Form 1295, EDGAR Certifications, etc.); and
- Maintain required insurance and submit updated certificate(s) to CP annually

5.46. **No Agency or Endorsements**

It is the intention of the parties to this Contract that Vendor is independent of HCDE/CP and CP members, is an independent contractor, and is not an employee, agent, joint venturer, or partner of HCDE/CP or any CP member. Nothing in this Contract shall be interpreted or construed as creating or establishing the relationship of employer and employee, agent, joint venturer or partner, between HCDE/CP and Vendor, any CP member and Vendor, HCDE/CP and any of Vendor's agents, or any CP member and any of Vendor's agents. Vendor has no power or authority to assume or create any obligation or responsibility on behalf of HCDE/CP or any CP member, and HCDE/CP and HCE members have no power or authority to assume or create any obligation or responsibility on behalf of Vendor. This Contract shall not be construed to create or imply any partnership, agency, or joint venture, nor shall it be construed or deemed an

endorsement of a specific company or product. Vendor agrees that HCDE/CP and CP members have no responsibility for any conduct of any of Vendor's employees, agents, representatives, contractors, or subcontractors.

5.47. Equal Opportunity

It is the policy of HCDE/CP not to discriminate on the basis of race, color, national origin, gender, limited English proficiency or handicapping conditions in its programs. Vendor agrees not to discriminate against any employee or applicant for employment to be employed in the performance of this Contract, with respect to hire, tenure, terms, conditions and privileges of employment, or a matter directly or indirectly related to employment, because of age (except where based on a bona fide occupational qualification), sex (except where based on a bona fide occupational qualification) or race, color, religion, national origin, or ancestry. Vendor further agrees that every subcontract entered into for the performance of this Contract shall contain a provision requiring non-discrimination in employment herein specified, binding upon each subcontractor. Breach of this covenant may be regarded as a material breach of the Contract.

5.48. Force Majeure

Neither HCDE, any CP member, or Vendor shall be deemed to have breached any provision of this Contract as a result of any delay, failure in performance, or interruption of service resulting directly or indirectly from acts of God, network failures, acts of civil or military authorities, civil disturbances, wars, energy crises, fires, transportation contingencies, interruptions in third-party telecommunications or Internet equipment or service, other catastrophes, or any other occurrences which are reasonably beyond HCDE, any CP member, or Vendor's control.

HCDE, CP members, and Vendor are required to use due caution and preventive measures to protect against the effects of force majeure, and the burden of proving that a force majeure event has occurred shall rest on the party seeking relief under this provision. The party seeking relief due to force majeure is required to promptly notify the other parties in writing, citing the details of the force majeure event and relief sought, and shall resume performance immediately after the obstacles to performance caused by a force majeure event have been removed, provided the Contract has not been terminated. Delay or failure of performance, by either party to this Contract, caused solely by a force majeure event, shall be excused for the period of delay caused solely by the force majeure event. HCDE, CP members, and Vendor shall not have any claim for damages against any other party resulting from delays caused solely by force majeure. Notwithstanding any other provision of this Contract, in the event the Vendor's performance of its obligations under this Contract is delayed or stopped by a force majeure event, HCDE/CP shall have the option to terminate this Contract. This section shall not be interpreted as to limit or otherwise modify any of HCDE's or CP members' contractual, legal, or equitable rights.

5.49. Severability

In the event any one or more of the provisions contained in this Contract shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions, and the Contract shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in it.

5.50. Waiver

No failure on the part of either party at any time to require the performance by the other party of any term hereof shall be taken or held to be a waiver of such term or in any way affect such party's right to enforce such term, and no waiver on the part of either party of any term hereof shall be taken or held to be a waiver of any other term hereof or the breach thereof. No waiver, alteration, or modification of any of the provisions of this Contract shall be binding unless in writing and signed by duly authorized representatives of the parties hereto.

5.51. Entire Agreement

The Contract, the RFP, Vendor's proposal submitted in response to the RFP, the attached and incorporated attachments, addendum, and/or exhibits, if any, and the Supplemental Contract, if any, contain the entire agreement of the parties relative to the purpose(s) of the Contract and supersede any other representations, agreements, arrangements, negotiations, or understandings, oral or written, between the parties to this Contract. In the event of a conflict between this Contract and the RFP or Vendor's proposal submitted in response to the RFP, this Contract shall control. In the event of a conflict between the RFP and Vendor's proposal submitted in response to the RFP, the RFP shall control. This Contract supersedes any conflicting terms and conditions on any Purchase Order, invoices, checks, order acknowledgements, forms, purchase orders, or similar commercial documents relating hereto and which may be issued by Vendor after the Effective Date of this Contract.

