

STATE OF SOUTH DAKOTA
OFFICE OF PROCUREMENT MANAGEMENT
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA 57501-3182

Mobile Breath Alcohol Testing Device 24/7 Sobriety Program

PROPOSALS ARE DUE NO LATER THAN SEPTEMBER 4, 2018, AT 5:00 P.M. CT

RFP #: 1408

Buyer: Kelly Marnette

EMAIL: atghelp@state.sd.us

READ CAREFULLY

FIRM NAME: _____ AUTHORIZED SIGNATURE: _____

ADDRESS: _____ TYPE OR PRINT NAME: _____

CITY/STATE: _____ TELEPHONE NO: _____

ZIP (9 DIGIT): _____ FAX NO: _____

FEDERAL TAX ID#: _____ E-MAIL: _____

PRIMARY CONTACT INFORMATION

CONTACT NAME: _____ TELEPHONE NO: _____

FAX NO: _____ E-MAIL: _____

1.0 GENERAL INFORMATION

1.1 PURPOSE OF REQUEST FOR PROPOSAL (RFP) AND SUMMARY

The purpose of this Request for Proposal is to provide a mobile breath alcohol testing device, along with supporting hardware and software, to enable use of the devices by participants placed in the 24/7 Sobriety Program (the "Program"). The mobile breath alcohol testing device selected will be the only mobile breath alcohol testing device used by participants in the Program during the term of the agreement resulting from this RFP.

The 24/7 Sobriety Program is administered by the Office of the Attorney General under SDCL chapter 1-11 and ARSD article 2:06. The Program's purpose is to find and implement alternatives to incarceration for certain offenses that involve alcohol, marijuana, or controlled substances. In 2017, the Attorney General proposed legislation to expand the types of authorized testing under the 24/7 Sobriety Program to include testing by mobile breath alcohol testing devices. The legislation, Senate Bill 29, was passed and was effective July 1, 2017. A copy of the legislation is attached to this RFP as Exhibit A.

For purposes of this RFP a mobile breath alcohol testing device means: An instrument used by a participant outside of a 24/7 Sobriety Program testing center in which a participant submits to a breath test that detects the presence of alcohol in the participant's body, provides simultaneous testing and facial recognition confirmation information, and a GPS reading to the participating agency; and allows for scheduled, random, and on-demand testing of the participant. To be selected, the Vendor must be able to provide mobile breath alcohol testing devices and related services that meet the definition of a "Mobile breath alcohol testing device" as set forth in ARSD 2:06:01:01:(3A), and meet the minimum requirements for such device set forth in ARSD 2:06:02:07. Additional information regarding the purpose of this RFP is included in the Statement of Work in Section 3.0.

Proposals shall conform to all instructions, conditions, and requirements included in this Request for Proposal. Prospective vendors are expected to carefully examine all documentation, including the attached exhibits contained in this Request for Proposal, and be willing to accept each requirement, term and condition.

1.2 ISSUING OFFICE AND RFP REFERENCE NUMBER

The Office of the Attorney General is the issuing office for this document and all subsequent addenda relating to it, on behalf of the State of South Dakota. The reference number for the transaction is RFP 1408. This number must be referred to on all proposals, correspondence, and documentation relating to the RFP.

1.3 SCHEDULE OF ACTIVITIES (SUBJECT TO CHANGE)

1.3.1 All times referenced in the calendar of events below are 5:00 p.m. Central Time.

RFP Publication	July 2, 2018
Letter of Intent (see §1.3.2 herein)	July 16, 2018
Deadline for Submission of Written or e-mail Inquiries	July 23, 2018
Responses to vendor Questions	July 30, 2018
Proposal Submission	September 4, 2018
Oral Presentation/Discussions (If Required)	September 18, 2018
Proposal Revisions (If Required)	October 1, 2018
Anticipated Award Decision/Agreement Negotiation	November 5, 2018

1.3.2 Letter of Intent

The Letter of Intent must be submitted no later than the date set forth above. Letters of intent submitted after that date, or proposals submitted without first submitting a letter of intent by the above stated date will NOT be considered.

The Letter of Intent must certify:

1. That the vendor already possesses a device and software which meets the requirements set forth in sections 3.1.1 through 3.1.6 of this RFP.
2. That the vendor understands that the requirements set forth in sections 3.1.1 through 3.1.5 of this RFP are regulatory requirements and if the vendor's proposed device cannot meet all or any one of the requirements of those sections, their proposal will not be scored and the vendor will be ineligible to be the successful vendor under this RFP.
3. That the vendor understands that while the requirement set forth in section 3.1.6 of this RFP are not regulatory requirements, they are nevertheless mandatory for success on this RFP. If the vendor's proposal cannot meet the requirements set forth in section 3.1.6 of this RFP, their proposal will not be scored and they will be ineligible to be the successful vendor under this RFP.

1.4 SUBMITTING YOUR PROPOSAL

All proposals must be completed and received in the Attorney General's Office by the date and time set forth in the above Schedule of Activities. Proposals received after the deadline will be late and ineligible for consideration. It is the responsibility of the vendor to anticipate potential delays by allowing adequate time for delivery. An original and five identical copies of the proposal shall be submitted.

All proposals must be signed, in ink, by an officer of the responder who is legally authorized to bind the responder to the proposal and placed in a sealed envelope. Proposals that are not properly signed may be rejected. The sealed envelope must be marked with the appropriate RFP Number and Title. The words "Sealed Proposal Enclosed" must be prominently denoted on the outside of the shipping container. **Proposals must be addressed and labeled as follows:**

**REQUEST FOR PROPOSAL 1408
KELLY MARNETTE
OFFICE OF ATTORNEY GENERAL
1302 EAST HIGHWAY 14 SUITE 1
PIERRE SOUTH DAKOTA 57501-8501**

All capital letters and no punctuation are used in the address. The Office of Attorney General address as displayed should be the only information in the address field.

No proposal shall be accepted from, or no agreement shall be awarded to, any person, firm or corporation that is in arrears upon any obligation to the State of South Dakota, or that otherwise may be deemed irresponsible or unreliable by the State of South Dakota.

1.5 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION – LOWER TIER COVERED TRANSACTIONS

By signing and submitting this proposal, the vendor certifies that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation, by any Federal department or agency, from transactions involving the use of Federal funds. Where the vendor is unable to certify to any of the statements in this certification, the bidder shall attach an explanation to their offer.

1.6 NON-DISCRIMINATION STATEMENT

The State of South Dakota requires that all contractors, vendors, and suppliers doing business with any State agency, department, or institution, provide a statement of non-discrimination. By signing and

submitting their proposal, the vendor certifies they do not discriminate in their employment practices with regard to race, color, creed, religion, age, sex, ancestry, national origin or disability.

1.7 MODIFICATION OR WITHDRAWAL OF PROPOSALS

Proposals may be modified or withdrawn by the vendor prior to the established due date and time. No oral, telephonic, telegraphic or facsimile responses or modifications to the proposals will be considered. Modifications or withdrawals should be submitted in the same manner as the proposal was submitted.

1.8 VENDOR INQUIRIES

Vendors may make written or email inquiries concerning this RFP to obtain clarification of requirements. No inquiries will be accepted after the date and time indicated in the Schedule of Activities. Email inquiries must be sent to atghelp@state.sd.us. Inquires may also be faxed to 605-773-4106. If inquiries are submitted by mail the envelope should be addressed to: Attn: Kelly Marnette, Office of Attorney General, 1302 East Highway 14 Suite 1, Pierre, South Dakota 57501-8501. Be sure to reference RFP 1408 in your letter, email or fax.

The Office of Attorney General prefers to respond to vendor inquiries (if required) via e-mail. If a vendor does not indicate an e-mail address, the response will be sent via fax. If no fax number is provided, the Office of Attorney General will mail the response to the vendor. The inquiries and the Office's response will be sent to all vendors who have submitted Letters of Intent prior to the deadline for such letters set forth in §1.3.1 herein. Vendors may not rely on any other statements, either of a written or oral nature, that alter any specification or other term or condition of this RFP. Vendors will be notified in the same manner as indicated above regarding any modifications to this RFP.

1.9 PROPRIETARY INFORMATION

The proposal of the successful vendor(s) becomes public information. Proprietary information such as client lists and non-public financial statements can be protected under limited circumstances. Pricing and service elements are not considered proprietary. An entire proposal may not be marked as proprietary. Vendors must clearly identify in the Executive Summary and mark in the body of the proposal any specific proprietary information they are requesting to be protected. The Executive Summary must contain specific justification explaining why the information is to be protected. Proposals may be reviewed and evaluated by any person at the discretion of the Office of Attorney General. All materials submitted become the property of the State of South Dakota and may be returned only at the Office of Attorney General's option.

