



Offeror –Terms and Conditions and Instructions Exceptions

STATE OF ARIZONA

Agency: Arizona Dept. of Administration
State Procurement Office (ADOA/SPO)

Customer: WSCA/NASPO participating states; AZ
Statewide (state agencies & cooperative partners)

Description: Mailing Equipment, Supplies and Maintenance

Offerors shall complete the following Response Form, indicating their responses in the spaces provided. Additional pages may be added so long as they are clearly referenced in the spaces provided.

Response Form Responses

BÖWE BELL + HOWELL have read, understand, and shall comply with the Uniform Terms and Conditions and all Solicitation Instructions, the Special Terms and Conditions and the WSCA Terms and Conditions and all other States Terms and Conditions (located within the Intent to Participates PDF's, within this Proposal. Offerors that accept the RFP's Terms and Conditions and Instructions shall check **YES** to clearly indicate their acceptance. Offerors who take exception to the Terms and Conditions or any of the Solicitation Instructions shall check **NO** to clearly indicate their intent to take exception and provide Offeror's suggested language.

- ☐ **YES**, I acknowledge that I have read and understand all Terms and Conditions and Instructions and will comply in any resultant contract.
- ☒ **NO**, I acknowledge that I have read, understand all Terms and Conditions and Instructions and will comply in any resultant contract with the exceptions listed below.

Exceptions (If checked NO)

Offerors that take exception to any Terms and Conditions and Instructions shall justify their exception as well as proposing any changes to the State's language with a marked-up copy of the Clause in question, with the Offeror's suggested changes clearly indicated. In such cases, the Offeror shall replace the State's Terms and Conditions and Instructions with their marked-up version, within the appropriate location in the proposed contract documents. Please note: Any terminology requesting to reserve the right to negotiate any Terms and Conditions at a later time or any addition or deletion of language will be additional be viewed as an exception and may negatively affect your score or have the effect of deeming your proposal as non-responsive.

Offeror shall be advised that evaluation scores will be negatively affected by absolute number and/or significance of any exception(s) requested. Anything other than a check of YES will be deemed an exception. Any one exception may have the effect of deeming your proposal as non-responsive.

Per the instructions of Bid Solicitation ADSP011-00000411, **Bowe Bell + Howell** has submitted suggested revisions to certain provisions which are outlined in the RFP response. Please note that these suggested revisions are intended for further discussion purposes between the parties pending award of the solicitation.

Special Terms and Condition

BBH comment: BBH did not see any provision governing the use of BBH's software.

3.14 Software License

Any software, including documentation and improvements, updates or later versions thereof provided by the Contractor under this Master Agreement (the "Software") is the property of the Contractor or a licensor of the Contractor. The Contractor grants the Purchasing Entity a non-exclusive, nontransferable right and license to use for the Purchasing Entity's internal business the number of copies of the Software ordered by and shipped to the Purchasing Entity for use on one computer or the product upon which it was delivered. To the extent license keys are used in conjunction with the Software, the Purchasing Entity's use of the Software may only be on those machines of the Purchasing Entity for which a license key has been granted by the Contractor. The Purchasing Entity may not make any copies of the Software, except for one copy to be used solely for archival and backup purposes. The Purchasing Entity will not transfer, disclose, modify, reverse engineer or decode the Software. The Purchasing Entity will not export the Software in any form without the Contractor's consent and appropriate United States and foreign government licenses.

Uniform Terms and Conditions Version 8

- 3.7. Property of the State. Other than Contractor Intellectual Property as defined in Section 3.8 herein, aAny materials, including reports, computer programs and other deliverables, created under this Contract solely for the State, with the



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development thereof fully funded by the State, are the sole property of the State. The Contractor is not entitled to a patent or copyright on those materials and may not transfer the patent or copyright to anyone else. The Contractor shall not use or release these materials without the prior written consent of the State.

BBH comment: BBH does not transfer ownership rights to its intellectual property, except in limited circumstances whereby BBH is commissioned by a customer to develop a deliverable specifically for the customer, with all associated development efforts being fully funded by the customer.

3.8 Ownership of Intellectual Property.

a. Except as otherwise agreed upon in writing in accordance with Section 3.8(b), in no event shall the State obtain a proprietary interest in any of Contractor's or Contractor's licensor's ideas, improvements, know-how, discoveries, techniques, including without limitation, computer programs, routine and code, documentation, or related materials, training materials, or technology, or any modifications or revisions thereto (collectively, "Contractor Intellectual Property"). To the extent Contractor Intellectual Property may be incorporated into any deliverables hereunder and not otherwise licensed to the State under a separate license, Contractor grants to the State a personal, non-exclusive, non-transferable royalty-free limited license to use such deliverables solely for internal use and solely in conjunction with the same or like products identified in the applicable Statement of Work. Customer may not modify, disclose, copy or reverse engineer Contractor Intellectual Property.