In addition to this Contract, a Supplemental Contract between Vendor and the CP member may be established to further detail the terms and conditions of the CP member's specific project. In the event of a conflict between this Contract and the Supplemental Contract, as to HCDE, this Contract shall prevail. In the event of a conflict between this Contract and the Supplemental Contract, as to the CP member, the Supplemental Contract shall prevail unless the Supplemental Contract states otherwise.

5.52. Interpretation

Vendor agrees that the normal rules of construction that requires that any ambiguities in this Contract are to be construed against the drafter shall not be employed in the interpretation of this Contract.

5.53. Notice

Any notice provided under the terms of this Contract by the parties to any other shall be in writing and shall be given by hand-delivery or by certified or registered mail, return receipt requested. Notice shall be sufficient if made or addressed to the party at the address listed in the signature line of this Contract. Notice shall be deemed effective upon receipt. Each party may change the address at which notice may be sent to that party by giving notice of such change to the other party by certified mail, return receipt requested.

5.54. Captions

The captions herein are for convenience and identification purposes only, are not an integral part hereof, and are not to be considered in the interpretation of any part hereof.

5.55. USDA/TDA Special Terms and Conditions

The following terms and conditions apply to all procurements and purchases involving federal School Nutrition Program funds. In the event of a conflict or inconsistency between the following terms and conditions and any provision of the Agreement, the procurement solicitation issued by HCDE, or the portion of Vendor's proposal submitted in response to HCDE's procurement solicitation that is satisfactory to HCDE, the following terms and conditions shall control.

5.55.1 Market Basket Analysis

HCDE/CP reserves the right, in its sole discretion, to use a "Market Basket Analysis" method, as that term is defined by applicable USDA/TDA regulations and guidance. The Market Basket Analysis sample is established to represent 75% of the total estimated value of the Contract. The most recent velocity/sales report(s) from HCDE/CP's current supplier(s) was used to project the balance of the year and adjusted for any estimated change in menu and participation for the following year. As a result, this list of [100] goods to be purchased under this procurement solicitation and any resulting Contract includes the top [60] goods purchased by dollar volume representing the 75% threshold. Prices for the remaining [40] goods listed in this procurement solicitation should also be included, though they will not be a part of the Market Basket Analysis. The Market Basket Analysis shall not be used for service or equipment contracts/procurement solicitations or for Fee-For-Service Processing contracts.

5.55.2 Material Change

If a material change (as the term is defined by TDA rules and regulations) to a contract entered into between HCDE/CP and Vendor occurs, then the contract will not be renewed upon the conclusion of its term. Upon the expiration of the term, HCDE/CP may issue a new RFP for the goods or services procured under the previously-existing contract. Material change for purposes of this Section 5.55.2 means a modification that substantially exceeds the terms of the original contract between HCDE/CP and Vendor.

5.55.3 Supplemental Contracts

Supplemental Contracts are entered into pursuant to the piggyback method delineated in the U.S. Department of Agriculture directive SP 35-2012. Should the "piggybacking" result in a material change to the Contract, HCDE/CP will proceed under Section 5.55.2 of this RFP.

5.55.4 New Products

During the Term of a Contract awarded under this RFP, additional purchases not included in the original RFP list and resulting awarded contract may become necessary and benefit HCDE/CP members. Vendor and HCDE/CP agree that the aggregate value of added purchases during each year of the Contract (if renewed) shall not exceed 10% of the estimated total value of the Contract. The total value of the Contract must be

agreed upon, and the dollar value listed in the Contract and each renewal term of the Contract (if any). For purposes of this section, the total value of the Contract includes all contracts awarded as a result of the procurement solicitation to all vendors. For the initial Term of a Contract awarded under this RFP, Vendor and HCDE/CP agree that the total value of the Contract shall be \$200 million. Additions of new products may be included in the awarded Contract list during the renewal of the Contract through an amendment to the Contract, and the total Contract value adjusted accordingly. For each renewal term of the Contract, the total actual value of the Contract in the preceding year and the additional new product(s) made during that Term will be the basis for determining the maximum dollar amount (not to exceed 10%) of the additional added product(s) that will be allowed during the next Contract renewal term.

5.55.5 **Bonds**

Vendor shall provide all bonds, including bid guarantee, performance bond, and payment bond, as applicable under U.S. Department of Agriculture and/or Texas Department of Agriculture rules.

5.55.6 **Use by Other Governmental Entities**

In the event that HCDE/CP allows other governmental entities to “piggyback” onto any existing contract between HCDE and Vendor entered into pursuant to this procurement solicitation, Vendor agrees and understands that such other governmental entities may include “school food authorities,” as that term is used in SP 35-2012. Should the “piggybacking” result in a material change to the Agreement for purposes of USDA/TDA purchases, HCDE/CP will proceed under the foregoing section entitled “Material Changes.”