1.10 LENGTH OF AGREEMENT

The Agreement resulting from this solicitation will be effective upon execution by the parties for a period of one year. The Office of Attorney General reserves the right in its sole discretion to extend the Agreement for up to four (4) additional one year periods as provided in the Agreement

1.11 GOVERNING LAW

Jurisdiction and venue for any and all legal actions regarding or arising out of the RFP or the resulting Agreement shall be solely in the Circuit Court Sixth Judicial Circuit, Hughes County of the State of South Dakota. The laws of South Dakota shall govern without regard to any conflicts of law principles, decisional law, or statutory provision which would require or permit the application of another jurisdiction's substantive law.

1.12 DISCUSSIONS WITH VENDORS (ORAL PRESENTATION/NEGOTIATIONS)

An oral presentation by a vendor to clarify a proposal may be required at the sole discretion of the State. However, the State may award a contract based on the initial proposals received without discussion with the vendor. If oral presentations are required, they will be scheduled after the submission of proposals. Oral presentations will be made at the vendor's expense.

This process is a Request for proposal/competitive negotiation process. Each proposal shall be evaluated, and each vendor shall be available for negotiation meetings at the State's request. The State reserves the right to negotiate on any and/or all components of every proposal submitted. From the time the proposals are submitted until an agreement is executed, each proposal is considered a working document and as such, will be kept confidential. The negotiation discussions will also be held as confidential until such time as the award is completed.

2.0 STANDARD AGREEMENT TERMS AND CONDITIONS

Any contract or agreement resulting from this RFP will include, at a minimum, the substance of the State's standard contract terms and conditions as set forth in Attachment B. However, as part of the negotiation process, the language of a specific term or condition listed in Attachment B could be modified upon agreement between the State and the vendor. Additional terms and conditions may be required. In their response, the vendor must identify any specific contract term or condition they wish to negotiate and provide a brief summary of their issue.

3.0 STATEMENT OF WORK

3.1 Provide Mobile Breath Alcohol Testing Device and Supporting Hardware and Software. The mobile breath alcohol testing device and supporting hardware and software must be :

- 3.1.1 Able to perform scheduled, random, and on-demand tests, and provide the results immediately to the enrolling agency;
- 3.1.2 Able to provide a GPS location of the program participant when each test is provided;
- 3.1.3 Able to provide a digital photograph of the user's face when each test is provided that is compared with an enrollment photograph of the participant using facial recognition software;
- 3.1.4 Able to provide immediate notification to the enrolling agency of a missed test, failed test, or a test where the participant's face is not confirmed by the facial recognition software;
- 3.1.5 Able to provide text message notification of an upcoming test to a participant; and
- 3.1.6 Able to record and store information regarding each participant in a manner that the information is available to the agency enrolling the person on the Program.
 - 3.1.6.1 The vendor must demonstrate that their existing software will record personal information of the program participant including but not limited to name, date of birth, home address, phone number, the date the participant starts the Program, and the date the participant is removed from the Program.
 - 3.1.6.2 The vendor must further provide a detailed description of how the data will be matched with the participant account.
- 3.1.7 The vendor must provide a detailed description of how personnel who work with the Program will access the data gathered, including a description of any automatic or manual data entry points, web access or other points of access.
- 3.1.8 Vendor must describe in detail all warranties for repair or replacement of devices and provide a list of the terms and conditions of such warranties.

- 3.1.9 Vendor must demonstrate how deliverables, including all hardware and software, make usage intuitive and simple for both the Program participant and the personnel using the deliverables in furtherance of the Program.

3.2 Duties of Vendor Associated With Mobile Breath Alcohol Testing. Associated duties and responsibilities of the vendor will include:

- 3.2.1 Making personnel available 24-hours a day by e-mail and telephone to consult with, provide information to, and assist and advise state, country or other municipal personnel who work with the Program.
- 3.2.2 Providing expert testimony for court and agency proceedings regarding the device's operation subject to reimbursement of reasonable travel expenses.

4.0 PROPOSAL REQUIREMENTS AND COMPANY QUALIFICATIONS

- 4.1 Vendors are cautioned that it is the vendor's sole responsibility to submit information related to the evaluation categories and that the State of South Dakota is under no obligation to solicit such information if it is not included with the proposal. The vendor's failure to submit such information may cause an adverse impact on the evaluation of the proposal.
- 4.2 Vendor's Contacts: Vendors must direct all of their questions or comments regarding the RFP, the evaluation, etc. as instructed in Section 1.8 above. Vendors and their agents may not contact any state employee other than the buyer of record regarding this RFP during the solicitation and evaluation process. Inappropriate contacts are grounds for suspension and/or exclusion from specific procurements. Vendors and their agents who have questions regarding this matter should contact the buyer of record.
- 4.3 A Vendor **may be required to** submit a copy of its most recent audited financial statements.
- 4.4 All vendors must provide the following information:
 - 4.4.1 A detailed description of their specialized expertise, capabilities, and technical competence as demonstrated by the proposed approach and methodology to meet the project requirements;
 - 4.4.2 A detailed description of their resources available to perform the work, including any specialized services, within the specified time limits for the project;
 - 4.4.3 A detailed record of past performance which must include price and cost data from previous projects, a statement of its quality of work, a demonstration of its ability to meet schedules, demonstration cost control measures, and contract administration experience;
 - 4.4.4 A detailed description of their availability to the project locale;
 - 4.4.5 A detailed description of their familiarity with project locale;
 - 4.4.6 A detailed description of their proposed project management techniques; and
 - 4.4.7 A detailed description of their ability and proven history in handling special project constraints.
- 4.5 All vendors must provide the following information related to previous and current contracts/agreements, performed by the vendor, which are similar to the requirements of this RFP and which were terminated, expired or not renewed in the past three years.
 - a. Name, address and telephone number of the contracting entity and a representative of that agency who may be contacted for verification of all information submitted;
 - b. Dates of the service/agreement; and
 - c. A brief, written description of the specific prior services performed and requirements thereof.
- 4.6 All vendors must state whether they are currently in contract with the South Dakota Office of the Attorney General or the South Dakota Division of Criminal Investigations for the provision of any goods or services.

4.7 All vendors must demonstrate their experience, knowledge, skills and abilities in the following ways:

- 4.7.1 Vendor must demonstrate business experience in providing mobile breath alcohol testing devices.
- 4.7.2 Vendor must demonstrate their experience in working with law enforcement agencies.
- 4.7.3 Vendor must demonstrate their financial, personnel and other resources to perform the duties in Sections 3.1 and 3.2.

5.0 COST PROPOSAL

5.1 Vendor shall set forth the cost to purchase the device including a description of any quantity discounts.

5.2 Vendor shall set forth a schedule of the daily charges that Vendor will impose for each device in use by a Program participant. Vendor will also indicate how long the proposed daily charges will be in effect for each option.

5.3 Vendor understands and agrees that in any contract or agreement which results from this RFP, the total compensation that will be paid to vendor shall be limited to the agreed upon sums pursuant to Paragraphs 5.1 and 5.2 above.

6.0 PROPOSAL RESPONSE FORMAT

6.1 An original and five copies shall be submitted.

- 6.1.1 In addition, the vendor should provide one (1) electronic copy of their entire proposal, including all attachments, in PDF or comparable electronic format. Vendors may not send the electronically formatted copy of their proposal via email.
- 6.1.2 The proposal should be page numbered and should have an index and/or a table of contents referencing the appropriate page number.

6.2 All proposals must be organized and tabbed with labels for the following headings:

- 6.2.1 **RFP Form.** The State's Request for Proposal form (page 1 of this RFP) completed and signed.
- 6.2.2 **Executive Summary.** A one or two page executive summary that briefly describes the vendor's proposal. This summary should highlight the major features of the proposal. It must indicate any requirements that cannot be met by the vendor. The reader should be able to determine the essence of the proposal by reading the executive summary. Proprietary information requests should be identified in this section.
- 6.2.3 **Detailed Response.** This section should constitute the major portion of the proposal and must contain at least the following information:
 - 6.2.3.1 A complete narrative of the vendor's assessment of the work to be performed, the vendor's ability and approach, and the resources necessary to fulfill the requirements. This should demonstrate the vendor's understanding of the desired overall performance expectations.
 - 6.2.3.2 A specific point-by-point response, in the order listed, to each requirement in the RFP. The response should identify, by its section and subsection number, each requirement being addressed as enumerated in the RFP.
 - 6.2.3.3 A clear description of any options or alternatives proposed.
- 6.2.4 **Cost Proposal.** Cost will be evaluated in conjunction with the technical proposal.