b. To the extent the State contracts with Contractor to develop a deliverable specifically for the State, with the development effort fully funded by the State, the parties shall agree in writing in a Ownership of Intellectual Property Rights Exhibit to such Order on the use and ownership of any intellectual property rights associated therewith. Any and all intellectual property, including but not limited to copyright, invention, trademark, trade name, service mark, and/or trade secrets created or conceived pursuant to or as a result of this contract and any related subcontract ("Intellectual Property"), shall be work made for hire and the State shall be considered the creator of such Intellectual Property. The agency, department, division, board or commission of the State of Arizona requesting the issuance of this contract shall own (for and on behalf of the State) the entire right, title and interest to the Intellectual Property throughout the world. Contractor shall notify the State, within thirty (30) days, of the creation of any Intellectual Property by it or its subcontractor(s). Contractor, on behalf of itself and any subcontractor(s), agrees to execute any and all document(s) necessary to assure ownership of the Intellectual Property vests in the State and shall take no affirmative actions that might have the effect of vesting all or part of the Intellectual Property in any entity other than the State. The Intellectual Property shall not be disclosed by contractor or its subcontractor(s) to any entity not the State without the express written authorization of the agency, department, division, board or commission of the State of Arizona requesting the issuance of this contract.

- 6.2.1. **Contractor/Vendor Indemnification (Not Public Agency)** The parties to this contract agree that the State of Arizona, its departments, agencies, boards and commissions shall be indemnified and held harmless by the contractor for the vicarious liability of the State as a result of entering into this contract, arising out of bodily injury of any person (including death) or property damage but only to the extent that such claims which result in vicarious/derivative liability to the State, are caused by the act, omission, negligence, misconduct, or other fault of the Contractor, its officers, officials, agents, employees, or volunteers. However, the parties further agree that the State of Arizona, its departments, agencies, boards and commissions shall be responsible for its own negligence. Each party to this contract is responsible for its own negligence.

BBH comment: As originally drafted, the State's language is overly broad and does not limit BBH's indemnification to claims resulting from BBH's wrongdoing.

- 6.3. **Indemnification - Patent and Copyright.** The Contractor shall indemnify and hold harmless the State against any liability, including costs and expenses, for infringement of any patent, trademark or copyright arising out of Contract performance or use by the State in the ordinary manner of materials furnished or work performed under this Contract; provided that the State does not modify such material or work in any manner which would render it infringing or use such material or work in any process, apparatus or system not provided by the Contractor which is alleged to infringe a patent. The State shall reasonably notify the Contractor of any claim for which it may be liable under this paragraph. If the contractor is insured pursuant to A.R.S. § 41-621 and § 35-154, this section shall not apply.

BBH comment: BBH should not be responsible for indemnification resulting from infringement caused by the State's actions.

- 9.5.2. Upon termination under this paragraph, all goods, materials, documents, data and reports prepared by the



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Contractor under the Contract for which Contractor has been paid shall become the property of and be delivered to the State on demand.

BBH comment: To the extent the contract is for the purchase of products/deliverables, such items should not become the property of the State until BBH has been paid for them.

Standard Contract Terms and Conditions WSCA/NASPO

INSPECTIONS: Goods furnished under this master price agreement shall be subject to inspection and testing by the Purchasing Entity after delivery and upon completion of installation at times and places determined by the Purchasing Entity. Inspection and testing shall be in accordance with mutually agreed upon acceptance specifications between the Contractor and Purchasing Entity. If the Purchasing Entity finds goods furnished to be ~~incomplete or~~ not in compliance with ~~proposal~~ the acceptance specifications, the Contractor shall have thirty (30) days to modify, adjust, repair or replace the Product or components thereof to meet the Acceptance Specifications. After adjustment, modification, repair, or replacement, the tests described above shall be run again during the next thirty (30) days, and if during which the Product fails to meet the Acceptance Specifications, it shall be deemed to be nonconforming. In such event, the Purchasing Entity shall have the right to continue testing for a mutually agreed upon period of time or terminate this Agreement and return the Product to BBH without any liability to BBH for the purchase price or may reject the goods and require Contractor to either correct them without charge or deliver them Product at a reduced price, which is equitable under the circumstances: if the failure to meet the Acceptance Specifications is solely the fault of the Contractor. ~~If Contractor is unable or refuses to correct such goods within a time deemed reasonable by the Purchasing Entity, the Purchasing Entity may cancel the order in whole or in part.~~ Nothing in this paragraph shall adversely affect the Purchasing Entity's rights including the rights and remedies under the Uniform Commercial Code.

BBH comment: BBH is seeking to add clarification to the scope of testing and provide additional recourse options for nonconformity.