5.55.7 **No Guarantee of Quantities**

Quantities for purchases paid for with School Nutrition Program funds are subject to change for various reasons, which include, but are not limited to the following: USDA commodity allocation(s), variations in student population, production item substitution(s), changes in consumer taste or expectations, pricing, and nutrition regulatory changes.

5.55.8 **Buy American Act**

The Buy American Act, set forth in 7 C.F.R. Part 210.21(d), requires that participants in the National School Lunch Program and School Breakfast Program use the federal nonprofit food service funds, to the maximum extent practical, to buy domestic commodities or products for Program meals. 7 CFR Part 210.21(d) defines a “domestic commodity or product” as one that is either produced in the U.S. or is processed in the U.S. substantially using agricultural commodities that are produced in the U.S. “Substantially” means that over 51 percent of the final processed product consists of agricultural commodities that were grown domestically.

Because many HCDE/CP members participate in the National School Lunch Program and School Breakfast Program, HCDE/CP requires Vendor to certify whether its products are “domestic commodities or products”, as defined by 7 C.F.R. Part 210.21(d). Accordingly, Vendor agrees to provide certification and any necessary documentation requested by HCDE/CP member that the food product was processed in the U.S. and the percentage of U.S. content, by weight or volume, in the food component of processed food products supplied to HCDE/CP members. A “domestic commodity or product” is defined as one that is either produced in the U.S. or is processed in the U.S. substantially using agricultural commodities that are produced in the U.S. as provided in 7 C.F.R. 210.21(d). “Substantially” means that over 51 percent of the final processed product consists of agricultural commodities that were grown domestically. When USDA Foods items are manufactured into processed end products, 51% of resulting food products must be of United States origin.

Vendor certifies that Vendor shall provide food products that meet the Buy American provision. Vendor further certifies that, in compliance with the Buy American provision, its products are “domestic commodities or products” as defined by 7 C.F.R. § 210.21(d). Vendor further certifies that the food products it supplies are processed in the U.S. and Vendor shall certify the percentage of U.S. content, by weight or volume, in the food component of processed food products supplied to the District.

If Vendor is repetitively unable to provide domestic food products, HCDE/CP member may require Vendor to provide evidence that Vendor is capable of fulfilling the terms and conditions of the Contract and specifically, the Buy American provision. If HCDE/CP member determines that Vendor is not capable of fulfilling the terms and conditions of the Contract and/or specifically, the Buy American provision, HCDE/CP member may

terminate its Contract with Vendor. Vendor shall provide documentation that demonstrates that food products meet the Buy American provision.

Vendor must notify the District if a delivery contains non-domestic products, so the District may approve delivery as an exception to the Buy American provision. Vendor certifies that it will adhere to the notification requirements for the Buy American provision.

Exceptions to the Buy American provision should be used as a last resort; however, an alternative or exception may be approved by the CP member, upon request, by occurrence (i.e., delivery). Blanket exception approvals are not allowed. The District must determine that the use of a non-domestic food product is appropriate, using the USDA-prescribed questions in making the decision. See “Requirements for an Exception,” ARM Section 17b Buy American, at p. 19 (August 12, 2020). Vendor agrees to provide information to the District that will assist the District in this determination. The decision to purchase or accept delivery of a non-US product must be made by the District. Vendor agrees to comply with all requirements imposed by applicable law, USDA/TDA guidance, and the District concerning Buy American provision exceptions.

Vendor further agrees to provide HCDE/CP members with documentation verifying that a domestic product is not available and the cost range is reasonable within a reasonable time upon request by HCDE/CP members.

In the event Vendor or Vendor’s supplier(s) are unable or unwilling to certify compliance with the Buy American Provision, or the applicability of an exception to the Buy American provision, HCDE/CP members may decide not to purchase from Vendor and/or HCDE/CP may terminate the Contract if Vendor is incapable of fulfilling the terms and conditions of the Contract, including the Buy American requirements.

Additionally, HCDE/CP members may require country of origin on all products and invoices submitted for payment by Vendor, and Vendor agrees to comply with any such requirement.

5.55.9 Records Retention

When school nutrition program funds are expended by HCDE or any CP member pursuant to this Contract, Vendor certifies that it will comply with the record retention requirements promulgated by USDA/TDA. Vendor further certifies that Vendor will retain all records as required by USDA/TDA for a period of five (5) years after the end of the fiscal year to which the documentation/records pertain. Vendor further certifies that these records must be accessible to appropriate HCDE/CP member and federal or state reviewers. See TDA ARMS Manual, 17.107.