7.0 PROPOSAL EVALUATION AND AWARD PROCESS

- 7.1 After determining that a proposal satisfies the mandatory requirements stated in the Request for Proposal, the evaluator(s) shall use subjective judgment in conducting a comparative assessment of the proposal by considering each of the following criteria:
- 7.1.1 Capabilities and reliability of the mobile breath alcohol testing device and supporting hardware and software, including ease of use by the end user and personnel using the deliverables in furtherance of the 24/7 Sobriety Program.
 - 7.1.2 Specialized expertise, capabilities, and technical competence of vendor as demonstrated by the proposed approach and methodology to meet the activity requirements and requests;
 - 7.1.3 Costs.
 - 7.1.4 Resources available to perform the work, including any specialized services, within the specified time limits for the project.
 - 7.1.5 Record of past performance, including price and cost data from previous projects, quality of work, ability to meet schedules, cost control, and contract administration.
 - 7.1.6 Ability and proven history in handling special project constraints.
 - 7.1.7 Proposed project management techniques.
 - 7.1.8 Familiarity with the project locale.
 - 7.1.9 Availability to the project locale.
- 7.2 Experience and reliability of the vendor's organization are considered subjectively in the evaluation process. Therefore, the vendor is advised to submit any information which documents successful and reliable experience in past performances, especially those performances related to the requirements of this RFP.
- 7.3 The qualifications of the personnel proposed by vendor to perform the requirements of this RFP will be subjectively evaluated. Therefore, the vendor should submit detailed information related to the experience and qualifications of proposed personnel, including education and training.
- 7.4 All of the above review criteria will be utilized. Given the nature of the RFP, weight will be given to the criteria in the order in which they appear.
- 7.5 The State reserves the right to reject any or all proposals, waive technicalities, and make award(s) as deemed to be in the best interest of the State of South Dakota.
- 7.6 **Award:** The State and the highest ranked vendor shall mutually discuss and refine the scope of services for the project and shall negotiate terms, including compensation and performance schedule.
- 7.6.1 If, for any reason, the State and the highest ranked vendor are unable to negotiate an agreement at a compensation level that is reasonable and fair to the State, the State shall, either orally or in writing, terminate negotiations with the Vendor. The State may then negotiate with the next highest ranked vendor.
 - 7.6.2 The negotiation process may continue through successive offerors, according to the State's ranking, until an agreement is reached or the agency terminates the negotiation process.

EXHIBIT A

2017 Senate Bill 29 - Enrolled

AN ACT

ENTITLED, An Act to provide for the use of mobile breath alcohol testing in the 24/7 sobriety program.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 1-11-19 be amended to read:

1-11-19. Each county, through the county sheriff, may participate in the 24/7 sobriety program. If a sheriff is unwilling or unable to participate in the 24/7 sobriety program, the sheriff may designate an entity willing to provide the service. If twice-a-day testing is ordered, the sheriff, or designated entity, shall establish the testing locations and times for each county with at least one location and two daily testing times approximately twelve hours apart.

The Department of Corrections may participate in the 24/7 sobriety program for electronic alcohol monitoring device testing and mobile breath alcohol testing of a parolee.

The Unified Judicial System may participate in the 24/7 sobriety program for electronic alcohol monitoring device testing and mobile breath alcohol testing of a person placed under its supervision.

Section 2. That § 1-11-24 be amended to read:

1-11-24. The Office of the Attorney General, pursuant to chapter 1-26, may promulgate rules for the administration of §§ 1-11-17 to 1-11-25, inclusive, to:

- (1) Regulate the nature, method, and manner of testing;
 - (2) Provide for procedures and apparatus for testing including electronic monitoring devices, ignition interlock devices, and mobile breath alcohol testing devices; and
 - (3) Require the submission of reports and information by law enforcement agencies within this state.
- Section 3. That § 1-11-25 be amended to read:

1-11-25. Any fees collected under §§ 1-11-17 to 1-11-25, inclusive, shall be distributed as follows:

- (1) Any daily user fee collected in the administration of twice-a-day testing, drug patch testing, or urinalysis testing under the 24/7 sobriety program shall be collected by the sheriff, or an entity designated by the sheriff, and deposited with the county treasurer of the proper county. The proceeds shall be applied and used only to defray the recurring

costs of the 24/7 sobriety program including maintaining equipment, funding support services, and ensuring compliance;

(2) Any installation fee and deactivation fee collected in the administration of electronic alcohol monitoring device testing or mobile breath alcohol testing shall be collected by the sheriff, or an entity designated by the sheriff, and deposited with the county treasurer of the proper county. The proceeds shall be applied and used only to defray the recurring costs of the 24/7 sobriety program including maintaining equipment, funding support services, and ensuring compliance;

(3) Any daily user fee collected in the administration of electronic alcohol monitoring device testing or mobile breath alcohol testing, arising from a court ordered placement in the 24/7 sobriety program, shall be collected by the sheriff, or an entity designated by the sheriff, and deposited in the state 24/7 sobriety fund created by § 1-11-18. If the test is directed by the Board of Pardons and Parole, the Department of Corrections, the Department of Public Safety, or a parole agent, the fees shall be collected and deposited as provided in the written directive;

(4) The Department of Corrections or the Unified Judicial System may collect an installation fee and a deactivation fee for the administration of electronic alcohol monitoring device testing and mobile breath alcohol testing. These fees shall be deposited into the state general fund;

(5) Any enrollment and monitoring fee collected in the administration of ignition interlock device testing shall be collected by the sheriff, or an entity designated by the sheriff, and deposited with the county treasurer of the proper county. The proceeds shall be applied and used only to defray the recurring costs of the 24/7 sobriety program including maintaining equipment, funding support services, and ensuring compliance; and

(6) Any participation fee collected in the administration of testing under the 24/7 sobriety program to cover program administration costs incurred by the Office of the Attorney General shall be collected by the sheriff, or an entity designated by the sheriff, and deposited in the state 24/7 sobriety fund created by § 1-11-18.

Section 4. That § 1-11-29 be amended to read:

1-11-29. A participant submitting to the wearing of the electronic alcohol monitoring device or the use of a mobile breath alcohol testing shall pay a user fee of not more than ten dollars per day.

The participant shall also pay an installation fee and a deactivation fee, in the amount of not more than fifty dollars each.

The participant is also financially responsible for the actual replacement cost for loss or breakage of the electronic alcohol monitoring device or mobile breath alcohol testing device and all associated equipment provided to the participant that is necessary to conduct electronic alcohol monitoring device testing or mobile breath alcohol testing.

Section 5. That § 1-11-31 be amended to read:

1-11-31. A participant shall pay all electronic alcohol monitoring device or mobile breath alcohol testing device fees in advance or at the same time the device is activated. All other applicable fees shall be paid in advance or at the time of testing.

Section 6. That § 1-11-31.1 be amended to read:

1-11-31.1. A sheriff, an entity designated by a sheriff, or a directing entity may, in addition to any other authorized sanction, remove a participant from electronic alcohol monitoring device testing, ignition interlock device testing, or mobile breath alcohol testing and place the participant on twice-a-day testing if the participant fails to pay the required fees and costs for testing.

Section 7. That ARSD 02:06:01:01 be amended to read:

2:06:01:01 Definitions for 24/7 Sobriety Program. Terms used in this article mean:

(1) "Drug patch," any type of device that is affixed to a person's skin and tests for the presence of marijuana or controlled substances in the person's body;

(2) "Electronic alcohol monitoring device," any electronic instrument that is attached to a person and is capable of determining and monitoring the presence of alcohol in a person's body. The term, electronic alcohol monitoring device, includes any associated equipment a participant needs in order for the device to properly perform;

(3) "Ignition interlock device," an instrument that is attached to a motor vehicle's ignition system in which a participant submits to a breath test that detects the presence of alcohol in the participant's body, provides simultaneous testing and photo confirmation information to the participating agency, and does not permit the starting and continued operation of the participant's vehicle if test detects alcohol;

(3A) "Mobile breath alcohol testing device," any mobile breath alcohol testing device capable of determining the presence of alcohol in a participant's body that is capable of scheduled, random, and on-demand tests. The device must provide immediate testing results, a GPS reading, and facial recognition confirmation to the participating agency;

(4) "Participant," a person who has been ordered by a court or directed by the Board of Pardons and Parole, Department of Corrections, or any parole agent to participate in the 24/7 Sobriety Program. The term, participant, also includes a person who, as a condition of receiving a work permit, is directed by the Department of Public Safety to participate in the 24/7 Sobriety Program;

(5) "Participating agency," a sheriff's office or a designated entity named by a sheriff that has agreed to participate in the 24/7 Sobriety Program by enrolling participants, administering one or more of the tests, and submitting reports to the Attorney General;

(6) "Participation agreement," a written document executed by a participant agreeing to participate in the 24/7 Sobriety Program in a form approved by the Attorney General that contains the following information:

(a) The type, frequency, and time period of testing;

- (b) The location of testing;
- (c) The fees and payment procedures required for testing; and
- (d) The responsibilities and obligations of the participant under the 24/7 Sobriety Program;

(7) "24/7 Sobriety Program," a twenty-four hour and seven day a week sobriety program in which a participant submits to the testing of the participant's blood, breath, urine, or other bodily substances in order to determine the presence of alcohol, marijuana, or any controlled substance in the participant's body;

(8) "Twice-a-day testing," the 24/7 Sobriety Program test in which a participant submits to a breath test that detects the presence of alcohol in the participant's body and is performed at least twice daily with testing times approximately twelve hours apart.