Statement of Work

2.6.4 Training & Support Services

Upon delivery and installation of specified equipment, the Contractor shall provide training to personnel designated by the Participating Entity. Operational Training must be provided to the designated personnel within a Participating Entity until the personnel are able to operate the equipment independently. The amount of training is determined by the complexity of the equipment purchased, rented or leased by the Participating Entity. All product and system training shall be included in the price and there shall be no additional charge for training. ~~Contractor shall provide additional training at the Participating Entity's request throughout the life of the equipment at no additional charge. All training will be performed on the Participating Entity's site. Site required training will only be at no additional charge only if the equipment is either under warranty or an active maintenance plan.~~

BBH Comment: BBH will provide the following training provisions:

One session of introductory operator training is provided free of charge for up to four operators for each inserting or sorting system installed. This training covers the operation, use, configuration, and normal daily operator maintenance of the system, as well as applicable health and safety issues.

The training will occur during normal business hours, and is customarily scheduled at least 45 days in advance. All training will be conducted at the customer site. Supplementary operator training sessions may be scheduled will be charged at \$1675.00 per day for normal business hours, and is scheduled in advance.

2.6.9 Equipment Performance.

In the event that any equipment, actively covered by a Resident Maintenance contract, is inoperable due to equipment failure, through no fault or negligence of the Participating Entity, and the total number of hours of downtime exceeds five percent (5%) of the total productive use of time for three consecutive calendar months, the Participating Entity reserves the right to require the Contractor to replace the equipment or terminate the maintenance contract order with no termination or removal charges being assessed to the Participating Entity. The Participating Entity will notify the contractor in writing of the deficiency. ~~After such notice, the Contractor must remove and replace the defective product(s) within ten (10) business days, at no cost to the Participating Entity.~~ Failure to respond in good faith may result in termination of the contract. The



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effectiveness level for any equipment is computed by the following formula: subtract the total number of downtime hours, through no fault or negligence of the Participating Entity divided by the total productive time in the month. The total productive time shall be computed by multiplying 8 hours per day by the number of business days in the month. (weekend, furlough, and State Holidays excluded). It is understood and accepted that equipment failure may not be attributed to the use of recycled paper and/or recycled/remanufactured supplies, as long as those products meet the specifications set by the USPS and the equipment manufacturer. The following shall not constitute downtime hours:

Regularly scheduled Preventive Maintenance Inspections

Operator Setup

Material problems resulting from storage outside of manufacturer requirements

Damage to the equipment by misuse or abuse

Changes in incoming power beyond published specifications or power outages

Maintenance required as a result of equipment operated outside of normal business hours.

Replacement of Unsatisfactory Equipment. The Contractor shall grant a credit to the Participating Entity for any equipment, that is ~~currently in the warranty period, or~~ on a maintenance plan, which fails to perform at an effectiveness level of ninety five percent (95%) during any month, or equipment out of service for more than three consecutive days. The credit shall be the equivalent to the percentage of down time below ninety five percent (95%) experienced in the month. Regarding Production equipment, the Contractor may elect to replace an individual component or section that is causing the issue. If this doesn't resolve the issue with the equipment the Participating Entity shall notify the Contractor in writing, which will act as a cure letter allowing fifteen (15) to have resolution plan in place. ~~During the warranty period, unsatisfactory equipment performance requires an even exchange of equipment of equal or greater performance at no additional cost is required. After warranty period, the credit value shall be either the amount paid at the time of purchase or the dollar amount paid multiplied by the number of lease payments made at the time of the identified poor performance.~~ If equipment, and software, is not functional within 60 days of delivery, the Purchasing Entity may return for full refund or cancel any rental or lease agreement with no fees or charges of any kind due.

BBH comment: As originally drafted, BBH would be liable to credit or replace a machine for downtime even though the maintenance requirements listed in section 2.7.1 include an 8 hour on-site response time. Therefore the 5% threshold may be exceeded in one monthly service call. BBH will guarantee a 95% uptime provided the agreement with the participating agency is for Resident Services (on-site response).

2.7.1.3 Loaner Equipment

~~If at any time a repair, no matter the origin, will keep any equipment inoperable for a total time exceeding two business days, the Contractor shall offer loaner equipment of equal or greater value and functionality to be in place until the inoperable equipment is in full operation at no cost to the participating entity, this may include piece parts or sub-assemblies, so long as no functionality is lost. Pertaining to Production equipment, the Contractor may offer, in lieu of loaner equipment, to provide production or alternative services during the period of repair. This shall be mutually agreed to in writing beforehand.~~

BBH comment: Production Mail inserting and sorting equipment is made-to-order and typically customized for a customer's individual application. BBH is committed to the uptime and performance of the Participating Entity's equipment and will make every effort to repair inoperable equipment in a timely manner. The remedies outlined in 2.6.9 of the Statement of Work remain.