Section 8. That ARSD 02:06:02:03 be amended to read:

2:06:02:03 Type of testing authorized. A participant placed on the 24/7 Sobriety Program shall submit to one or more of the following tests:

- (1) Twice-a-day testing;
- (2) Urinalysis;
- (3) Drug patch;
- (4) Electronic alcohol monitoring device, if a device is available for attachment on a participant and the participant is capable of wearing the device;
- (5) Ignition interlock device, if a device is available from a vendor for attachment on the participant's vehicle, the participant possesses a valid driver's license or work permit, and the participant has proof of financial responsibility; or
- (6) Mobile breath alcohol testing device, if a device is available for a participant.

Section 9. That ARSD 02:06:02:04 be amended to read:

2:06:02:04 Frequency and time period of testing. A participant placed on a 24/7 Sobriety Program shall submit to tests at the participating agency's premises as follows:

- (1) Twice-a-day testing shall be conducted for the time period ordered or directed by the court, the Board of Pardons and Parole, the Department of Corrections, the Department of Public Safety, or a parole agent;
- (2) Urinalysis testing shall be conducted as ordered or directed by the court, the Board of Pardons and Parole, the Department of Corrections, the Department of Public Safety, or a parole agent, for the time period ordered or directed;
- (3) Drug patch testing shall be utilized as ordered or directed by the court, the Board of Pardons and Parole, the Department of Corrections, the Department of Public Safety, or a parole agent, for the time period ordered or directed;
- (4) Electronic alcohol monitoring device testing shall be utilized if ordered or directed by the court, the Board of Pardons and Parole, the Department of Corrections, the Department of

Public Safety, or a parole agent, for the time period ordered or directed, based upon availability of the device and if it is determined that the participant is capable of wearing the electronic alcohol monitoring device;

(5) Ignition interlock testing shall be utilized if ordered or directed by the court, the Board of Pardons and Parole, the Department of Corrections, the Department of Public Safety, or a parole agent, for the time period ordered or directed, based upon availability of the device from a vendor for attachment, and the participant's possession of a valid driver's license or work permit and proof of financial responsibility; and

(6) Mobile breath alcohol testing shall be utilized if ordered or directed by the court, the Board of Pardons and Parole, the Department of Corrections, the Department of Public Safety, or a parole agent, for the time ordered or directed, based on the availability of the device for use by the participant.

Section 10. That ARSD 02:06:02:06 be amended to read:

2:06:02:06 Attorney General selection of ignition interlock device Minimum requirements for ignition interlock device.

Each participant shall use an ignition interlock device selected by the Attorney General. The Attorney General may not select a device unless it conforms to the following minimum requirements:

(1) The device meets the standards set forth in the National Highway Traffic Safety Administration "Model Specifications for Breath Alcohol Ignition Interlock Devices (BAIIDS)" published in the Federal Register Vol. 80, No. 60, Monday, March 30, 2015, pp. 16720-23;

(2) The device simultaneously records testing information and a digital photo of the participant during the testing process;

(3) The device is able to perform tests at least twice daily, even if the participant is not operating the vehicle, with testing times approximately 12 hours apart;

(4) The device and supporting hardware and software shall transmit, at least daily, all testing information and a digital photo for each test and all device malfunctions in a manner that the information is available to the participating agency enrolling the participant and may be made available on the Attorney General's reporting system; and

(5) The vendor of a participant submitting to ignition interlock device testing agrees to notify the applicable participating agency at least 24 hours prior to the removal or deactivation of an ignition interlock device if the participant fails to pay costs and expenses.

Section 11. That a NEW SECTION be added to ARSD chapter 02:06:02 to read:

02:06:02:07. Attorney General selection of mobile breath alcohol testing device - Minimum requirements for mobile breath alcohol testing device. Each participant shall use a mobile

breath alcohol testing device selected by the Attorney General. The Attorney General may not select a device unless it conforms to the following minimum requirements:

- (1) The device is able to perform scheduled, random, and on-demand tests;
 - (2) The device provides a GPS location of where each test is conducted;
 - (3) The device submits a digital photograph when each test is provided that is compared with an enrollment photograph using facial recognition software;
 - (4) The device provides immediate notification of a missed test, failed test, or a test where facial recognition is not confirmed to the participating agency; and
 - (5) The device is able to provide the text message notification of an upcoming test to a participant.
- Section 12. That a NEW SECTION be added to ARSD chapter 02:06:03 to read:

02:06:03:05.01. Mobile breath alcohol testing device fees. A participant using a mobile breath alcohol testing device shall pay a fee of four dollars for each day the participant uses the device. In addition, the participant shall pay an installation fee and a deactivation fee of \$40 each.

Section 13. That ARSD 02:06:03:06 be amended to read:

2:06:03:06 Participation fees. A participant placed on the 24/7 Sobriety Program shall pay the following participation fees:

- (1) A participant submitting to electronic alcohol monitoring device testing, ignition interlock device testing, or mobile breath alcohol testing shall pay one dollar for each day the participant is on the program; and
- (2) A participant submitting to twice-a-day testing shall pay one dollar for each day the participant is on the program, up to a maximum of \$30.

ATTACHMENT B

STATE OF SOUTH DAKOTA Consultant Contract for Services Between

State of South Dakota
Office of the Attorney General
24/7 Sobriety Program
1302 East Highway 14
Pierre SD 57501

Referred to as Vendor

Referred to as State

The State hereby enters into this agreement (the "Agreement" hereinafter) for services with the Vendor. While performing services hereunder, Vendor is an independent contractor and not an officer, agent, or employee of the State of South Dakota.

A. STANDARD PROVISIONS

1. VENDOR

The Vendor will provide the State with its Vendor Number, Employer Identification Number, Federal Tax Identification Number or Social Security Number upon execution of this Agreement.

2. PERIOD OF PERFORMANCE OF THIS AGREEMENT

This agreement shall be effective on _____ and will end on _____, unless sooner terminated pursuant to the terms hereof. The State in its sole discretion may renew the Agreement under the same terms and conditions for up to four (4) one year periods. Notice of intent to renew shall be given by the State to the Vendor in writing prior to a term's expiration as provided in the Agreement. If notice of intent to renew is given, the Agreement shall renew unless terminated by either party pursuant to the Termination Provision of the Agreement.

3. NOTICE

Any notice or other communication required under this Agreement shall be in writing and sent to the address set forth above. Notices shall be given by and to _____ on behalf of the State, and by and to _____, on behalf of the Vendor, or such authorized designees as either party may from time to time designate in writing. Notices or communications to or between the parties shall be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail, or, if personally delivered, when received by such party.

4. PROVISIONS (If an addendum is used it is incorporated herein)

A. The Purpose of this Agreement is to provide a mobile breath alcohol testing device, along with supporting hardware and software, to enable use of the devices by participants placed in the 24/7 Sobriety Program.

B. The Vendor agrees to perform those activities described in the Scope of Work attached hereto as Attachment A which is incorporated herein.

1. The Vendor further agrees, represents, and warrants that they will not use state equipment, supplies or facilities.

D. Will the State pay Vendor expenses as a separate item?

YES () NO ()

If YES, expenses submitted will be reimbursed as identified in this Agreement.

E. The TOTAL CONTRACT AMOUNT will not exceed \$ _____.

5. BILLING AND PAYMENT

The State will make payment for services upon satisfactory completion of the services. Vendor agrees to submit an itemized invoice for services within thirty (30) days following the month in which services were provided. Vendor agrees to submit a final itemized invoice within thirty (30) days of the Agreement end date to receive payment for completed services. As used herein, the term "end date" shall include the completion of any services pursuant to the Agreement, any extension period, or early termination of the Agreement. If a final itemized invoice cannot be submitted in thirty (30) days, then a written request for extension of time and explanation must be provided to the State.

Payment will be made consistent with SDCL ch. 5-26, as such, payment will be made within forty-five (45) days of the receipt of an itemized invoice submitted by the Vendor with a signed state voucher. The Vendor acknowledges that it would be difficult or impracticable for the State to provide the notice of disagreement provided for by SDCL 5-26-5 within the ten days provided for by that section. Accordingly, Vendor hereby agrees that the State shall have thirty (30) days to provide the requisite notice of disagreement.

6. OVERPAYMENT

All payments to the Vendor by the State are subject to site review and audit as prescribed and carried out by the State. Any overpayment of this Agreement shall be returned to the State within thirty (30) days after written notification to the Vendor.

7. LICENSING AND STANDARD COMPLIANCE

The Vendor agrees to comply in full with all laws, regulations, ordinances, guidelines, permits, requirements and other standards applicable to providing services under this Agreement, promulgated by any federal, state, tribal, or local government, and will be solely responsible for obtaining current information regarding the foregoing.

8. LICENSE AGREEMENTS

Vendor warrants that, prior to the execution of this Agreement, it has provided to the State and incorporated into this agreement dated, physical copies of all license agreements, End User License Agreements, and terms of use regarding its software or any software incorporated into its software. Failure to provide all such license agreements, End User License Agreements, and terms of use shall be a breach of this agreement at the option of the State. The parties agree that neither the State nor its end users shall be bound by the terms of any such agreements not timely provided pursuant to this paragraph and incorporated into this Agreement. Vendor agrees that it shall indemnify and hold the State harmless from any and all damages or other detriment, actions, lawsuits or other proceedings that arise from failure to provide all such license agreements, End User License Agreements, and terms of use or that arise from any failure to give the State notice of all such license agreements, End User License Agreements, and terms of use. Any changes to the terms of the agreements

described in this paragraph must first be agreed to by both parties in writing before they go into effect. This paragraph shall control and supersede the language of any such agreements to the contrary.

9. TERMINATION

This Agreement may be terminated by either party hereto upon thirty (30) days written notice. In the event the Vendor breaches any of the terms or conditions hereof, this Agreement may be terminated by the State for cause at any time, with or without notice. If termination for such a default is effected by the State, any payments due to Vendor at the time of termination may be adjusted to cover any additional costs to the State because of Vendor's default. Upon termination the State may take over the work and may award another party an agreement to complete the work under this Agreement. If after the State terminates for a default by Vendor it is determined that Vendor was not at fault, then the Vendor shall be paid for eligible services rendered and expenses incurred up to the date of termination. Upon termination of this Agreement in all other circumstances, all accounts and payments shall be processed according to financial arrangements set forth herein for services rendered to date of termination.

Upon the effective date of the termination of the Agreement the Vendor will return all Confidential Information, state proprietary information, state data and end user data in a non-proprietary form.

In the event that the Vendor fails to complete the project or any phase thereof within the time specified in the Scope of Work, attached hereto as "Attachment A", or within such additional time as may be granted in writing by the State, or fails to perform the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in the Scope of Work or any extensions thereof, the State shall be authorized to terminate the Agreement for default and suspend the payments scheduled as set forth elsewhere in this Agreement.

In the event this Agreement is to be terminated by the State pursuant to Paragraph 11 (FUNDING), the Agreement may be terminated by the State upon five (5) business days written notice.

10. SURVIVAL FOLLOWING TERMINATION

The confidentiality, indemnity and records retention provisions survive termination of the Agreement between the parties

11. FUNDING

This Agreement depends upon the continued availability of appropriated funds and expenditure authority from the Legislature for this purpose. If for any reason the Legislature fails to appropriate funds or grant expenditure authority, or funds become unavailable by operation of the law or federal funds reduction, this Agreement will be terminated by the State. Termination for any of these reasons is not a default by the State nor does it give rise to a claim against the State.

12. ASSIGNMENT AND AMENDMENT

This Agreement may not be assigned without the express prior written consent of the State. This Agreement may not be amended except in writing, which writing shall be expressly identified as a part hereof, and be signed by an authorized representative of each of the parties hereto.

13. CONTROLLING LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota, without regard to any conflicts of law principles, decisional law, or statutory provision which would require or permit the application of another jurisdiction's substantive law. Venue for any lawsuit pertaining to or affecting this Agreement shall be in the Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota.

14. SUPERCESSION

All prior discussions, communications and representations concerning the subject matter of this Agreement are superseded by the terms of this Agreement, and except as specifically provided herein, this Agreement constitutes the entire agreement with respect to the subject matter hereof.

15. SEVERABILITY

In the event that any provision of this Agreement shall be held unenforceable or invalid by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Agreement, which shall remain in full force and effect.

16. WORK PRODUCTS

Vendor hereby acknowledges and agrees that all reports, plans, specifications, technical data, drawings, software system programs and documentation, procedures, files, operating instructions and procedures, source code(s) and documentation, including those necessary to upgrade and maintain the software program, state data, end user data, and all information contained therein provided to the State by the Vendor in connection with its performance of service under this Agreement, and any Confidential Information as defined in the Confidentiality of Information paragraph herein, shall belong to and is the property of the State and will not be used in any way by the Vendor without the written consent of the State.

Paper, reports, forms software programs, source code(s) and other materials which are a part of the work under this Agreement will not be copyrighted without written approval of the State. In the unlikely event that any copyright does not fully belong to the State, the State none the less reserves a royalty-free, non-exclusive, and irrevocable license to reproduce, publish, and otherwise use, and to authorize others to use, any such work for government purposes.

Vendor agrees to return all information received from the State to State's custody upon the end of the term of this Agreement, unless otherwise agreed in a writing signed by both parties.

17. THIRD PARTY BENEFICIARIES

This Agreement is intended only to govern the rights and interests of the parties named herein. It is not intended to, does not and may not be relied upon to create any rights, substantial or procedural, enforceable at law by any third party in any matters, civil or criminal.

18. SUBCONTRACTORS

The Vendor may not use subcontractors to perform the services described herein without express prior written consent from the State.

The Vendor will include provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify the State, and to provide insurance coverage for the benefit of the State in a manner consistent with this Agreement. The Vendor will cause its subcontractors, agents, and employees to comply with applicable federal, state and local laws, regulations, ordinances, guidelines, permits and requirements and will adopt such review and inspection procedures as are necessary to assure such compliance. The State, at its option, may require the vetting of any subcontractors. The Vendor is required to assist in this process as needed.

19. STATE'S RIGHT TO REJECT

The State reserves the right to reject any person from the Agreement who the State believes would be detrimental to the project, presents insufficient skills, presents inappropriate behavior or is considered by the State to be a security risk.

20. HOLD HARMLESS AND INDEMNIFICATION

The Vendor agrees to hold harmless and indemnify the State of South Dakota, its officers, agents and employees, from and against any and all actions, suits, damages, loss, liability or other proceedings which may arise as the result of performing services hereunder, including reasonable attorney's fees. This section does not require the Vendor to be responsible for or defend against claims or damages arising solely from errors or omissions of the State, its officers, agents or employees. The foregoing indemnification language likewise applies to claims arising from or relating to a third party claim that any of the services or deliverables provided by Vendor to the State under this Agreement infringes that party's U.S. patent, U.S. trademark or copyright or misappropriates that party's trade secret or other intellectual property right; provided that Vendor, in this circumstance, shall not be required to indemnify State and its affiliates for any claims that result from or are related to: (i) the State's or other party's combination, operation, or use of the software in a manner not specifically authorized by Vendor; or (ii) alterations or modifications to the software not performed or authorized by Vendor.

21. INSURANCE

Before beginning work under this Agreement, Vendor shall furnish the State with properly executed Certificates of Insurance which shall clearly evidence all insurance required in this Agreement. The Vendor, at all times during the term of this Agreement, shall obtain and maintain in force insurance coverage of the types and with the limits listed below. In the event of a substantial change in insurance, issuance of a new policy, cancellation or nonrenewal of a policy, the Vendor agrees to provide immediate notice to the State and provide a new certificate of insurance showing continuous coverage in the amounts required. Vendor shall furnish copies of insurance policies if requested by the State.

A. Commercial General Liability Insurance:

Vendor shall maintain occurrence-based commercial general liability insurance or an equivalent form with a limit of not less than \$1,000,000 for each occurrence. If such insurance contains a general aggregate limit, it shall apply separately to this Agreement or be no less than two times the occurrence limit.

B. Business Automobile Liability Insurance:

Vendor shall maintain business automobile liability insurance or an equivalent form with a limit of not less than \$500,000 for each accident. Such insurance shall include coverage for owned, hired, and non-owned vehicles.

C. Worker's Compensation Insurance:

Vendor shall procure and maintain Workers' Compensation and employers' liability insurance as required by South Dakota law.

22. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION

By signing this Agreement, Vendor certifies that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by the federal government or any state or local government department or agency. Vendor further agrees that it will immediately notify the State if during the term of this Agreement either it or its principals become subject to debarment, suspension or ineligibility from participating in transactions by the federal government, or by any state or local government department or agency.

23. BACKGROUND CHECKS

The State of South Dakota requires all employee(s) of the vendor, subcontractors, agents, assigns and or affiliated entities who write or modify State of South Dakota-owned software, alter hardware, configure software of state-owned technology resources, have access to source code and/or protected personally identifiable information or other confidential information or have access to secure areas, to undergo fingerprint-

based background checks. These fingerprints will be used to check the criminal history records of the State as well as the Federal Bureau of Investigation's criminal history records. These background checks must be performed by the State with support from the State's law enforcement resources. The State will supply the finger print cards and prescribe the procedure to be used to process the finger print cards. Project plans should allow two (2) to four (4) weeks to complete this process. If work assignments change after the initiation of the project covered by this agreement so that employee(s) of the vendor, subcontractor's, agents, assigns and or affiliated entities will be writing or modifying State of South Dakota owned software, altering hardware, configuring software of state owned technology resources, have access to source code and/or protected personally identifiable information or other confidential information or have access to secure areas then, background checks must be performed on any employees who will complete any of the referenced tasks. The State reserves the right to require the Vendor to prohibit any employee, subcontractors, agents, assigns and or affiliated entities from performing work under this Agreement whenever the State, in its sole discretion, believes that having a specific employee, subcontractor, agent assign or affiliated entity performing work under this Agreement is detrimental to the project or is considered by the State to be a security risk, based on the results of the background check. The State will provide the Vendor with notice of this determination.

24. RECORDS RETENTION

The Vendor will comply with any applicable records retention provisions under State and/or federal law. Further, it is the responsibility of the Vendor to identify any and all such provisions regarding record retention.

25. REPORTING PROVISION

Vendor agrees to report to the State any event encountered in the course of performance of this Agreement which results in injury to any person or property, or which may otherwise subject Vendor, or the State of South Dakota or its officers, agents or employees to liability. Vendor shall report any such event to the State immediately upon discovery.

Vendor's obligation under this section shall only be to report the occurrence of any event to the State and to make any other report provided for by their duties or applicable law. Vendor's obligation to report shall not require disclosure of any information subject to privilege or confidentiality under law (e.g., attorney-client communications). Reporting to the State under this section shall not excuse or satisfy any obligation of Vendor to report any event to law enforcement or other entities under the requirements of any applicable law.

26. CONFIDENTIALITY OF INFORMATION

For the purpose of this Agreement, "Confidential Information" shall include all information disclosed to the Consultant by the State and all information regarding the participants in the 24/7 Sobriety Program obtained by the Consultant through the provisions of services as contemplated by this Agreement and any companion agreements with the State regarding the 24/7 Sobriety Program. The Vendor, and any person or entity affiliated with the Vendor shall not disclose any Confidential Information to any third person for any reason without the express written permission of a State officer or employee with authority to authorize the disclosure. The Vendor, and any person or entity affiliated with the Vendor shall not: (i) disclose any Confidential Information to any third person unless otherwise specifically allowed under this Agreement; (ii) make any use of Confidential Information except to exercise rights and perform obligations under this Agreement; (iii) make Confidential Information available to any of its employees, officers, agents or consultants except those who have agreed to obligations of confidentiality at least as strict as those set out in this Agreement and who have a need to know such information. The Vendor, and any person or entity affiliated with the Vendor is held to the same standard of care in guarding Confidential Information as it applies to its own confidential or proprietary information and materials of a similar nature, and no less than holding Confidential Information in the strictest confidence. The Vendor, and any person or entity affiliated with the Vendor shall protect confidentiality of the State's information from the time of receipt to the time that such information is either returned to the State or destroyed to the extent that it cannot be recalled or reproduced. Confidential Information shall not include information that:

- (i) was in the public domain at the time it was disclosed to the Vendor, or any person or entity affiliated with the Vendor;

- (ii) was known to the Vendor, or any person or entity affiliated with the Vendor without restriction at the time of disclosure from the State;
- (iii) that was disclosed with the prior written approval of State's officers or employees having authority to disclose such information;
- (iv) was independently developed by the Vendor, or any person or entity affiliated with the Vendor without the benefit or influence of the State's information;
- (v) becomes known to the Vendor, or any person or entity affiliated with the Vendor, without restriction, from a source not connected to the State of South Dakota.

Confidential Information can include names, social security numbers, employer numbers, addresses and all other data about applicants, participants, employers or other clients to whom the State provides services of any kind. Vendor understands that this information may be confidential and protected under applicable State law at SDCL 1-27-1.5, modified by SDCL 1-27-1.6. Vendor agrees to immediately notify the State if the information is disclosure, either intentionally or inadvertently. The parties mutually agree that neither of them shall disclose the contents of the Agreement except as required by applicable law or as necessary to carry out the terms of the Agreement or to enforce that party's rights under this Agreement. Vendor acknowledges that the State and its agencies are public entities and thus are bound by South Dakota open meetings and open records laws. It is therefore not a breach of this Agreement for the State to take any action that the State reasonably believes is necessary to comply with the South Dakota open records or open meetings laws. If work assignments performed in the course of this Agreement require additional security requirements or clearance, the Vendor agrees that its officers, agents and employees may be required to undergo investigation or may be required to sign separate confidentiality agreements, and it will limit access to the confidential information and related work activities to employees that have executed such agreements.

The Vendor will enforce the terms of this Confidentiality Provision to its fullest extent. The Vendor agrees to remove any employee or agent from performing work under this Agreement that has or is suspected to have violated the terms of this Confidentiality Provision and to immediately notify the State of such matter.

The Vendor will require every person or entity however affiliated with the Vendor who will have access to Confidential Information to be under a contractual obligation of nondisclosure at least as stringent as that required by this Agreement; and will limit access to any Confidential Information to those persons or entities who have a need to know and who have been instructed that such information is confidential under state law.

The Vendor will comply with any other confidentiality measures and terms included in the Agreement.

Upon termination of this Agreement, if not already done so as part of the services performed under the Agreement, the Vendor agrees to return to the State, at the Vendor's cost, any Confidential Information or documentation maintained by the Vendor regarding the services provided hereunder in a format readily useable by the State as mutually agreed by the Vendor and State.

27. FORCE MAJEURE

Notwithstanding anything in this Agreement to the contrary, neither party shall be liable for any delay or failure to perform under the terms and conditions of this Agreement, if the delay or failure is caused by war, terrorist attacks, riots, civil commotion, fire, flood, earthquake or any act of God, or other causes beyond the party's reasonable control. Provided, however, that in order to be excused from delay or failure to perform, the party must act diligently to remedy the cause of such delay or failure and must give notice to the other party as provided in this Agreement as soon as reasonably possible of the length and cause of the delay in performance.

B. BUREAU OF INFORMATION AND TELECOMMUNICATIONS (BIT CLAUSES)

Pursuant to South Dakota Codified Law 1-33-44, the Bureau of Information and Telecommunications ("BIT" hereinafter) oversees the acquisition of office systems technology, software and services; telecommunication equipment, software and services; and data processing equipment, software, and services for departments, agencies, commissions, institutions and other units of state government. BIT requires the contract provisions which are set forth this Section B (BIT CLAUSES) of this Agreement. It is understood and agreed to by all parties that BIT has reviewed only Section B of this Agreement.

28. DILIGENCE AND SKILL

- A. In the performance of these services and providing the deliverables under the Agreement, Vendor, and its employees shall exercise the degree of skill and care consistent with customarily accepted practices and procedures for the performance of the type of services required. The Vendor shall be responsible for the professional quality, technical accuracy, timely completion, and coordination of all services and deliverables furnished by the Vendor and any subcontractors, if applicable, under this Agreement.
- B. Vendor represents and warrants that:
 - i. It shall give high priority to the performance of the services; and
 - ii. The services shall be performed in a timely manner.
- C. It shall be the duty of the Vendor to assure that its services and deliverables are technically sound and in conformance with all pertinent technical codes and standards.
- D. The Vendor shall be responsible to the State for material deficiencies in the contracted deliverables and services which result from the failure to meet the standard given herein. Vendor shall promptly correct or revise any material errors or omissions in deliverables and re-perform any services which are not in compliance with such representations and warranties at no cost to the State, provided that Vendor's failure to comply is not related or attributable, in whole or in part, to the actions, errors or omissions of the State.
- E. Permitted or required approval by the State of any services or deliverables furnished by the Vendor shall not in any way relieve the Vendor of its responsibility for the professional quality and technical accuracy and adequacy of its work. The State's review, approval, acceptance, or payment for any of the Vendor's services or deliverables herein shall not be construed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement, and except as provided herein the Vendor shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages to the State caused by the Vendor's performance or failure to perform under this Agreement.
- F. In the event of a breach of these representations and warranties, the State shall provide telephonic notice to the Vendor. The State may, in its sole discretion, require Vendor to cure such breaches. If it is necessary for Vendor to send at least one qualified and knowledgeable representative to the State's site where the system is located, this will be done at Vendor's sole expense. This representative will continue to address and work to remedy the deficiency, failure, malfunction, defect, or problem at the site. The rights and remedies provided in this paragraph are in addition to any other rights or remedies provided in this Agreement or by law.

29. IT STANDARDS

Any software or hardware provided under this Agreement will comply with state standards which can be found at <http://bit.sd.gov/standards/>

30. INTELLECTUAL PROPERTY

In connection with the performance of this Agreement and the provision of services and deliverables under this Agreement, neither party will infringe any patent, copyright, trademark, trade secret or other proprietary right of any person. Neither party will improperly use any trade secrets or confidential or proprietary information owned by any third party in performing this Agreement or the services related to this Agreement.

31. THIRD PARTY RIGHTS

The Vendor represents and warrants that it has the full power and authority to grant the rights described in this Agreement without violating any rights of any third party, and that there is currently no actual or, to Vendor's knowledge, threatened suit by any such third party based on an alleged violation of such rights by Vendor. The Vendor further represents and warrants that the person executing this Agreement for Vendor has actual authority to bind Vendor to each and every term, condition and obligation to this Agreement, and that all requirements of Vendor have been fulfilled to provide such actual authority.

32. PROTECTION OF STATE INFORMATION

The Vendor shall take all actions necessary to protect State information from exploits, inappropriate alterations, access or release, and malicious attacks.

A. By signing this agreement, the Vendor warrants that:

1. All known security issues are resolved.
2. Assistance will be provided to the State by the Vendor in performing an investigation to determine the nature of any security issues that are discovered or are reasonably suspected after acceptance. This investigation can include security scans made at the State's discretion. Failure by the Vendor to remedy any security issues discovered can be considered a breach of this agreement by the State.
3. All members of the development team have been successfully trained in secure programming techniques.
4. A source code control system will be used that authenticates and logs the team member associated with all changes to the software baseline and all related configuration and build files.
5. State access to the source code will be allowed to ensure State security standards, policies, and best practices which can be found at <http://bit.sd.gov/standards/> are followed.
6. The Vendor will fully support and maintain the Vendor's application on platforms and code bases (including but not limited to: operating systems, hypervisors, web presentation layers, communication protocols, security products, report writers, and any other technologies on which the application depends) that are still being supported, maintained, and patched by the applicable third parties owning them. The Vendor may not withhold support from the State for this application nor charge the State additional fees as a result of the State moving the Vendor's application to a new release of third party technology if:
 - i. The previous version of the third party code base or platform is no longer being maintained, patched, and supported; and
 - ii. The new version to which the State moved the application is actively maintained, patched, and supported.

7. If there are multiple versions of the applicable code base or platform(s) supported by the third party in question, the Vendor may limit their support and maintenance to any one or all of the applicable third party code bases or platforms.
 8. If a code base or platform on which the Vendor's application depends is no longer supported, maintained, or patched by a qualified third party, the Vendor commits to migrate its application from that code base and/or platform to one that is supported, maintained, and patched after the State has performed a risk assessment using industry standard tools and methods. Based on that assessment, the Vendor will fix or mitigate the risk based on the following schedule: high risk, within 7 days, medium risk within 14 days, low risk, within 30 days. Failure on the part of the Vendor to work in good faith with the State toward a timely move to supported, maintained, and patched technology shall constitute a breach of this agreement and shall allow the State to cancel this agreement without penalty.
- A. The State routinely applies security patches and security updates as needed to maintain compliance with industry best practices as well as state and federal audit requirements. Vendors who do business with the State must also subscribe to industry security practices and requirements. Vendors must include costs and time needs in their proposals and project plans to assure they can maintain currency with all security needs throughout the life-cycle of a project. The State will collaborate in good faith with the Vendor to help them understand and support State security requirements during all phases of a project's life-cycle but will not assume the costs to mitigate applications or processes that fail to meet then-current security requirements.
 - B. At the State's discretion, security scanning will be performed and or security settings put in place or altered during the software development phase and during pre-production review for new or updated code. These scans and tests, initially applied to development and test environments, can be time consuming and should be accounted for in project planning documents and schedules. Products not meeting the State's security and performance requirements will not be allowed into production and will be barred from User Acceptance Testing (UAT) until all issues are addressed to the State's satisfaction. The discovery of security issues during UAT are automatically sufficient grounds for non-acceptance of a product even though a product may satisfy all other acceptance criteria. Any security issues discovered during UAT that require product changes will not be considered a project change chargeable to the State. The State urges the use of industry scanning/testing tools and recommends secure development methods are employed to avoid unexpected costs and project delays. Costs to produce and deliver secure and reliable applications are the responsibility of the Vendor producing or delivering an application to the State. Unless expressly indicated in writing, the State assumes all price estimates and bids are for the delivery and support of applications and systems that will pass security and performance testing.
 - C. Consistent with the provisions of the agreement, the Vendor, subcontractor and or agent shall use the highest applicable industry standards for sound secure software development practices to resolve critical security issues as quickly as possible. These standards include but are not limited to the South Dakota Application Security Vulnerabilities document found at <http://cybersecurity.sd.gov/docs/development/DevelopmentSecurityItems.pdf>. Items listed under Section A of the South Dakota Security Vulnerabilities document may not be present in the software. Continued compliance to these standards is required as the standards will change over time. The "highest applicable industry standards" shall also be defined as the degree of care, skill, efficiency, and diligence that a prudent person possessing technical expertise in the subject area and acting in a like capacity would exercise in similar circumstances.
 - D. By signing this agreement, the Vendor agrees to provide the following information to the State:
 1. Name of the person responsible for certifying that all deliverables are secure.
 2. Documentation detailing the vendor's version upgrading process (for those applications where there is or will be a maintenance agreement).

3. Notification of application patches and updates (for those applications where there is/will be a maintenance agreement).
 4. List of tools used in the software development environment used to verify secure coding.
 5. Based on a risk assessment, provide the State the secure configuration guidelines, specifications and requirements that describe security relevant configuration options and their implications for the overall security of the software. The guidelines, specifications and requirements must include descriptions of dependencies on the supporting platform, including operating system, web server, application server and how they should be configured for security. The default configuration of the software shall be secure.
- F. At the State's discretion the State will discuss the security controls used by the State with the Vendor upon the Vendor signing a non-disclosure agreement.

33. VENDOR WARRANTY

The Vendor warrants that:

- A. The software contains no code that does not support an application requirement.
- B. Vendor will not insert into the software or any media on which the software is delivered any malicious or intentionally destructive code and
- C. Vendor will use commercially reasonable efforts consistent with industry standards to scan for and remove any malicious code from the software before installation. In the event any malicious code is discovered in the software delivered by the Vendor, the Vendor shall provide the State at no charge with a copy of the applicable software that contains no malicious code or otherwise correct the affected portion of the services provided to the State. The remedies in this paragraph are in addition to other additional remedies available to the State
- D. Vendor will resolve all known security issues

34. ACCESS DENIAL AND REMOVAL FROM PRODUCTION

During the life of this agreement the application can be denied access to or removed from production at the State's discretion. The reasons for the denial of access or removal of the application from the production system may include security, functionality, unsupported third party technologies, or excessive resource consumption of resources. At the discretion of the State, contractual payments may be suspended while the application is denied access to or removed from production if the problem is caused by the Vendor's actions or inactions. Access to production and any updates to production will be made only with the State's prior approval. It is expected that the Vendor shall provide the State with proof of the remedy proposed before the State provides access to production. The State shall sign a non-disclosure agreement with the Vendor if revealing the remedy will put the Vendor's intellectual property at risk. If the Vendor is unable to produce the project deliverables due to the Vendor actions or inactions within thirty (30) days of the application's denial of access or removal from production and the Vendor does not alter the project schedule or deliverables in writing within the same thirty (30) days then at the State's discretion the agreement may be terminated and Vendor is required to refund to the State the prorated contract amount.

35. VIRTUALIZED COMPUTING ENVIRONMENT

- A. The State operates a virtualized computing environment and retains the right to use industry standard hypervisor high availability, fail-over, and disaster recovery systems to move instances of the product(s) between the install sites defined with the Vendor within the provisions of resource and usage restrictions outlined elsewhere in the agreement. As part of normal operations the State may also install the product on different computers or servers if the product is also removed from the previous computer or server

within the provisions of resource and usage restrictions outlined elsewhere in the agreement. All such movement of product can be done by the State without any additional fees or charges by the Vendor.

- B. The State operates a virtualized computing environment and uses software-based management and resource capping to fulfill licensing obligations and retains the right to use and upgrade as deemed appropriate its hypervisor and operating system technology and related hardware to execute the product without additional license fees or other charges provided the State assures the guest operating system(s) running within that hypervisor environment continue to present computing resources to the licensed product that conform with the terms of the license agreement. The computing resource allocations within the State's hypervisor software-based management controls for the guest operating system(s) executing the product shall be the only consideration in licensing compliance related to computing resource capacity.

36. LOAD BALANCING

The State routinely load balances across multiple servers applications that run on the State's computing environment. The Vendor's product must be able to be load balanced across multiple servers. Any changes or modifications required to allow the Vendor's product to be load balanced so that it can operate on the State's computing environment will be at the Vendor's expense.

37. ABSTACTION TECHNOLOGY

The Vendor's application must use appropriate abstraction technologies, such as relative pathing.

Use of hard-coded references will result in a failure to pass pre-production testing or may cause the application to fail or be shut down at any time without warning. In all such cases, correcting the hardcoded references shall be the responsibility of the Vendor and will not be a project change chargeable to the State.

38. DATA LOCATION

The Vendor shall provide its services to the State and its 24/7 program participants, as well as storage of State data and 24/7 program participant data solely from data centers in the continental United States. This restriction also applies to disaster recovery; any disaster recovery plan must provide for data storage entirely within the continental United States. The Vendor shall not allow its personnel or contractors to store State data on portable devices, including personal computers, except for devices that are used and kept only at its data centers. The Vendor shall permit its personnel and contractors to access State data remotely only as required to provide technical support.

39. DATA PROTECTION

Protection of personal privacy and data shall be an integral part of the business activities of the Vendor to ensure there is no inappropriate or unauthorized use of State's data and or 24/7 program participant data at any time. To this end, the Vendor shall safeguard the confidentiality, integrity and availability of State's data and or 24/7 program participant data and comply with the following conditions:

1. The Vendor shall implement and maintain appropriate administrative, technical and organizational security measures to safeguard against unauthorized access, disclosure or theft of Personally Identifiable Information (PII), data protected under the Family Educational Rights and Privacy Act (FERPA), Protected Health Information (PHI), Federal Tax Information (FTI) or any information that is confidential under state law. Such security measures shall be in accordance with recognized industry practice and not less protective than the measures the Vendor applies to its own non-public data.

2. At no time shall any data that either belong to or are intended for the use of the State or its officers, agents or employees — be copied, disclosed or retained by the Vendor or any party related to the Vendor for subsequent use in any transaction that does not include the State.
3. The Vendor will not use such data for the Vendor's own benefit and, in particular, will not engage in data mining of State's data and or 24/7 program participant data or communications, whether through automated or manual means, except as specifically and expressly required by law or authorized in writing by the State through a State employee or officer specifically authorized to grant such use of State data.

40. ACCESS TO SECURITY LOGS AND REPORTS

The Vendor shall provide reports to the State, as requested in a format as agreed to by both the Vendor and the State. Reports shall include latency statistics, user access, user access IP address, user access history and security logs for all State files related to this contract.

41. EXTRACTION OF DATA

Upon notice of termination by the Vendor or upon reaching the end of the term, any information stored in repositories not hosted on the State's infrastructure shall be extracted in a format to enable to State to load the information onto/into repositories. If this is not possible the information metadata, including data structure descriptions and data dictionary, and data will be extracted into a text file format and returned to the State. Upon the effective date of the termination of the agreement the State again requires that State applications that store information to repositories not hosted on the State's infrastructure require the Vendor before termination (whether initiated by the State or the Vendor) to extract the State's information such that the state is able to load the information onto or into repositories listed in the State's standards. If the information cannot be extracted in a format that allows the information to be loaded onto or into the State's Standard repositories the information (metadata (data structure descriptions) and data) will be extracted into a text file format and returned to the State. The Vendor recognizes and agrees that the State cannot enter into an agreement providing for hosting of any of its data on the Vendor's servers and networks without provisions protecting its ability to access and recover its data in a usable, non-proprietary format in the event of termination of this contract with sufficient time to convert that data and the business functions provided by the Vendor to another system and Vendor.

42. RIGHTS AND LICENSE IN AND TO STATE AND END USER DATA

The parties agree that between them, all rights including all intellectual property rights in and to State's data and 24/7 program participant data shall remain the exclusive property of the State, and that the Vendor has a limited, nonexclusive license to use these data as provided in this Agreement solely for the purpose of performing its obligations hereunder,. This Agreement does not give a party any rights, implied or otherwise, to the other's data, content, or intellectual property, except as expressly stated in the Agreement.

43. SERVICE LEVEL AGREEMENTS

The Vendor warrants that all services will be performed in a professional and workmanlike manner consistent with industry standards reasonably applicable to such services. The Vendor further warrants that the services will be operational at least 99.99% of the time in any given month during the term of this Agreement. In the event of a service outage, the Vendor will:

1. Promptly and at the Vendor's expense, use commercial best efforts to restore the services as soon as possible, and

2. Unless the outage was caused by a Force Majeure event refund or credit the State, at the State's election, the pro-rated amount of fees corresponding to the time Services were unavailable or \$100 US funds per incident, whichever is the greater amount. For the purpose of this agreement, an incident, regardless of time required to return to online position and whether re-keying of data is necessary to return, is defined as any significant reduction in the availability of hosted services lasting more than one minute or resulting in data loss, rework, or occurring more than 3 times in a 24 hour time period. For example, being forced offline no more than twice in 24 hours would not be an incident if the user could get back online within 60 seconds and continue work where he or she left off. Being forced off line 3 times in a day would be an incident, regardless. Being forced off line once in a 24 hour period of time, however, that resulted in the user having to rekey data that was lost would be an incident. Entering User authentication to log on shall not be considered data entry.

The Vendor will provide the State with seven days prior notice of scheduled downtime in the provision of services for maintenance or upgrades. To the extent possible, the Vendor will schedule downtime during times of ordinarily low use by the State. In the event of unscheduled or unforeseen downtime for any reason, except as otherwise prohibited by law, the Vendor will promptly notify the State and respond promptly to the State's reasonable requests for information regarding the downtime.

44. EDISCOVERY

The Vendor shall contact the State upon receipt of any electronic discovery, litigation holds, discovery searches, and expert testimonies related to, or which in any way might reasonably require access to the data of the State. The Vendor shall not respond to service of process, and other legal requests related to the State without first notifying the State unless prohibited by law from providing such notice.

45. DATA RETENTION AND DISPOSAL

1. The Vendor will use commercially reasonable efforts to retain data in an 24/7 program participant's account until the 24/7 program participant deletes them, or for an alternate time period mutually agreed by the parties.
2. Using appropriate and reliable storage media, the Vendor will regularly back up State's data and 24/7 program participant data and retain such backup copies for a minimum of thirty-six months. At the end of that time period and at the State's election, the Vendor will either securely destroy or transmit to the State repository the backup copies. Upon the State's request, the Vendor will supply the State with a certificate indicating the nature of the storage media destroyed, the date destroyed, and the method of destruction used.
1. The Vendor will retain logs associated with End User activity for a minimum of seven years, unless the parties mutually agree to a different period.

2. The Vendor will immediately place a "hold" on the destruction under its usual storage media retention policies of storage media that include State's data and 24/7 program participant data, in response to an oral or written request from authorized State personnel indicating that those records may be relevant to litigation that the State reasonably anticipates. Oral requests by the State for a hold on storage media destruction will be reproduced in writing and supplied to the Vendor for its records as soon as reasonably practicable under the circumstances. The State will promptly coordinate with the Vendor regarding the preservation and disposition of storage media. The Vendor shall continue to preserve the storage media until further notice by the State. The Vendor will provide documentation and, at the discretion of the State, allow for on-site inspections as needed to demonstrate that all facilities supporting the methods of disposal of storage media, are appropriate to and fulfill all of the State's needs. By way of example but not of limitation, all hard drives and tapes used to store State data must, upon destruction be properly disposed of.

All facilities used to store and process State's data and or 24/7 program participant data will employ commercial best practices, including appropriate administrative, physical, and technical safeguards, to secure such data from unauthorized access, disclosure, alteration, and use. Such measures will be no less protective than those used to secure the Vendor's own data of a similar type, and in no event less than commercially reasonable in view of the type and nature of the data involved. Without limiting the foregoing, the Vendor warrants that all State's data and or 24/7 program participant data will be encrypted in transmission (including via web interface) and storage at no less than AES256 level encryption with SHA256 or SHA2 hashing, and that the Vendor will comply with all other technical specifications of the State as incorporated herein by reference.

C. AUTHORIZED SIGNATURES:

In witness hereto, the parties signify their agreement by affixing their signatures hereto.

State

Vendor

(Signature)

(Signature)

BY: MARTY JACKLEY
ATTORNEY GENERAL
SOUTH DAKOTA OFFICE
OF THE ATTORNEY GENERAL

BY: _____
(Name)

(Title)

DATE: _____

(Vendor)

(Date)

BY: _____
David Zolnowsky (As to Section B only)
Commissioner, Bureau of Information
And Telecommunications

DATE: _____

-Name and phone number of contact person in State Agency who can provide additional information regarding this contract: Please contact Kay McLain at 605-773-3215.

-This contract will be paid out of the following funds: