



State of New Mexico
General Services Department

Statewide Price Agreement

Awarded Contractor
0000016201
ByteSpeed
3131 – 24th Avenue S.
Charleston, SC 29414

Attn: Anna Hanson, Sales Director
Telephone No. 877-553-0777 x457

Price Agreement Number: 80-000-17-00006AB

Payment Terms: Net 30

F.O.B.: Destination

Delivery: See Contract

Ship To:
All State of New Mexico Agencies, Commissions,
Institutions, Political Subdivisions and Local Public
Bodies allowed by law.

Procurement Specialist: Debra Saiz *DS*

Telephone No.: 505-827-0521

Invoice:
As Requested

Title: **BroadBand for Education Initiatives CAT2**

Term: **February 12, 2018 through February 12, 2022**

This Price Agreement is made subject to the “terms and conditions” shown on the attached pages as indicated in this Price Agreement.

Accepted for the State of New Mexico

Debra Saiz

New Mexico State Purchasing Agent

Date: 02/12/2018



SUSANA MARTINEZ
GOVERNOR

ED BURCKLE
CABINET SECRETARY

LAWRENCE O. MAXWELL
DIRECTOR
STATE PURCHASING DIVISION

State of New Mexico
General Services Department

ADMINISTRATIVE SERVICES DIVISION
(505) 827-2000

FACILITIES MANAGEMENT DIVISION
(505) 827-2141

STATE PURCHASING DIVISION
(505) 827-0472

RISK MANAGEMENT DIVISION
(505) 827-0442

STATE PRINTING & GRAPHIC SERVICES BUREAU
(505) 476-1950

TRANSPORTATION SERVICES DIVISION
(505) 827-1958

February 16, 2018

ByteSpeed LLC
3131 24th Avenue South
Moorhead, MN 56560

Re: Contingent award regarding BroadBand for Education Initiatives CAT2

Dear ByteSpeed,

Congratulations on being contingently awarded a contract to be a vendor on the above referenced procurement. This award is contingent on this letter being signed by your designated representative and being returned to me in a scanned, faxed or other means, by noon MST, February 19, 2018. A scanned copy may be sent to me at: Lawrence.maxwell@state.nm.us My fax number and physical address appears on the bottom of this letter. You are further required to send my office the original signed copy of this acceptance by February 26, 2018.

The contingencies being accepted by the parties are as follows:

1. Acknowledgment that Article 34 regarding price escalations is only for use with persistent problems and procedures and Article 34 shall not be utilized for pricing increases for the term of the awarded contracts. Price increases are covered in Exhibit A of the contract, and shall not be allowed during the term of the contract.
2. The pricing submitted with your proposal is the pricing included in this contract. For any clarification of the specifications represented by this pricing, the order of precedence shall be reversed from the order of precedence set forth in Article 28 of the contract.

Again, congratulations on this award. I look forward to receipt of your acceptance.

Very truly yours,

Lawrence O. Maxwell
State Purchasing Agent

cc: Anna Silva
Debra Saiz

Accepted by:

Date: 2-19-18

**State of New Mexico
State Purchasing Division
General Services Statewide Price Agreement**

Statewide Price Agreement No. _____

THIS Agreement ("Agreement" or "Contract") is made by and between the State of New Mexico State Purchasing Division, hereinafter referred to as the "SPD" and **ByteSpeed**, hereinafter referred to as the "Contractor" and collectively referred to as the "Parties".

WHEREAS, pursuant to the Procurement Code, NMSA 1978 13-1-28 *et. seq*; and Procurement Code Regulations, NMAC 1.4.1 *et.seq*; the Contractor has held itself out as expert in implementing the Scope of Work as contained herein and the Procuring Agency has selected the Contractor as the offeror most advantageous to the State of New Mexico; and

WHEREAS, all terms and conditions of the **RFP #80-000-17-00006** and the Contractor's response to such document(s) are incorporated herein by reference; and

NOW, THEREFORE, IT IS MUTUALLY AGREED BETWEEN THE PARTIES:

ARTICLE 1 – DEFINITIONS

1. "**Agreement**" is a negotiated, legally enforceable understanding between two or more parties resulting in a legal binding contract.
2. "**Award of Contract**" shall mean a formal written notice by the State Purchasing Division that a firm(s) has been selected to enter into a contract for equipment and/or consulting services.
3. "**Acceptance**" shall mean the approval, after Quality Assurance, of all Deliverables by an executive level representative ("Executive Level Representative") of the Procuring Agency.
4. "**Agency**" means each Educational Entity within the State of New Mexico also known as the Local Education Agency.
5. "**Agreement Administrator**" shall mean the State Purchasing Division of the General Service Department.
6. "**Authorized Purchaser**" means an individual authorized by a Participating Entity to place orders against this contract.
7. "**Award**" means the final execution of the contract document.

8. **“Buried Fiber with Conduit”** means placing conduit or HDPE in a trench directly buried into the ground. The fiber is pulled into the conduit and/or HDPE and encased to seal out moisture and protect the fiber optic cable.
9. **“Business Hours”** means 8:00 AM thru 5:00 PM Mountain Standard or Mountain Daylight Time, whichever is in effect on the date given.
10. **“Change Request”** shall mean the document utilized to request changes or revisions in the Scope of Work – Exhibit A, attached hereto and incorporated herein.
11. **“Chief Information Officer (“CIO”)**” shall mean the Cabinet Secretary/CIO of the Public Education Department (PED) for the State of New Mexico or designated representative.
12. **“Close of Business”** means 5:00 PM Mountain Standard or Mountain Daylight Time, whichever is in use at that time.
13. **“Combined Reporting System (CRS)”** means the New Mexico tax identification number (“ID”) assigned to anyone that registers with the Taxation and Revenue Department of New Mexico. This ID is used to report and pay state and local gross receipt tax, New Mexico withholding tax and compensation tax under CRS.
14. **“Confidential Information”** means any communication or record (whether oral, written, electronically stored or transmitted, or in any other form) that consists of: (1) confidential client information as such term is defined in State or Federal statutes and/or regulations; (2) all non-public State budget, expense, payment and other financial information; (3) all attorney-client privileged work product; (4) all information designated by the Procuring Agency or any other State agency as confidential, including all information designated as confidential under federal or state law or regulations; (5) unless publicly disclosed by the Procuring Agency or the State of New Mexico, the pricing, payments, and terms and conditions of this Agreement, and (6) State information that is utilized, received, or maintained by the Procuring Agency, the Contractor, or other participating State agencies for the purpose of fulfilling a duty or obligation under this Agreement and that has not been publicly disclosed.
15. **“Contract”** means a written legally binding agreement for the procurement of items of tangible personal property, services or construction.
16. **“Contract Manager”** means the individual selected by the Agency to monitor and manage all aspects of a contract.
17. **“Contractor”** means the successful offeror, person or company who enters into a legally binding contract to provide materials, labor or services.

18. **“Customer Premise Equipment”** means any associated equipment located at the Educational Entity’s premises and connected to the ISP’s network at the demarcation point.
19. **“Default”** or **“Breach”** shall mean a violation of this Agreement by either failing to perform one’s own contractual obligations or by interfering with another Party’s performance of its obligations.
20. **“Deliverable”** means any measurable, tangible, verifiable outcome, result, or item that **must** be produced to complete a project or part of a project.
21. **“DFA”** means the Department of Finance and Administration for the State of New Mexico.
22. **“DFA/CRB”** means the Contracts Review Board of the Department of Finance and Administration for the State of New Mexico.
23. **“Demobilization”** means all activities and costs for transportation of contractor’s personnel, equipment and supplies not required or included in the contract from the site; including the disassembly, removal, and site cleanup of offices, buildings, and other facilities assembled on the site as a result of any services contracted for as a result of the awarded agreement.
24. **“Designated Representative”** shall mean a substitute(s) for a title or role, e.g. Contract Manager, when the primary is not available.
25. **“Direct Connection”** means internet service connection to the awarded Contractor’s network and provided by the awarded Contractor.
26. **“Distributed Denial of Service (DDoS) attack”** means a malicious attempt where multiple systems are used to make a server or network resource unavailable to its intended users.
27. **“Downstream”** refers to direction in which data can be transferred from client away from the global Internet and to state government.
28. **“Educational Entity or Entities ”** means all E-rate eligible entities within the State of New Mexico as defined by USAC (<http://www.usac.org/sl/applicants/beforeyoubegin/default.aspx>), e.g., NM public schools, charters, libraries or local public body. **“Escrow”** shall mean a legal document (such as the software source code) delivered by the Contractor into the hands of a third party, and to be held by that party until the performance of a condition is Accepted; in the event Contractor fails to perform, the Procuring Agency receives the legal document, in this case, Source Code.

29. "**Employer**" means any for-profit or not-for-profit business, regardless of location, that employs one or more persons that qualify as a "New Mexico Employee". Such definition does not include governmental entities.
30. "**Enhancement**" means any modification including addition(s), modification(s), or deletion(s) that, when made or added to the program, materially changes its or their utility, efficiency, functional capability, or application, but does not constitute solely an error correction.
31. "**Executive Level Representative**" shall mean the individual empowered with the authority to represent and make decisions on behalf of the Agency's executives.
32. "**Fiber Construction Services**" means special construction charges for Category 1 eligible services, per the E-Rate requirements for eligibility, necessary to bring broadband connections to and from eligible locations to ensure Internet access is available. Special construction charges can include project management, design, engineering, construction materials and construction labor for new infrastructure construction.
33. "**GRT**" shall mean New Mexico gross receipts tax
34. "**Gateway**" means the provided IP address, router, computer and/or key stopping point for data on its way to or from other networks that controls all the data traffic the Internet Service Provider takes and sends out.
35. "**HDPE**" or "**High Density Polyethylene Pipe**" means a pipe and conduit is the preferred material to house and protect fiber and power cables. HDPE conduit is flexible and available in long reel lengths to reduce joints and installation time. HDPE is an inert thermoplastic, it offers corrosion and chemical resistance.
36. "**IT**" means Information Technology.
37. "**Intellectual Property**" or "**IP**" shall mean any and all proprietary information developed pursuant to the terms of this Agreement.
38. "**Know How**" shall mean all technical information and knowledge including, but not limited to, all documents, computer storage devices, drawings, flow charts, plans, proposals, records, notes, memoranda, manuals and other tangible items containing, relating or causing the enablement of any Intellectual Property developed under this Agreement.
39. "**Labor Rates**" means the proposed rates that must include travel, per diem, fringe benefits and any overhead costs for contractor personnel as well as subcontractor personnel, if appropriate. If the Contractor proposed mobilization and demobilization for construction services, those labor rates must also be included.

40. **“Lead Time”** means the lead time in calendar days for provisioning internet access services starting from the date customer requests service(s) formally in writing with signature approval through the date customer receives service(s) successfully
41. **“MACC”** means the “Maximum Allowable Construction Cost.
42. **“Managed Services”** means that the Contractor is contracted by the Educational Entity or Entities to manage the Educational Entity’s network for Internet Access Services. This includes, but is not limited to, supporting any upgrades to the equipment owned by the Educational Entity or Entities that is necessary and/or required and this also includes managed security.
43. **“Milestone”** means a significant event in a project, usually the completion of a major deliverable.
44. **“Mobilization”** means all activities and associated costs associated to transportation of contractor’s personnel, equipment, and operating supplies to the site.
45. **“Multiple Source Award”** means an award of an indefinite quantity contract for one or more similar services, items of tangible personal property or construction to more than one Contractor.
46. **“New Mexico Employee”** means any person employed by the State of New Mexico performing the majority of their work for the State of New Mexico regardless of the location of the employer’s office or offices.
47. **“Non-Business Hours”** All hours outside the definition of “Business Hours”
48. **“Payment Invoice”** shall mean a detailed, certified and written request for payment of Services by and rendered from the Contractor to the educational entity or entities. Payment Invoice(s) **must** contain the fixed price Deliverable cost and identify the Deliverable for which the Payment Invoice is submitted.
49. **“Performance Surety Bond”** shall mean a surety bond which guarantees that the Contractor will fully perform the Contract and guarantees against breach of contract.
50. **“PED”** shall mean the New Mexico Public Education Department.
51. **“Price Agreement”** means a definite quantity contract or indefinite quantity contract which requires the contractor to furnish items of tangible personal property, services or construction to a state procuring agency or a local public body which issues a purchase order, if the purchase order is within the quantity limitations of the contract, if any.
52. **“Procuring Agency”** means all State of New Mexico agencies, commissions, institutions, political subdivisions and local public bodies allowed by law to entertain procurements.

53. **“Project”** means a temporary process undertaken to solve a well-defined goal or objective with clearly defined start and end times, a set of clearly defined tasks, and a budget. The project terminates once the project scope is achieved and project acceptance is given by the project executive sponsor.
54. **“Project Manager”** shall mean a qualified person from the Procuring Agency or the the educational entity or entities responsible for the application of knowledge, skills, tools, and techniques to the project activities to meet the roject requirements from initiation to close. Under the terms of this Agreement, the project Manager shall be a designated representative from the educational entity or entities or the New Mexico Public Education Department or his/her proxy.
55. **“Qualified”** means demonstrated experience performing activities and tasks with Projects.
56. **“Quality Assurance”** shall mean a planned and systematic pattern of all actions necessary to provide adequate confidence that a Deliverable conforms to established requirements, customer needs, and user expectations.
57. **“QC” or “Quality Control”** means a set of procedures intended to ensure that the service(s) adhere to a defined set of quality criteria and/or meets the requirements of the customer prior to customer acceptance.
58. **“Requirements”** are obligatory and mean the system functions that are related to the organization’s goals and business opportunities. Requirements are defined by the project team and are usually prioritized.
59. **“Rural”** means located outside of a metropolitan area and is less than 20,000 in population.
60. **“Services”** shall mean the tasks, functions, and responsibilities assigned and delegated to the Contractor under this Agreement.
61. **“Software”** shall mean all operating system and application software used by the Contractor to provide the Services under this Agreement.
62. **“Software Maintenance”** shall mean the set of activities which result in changes to the originally Accepted (baseline) product set. These changes consist of corrections, insertions, deletions, extensions, and Enhancements to the baseline system.
63. **“Splicing”** means creating a permanent joint between two fibers.
64. **“Staff”** means any individual who is a full-time, part-time, or an independently contracted employee with the Contractor’s company.

65. **“State”** means the State of New Mexico.
66. **“State Agency”** means any department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational entity or official of the executive, legislative or judicial branch of the government of this state. “State agency” includes the purchasing division of the general services department and the state purchasing agent but does not include local public bodies.
67. **“State entity”** means any state entity that is eligible under the procurement code to use the Statewide Price Agreement.
68. **“State Purchasing Agent”** or **“SPA”** means the purchasing agent for the State of New Mexico or a designated representative.
69. **“State Purchasing Division”** or **“SPD”** shall mean the State Purchasing Division of the General Services Department for the State of New Mexico.
70. **“Statewide”** refers to the entities within the state that can use this procurement. This would be Educational Entity or Entities/entities within the State of New Mexico.
71. **“Turnover Plan”** means the written plan developed by the Contractor and approved by the Procuring Agency in the event that the work described in this Agreement transfers to another Contractor or the Procuring Agency.
72. **“Upstream”** refers to direction in which data can be transferred from client toward the global Internet and away from the state government.
73. **“Universal Service Administrative Company”** or **“USAC”** means the independent, not-for-profit corporation designated by the Federal Communications Commission (FCC) as the administrator of universal service.
74. **“Underground Construction”** means fibers are pulled in existing conduits and/or pathways that run from vault to vault to customer premises underground. HDPE/Inner duct inside the conduit separates the cables/fiber and provides easier pulling of cables.
75. **“Urban Area”** means a population of 20,000 or more, and is near to a metropolitan area.
76. **“User Contact”** is the person designated by the educational e to speak on behalf of the district/school or library staff concerning the scope of work and programming requirements for the project(s).
77. **“Wireless Broadband Internet Access Services”** or **“Wireless Services”** means the link between the educational entity location and the service provider facility. Any exclusion(s) for these services are defined in the most current eligibility services listing for this type of service as explained in <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx> .

Additional Terms may be added when finalizing the price agreement awards.

ARTICLE 2 – SCOPE OF WORK

- A. Scope of Work. The Contractor shall perform the work as outlined in Exhibit A, attached hereto and incorporated herein by reference.
1. The Contractor shall be limited to the eligible E-rate Category 2 products and/or services awarded in this Agreement as outlined in Exhibit A, attached hereto and incorporated herein by reference to include any future amendments. There are no volume or purchase commitments as to any specific dollar amount which will be contracted by the Procuring Agency or the State as a whole. The E-rate Category 2 in this Agreement **must** be available to the Procuring Agencies should they elect to make any purchases.
 2. The Price Listings of this Agreement shall not increase for the term of the awarded Agreement. Any other changes to the agreement to include pricing reductions shall be submitted to the Procuring Agency and State Purchasing Division for review and approval and may be negotiated at any point throughout the duration of the agreement with the Procuring Agency.
- B. Performance Measures. The Contractor shall substantially perform to the satisfaction of the Procuring Agency the Performance Measures set forth in Exhibit A. In the event the Contractor fails to obtain the results described in Exhibit A, the Procuring Agency may provide written notice to the Contractor of the Default and specify a reasonable period of time in which the Contractor shall advise the Procuring Agency of specific steps it will take to achieve these results and the proposed timetable for implementation. Nothing in this Section shall be construed to prevent the Procuring Agency from exercising its rights pursuant to Article 6 or Article 16.
- C. Schedule
The Contractor shall meet the due dates, as set forth in Exhibit A, which due dates shall not be altered or waived by the Procuring Agency without prior written approval, through the Amendment process, as defined in Article 25.
- D. License.
Not Applicable. The Parties agree there is no License for the services outlined in Exhibit A of this Agreement.
- E. Source Code
Not Applicable. The Parties agree there is no Source Code for the services outlined in Exhibit A of this Agreement.
- F. The Procuring Agency's Rights.
- A. Rights to Software. Not Applicable. The Parties agree the Procuring Agency does not have rights to the Software that support the services outlined in Exhibit A of this Agreement.

- B. Proprietary Rights. The Contractor will reproduce and include the State of New Mexico's copyright and other proprietary notices and product identifications provided by the Contractor on such copies, in whole or in part, or on any form of the Deliverables.
- C. Rights to Data.
Not Applicable. The Parties agree the Procuring Agency does not have rights to the data.

ARTICLE 3 - COMPENSATION

- A. Compensation Schedule. The educational entity or entities shall pay to the Contractor based upon fixed prices for each Deliverable per the schedule outlined in Exhibit A.
- B. Payment. The total compensation under this Agreement shall not exceed the cost to be paid for eligible and ineligible E-Rate Category 2 products and/or services rendered and accepted per the Cost Guidance Worksheet previously submitted excluding New Mexico gross receipts tax. This amount is a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The Parties do not intend for the Contractor to continue to provide Services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the educational entity or entities when the Services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for Services provided in excess of the total compensation amount without this Agreement being amended in writing prior to services, in excess of the total compensation amount being provided.

Payment shall be made upon Acceptance of each Deliverable according to Article 4 and upon the receipt and Acceptance of a detailed, certified Payment Invoice. Payment will be made to the Contractor's designated mailing address. In accordance with Section 13-1-158 NMSA 1978, payment shall be tendered to the Contractor within thirty (30) days of the date of written certification of Acceptance. All Payment Invoices **MUST BE** received by the Procuring Agency no later than fifteen (15) days after the termination of this Agreement. Payment Invoices received after such date **WILL NOT BE PAID.**

- C. Taxes.

The payment of taxes for any money received under this Agreement shall be the Contractor's sole responsibility and should be reported under the Contractor's Federal and State tax identification number(s).

Contractor and any and all subcontractors shall pay all Federal, state and local taxes applicable to its operation and any persons employed by the Contractor. Contractor shall require all subcontractors to hold the educational entity or entities harmless from any responsibility for taxes, damages and interest, if applicable, contributions required under Federal and/or state and local laws and regulations and any other costs, including transaction privilege taxes, unemployment compensation insurance, Social Security and Worker's Compensation.

D. Performance Surety Bond.

Contractor must have the ability to secure a Performance Surety Bond in favor of the Agency to insure the Contractor's performance upon any subsequent contract award. Each engagement will be different but the option to require a Performance Surety Bond must be available to the Agencies at time of contract award.

E. E-rate eligibility limitations for managed internal broadband services

The equipment eligible for support as part of a managed internal broadband service may include only equipment listed as a broadband internal connections component above. Upfront charges that are part of a managed service contract are eligible for E-rate support except to the extent that the upfront charges are for any ineligible internal connections (e.g., servers other than those that are necessary to provide caching) which, if included in the contract, must be cost allocated out of any funding request.

ARTICLE 4 – ACCEPTANCE

A. Submission. Upon completion of agreed upon Deliverables as set forth in Article 2 and Exhibit A, Contractor shall submit a Payment Invoice with the Deliverable, or description of the Deliverable, to the educational entity or entities. Each Payment Invoice shall be for the fixed Deliverable price as set forth in Article 2 and Exhibit A.

B. Acceptance. In accord with Section 13-1-158 NMSA 1978, the Executive Level Representative within the educational entity or entities shall determine if the Deliverable provided meets specifications. No payment shall be made for any Deliverable until the individual Deliverable that is the subject of the Payment Invoice has been accepted, in writing, by the Executive Level Representative. In order to Accept the Deliverable, the Executive Level Representative will assess the Quality Assurance level of the Deliverable and determine, at a minimum, that the Deliverable:

1. Complies with the Deliverable requirements as defined in Article 2 and Exhibit A;
2. Complies with the terms and conditions of the **RFP #80-000-17-00006**.
3. Meets the performance measures for the Deliverable(s) and this Agreement;
4. Meets or exceeds the generally accepted industry standards and procedures for the Deliverable(s); and
5. Complies with all the requirements of this Agreement.

If the Deliverable is deemed Acceptable under Quality Assurance by the Executive Level Representative or their Designated Representative, the Executive Level Representative will notify the Contractor of Acceptance, in writing, within fifteen (15) Business Days from the date the Executive Level Representative receives the Deliverable(s) and accompanying Payment Invoice.

C. Rejection. Unless the Executive Level Representative gives notice of rejection within the fifteen (15) Business Day Acceptance period, the Deliverable will be deemed to have been accepted. If the Deliverable is deemed unacceptable under Quality Assurance,

fifteen (15) Business Days from the date the Executive Level Representative receives the Deliverable(s) and accompanying Payment Invoice, the Executive Level Representative will send a consolidated set of comments indicating issues, unacceptable items, and/or requested revisions accompanying the rejection. Upon rejection and receipt of comments, the Contractor will have ten (10) Business Days to resubmit the Deliverable to the Executive Level Representative with all appropriate corrections or modifications made and/or addressed. The Executive Level Representative will again determine whether the Deliverable(s) is Acceptable under Quality Assurance and provide a written determination within fifteen (15) Business Days of receipt of the revised or amended Deliverable. If the Deliverable is once again deemed unacceptable under Quality Assurance and thus rejected, the Contractor will be required to provide a remediation plan that shall include a timeline for corrective action acceptable to the Executive Level Representative. The Contractor shall also be subject to all damages and remedies attributable to the late delivery of the Deliverable under the terms of this Agreement and available at law or equity. In the event that a Deliverable **must** be resubmitted more than twice for Acceptance, the Contractor shall be deemed as in breach of this Agreement. The Procuring Agency may seek any and all damages and remedies available under the terms of this Agreement and available at law or equity. Additionally, the Procuring Agency may terminate this Agreement.

ARTICLE 5 – TERM

THIS AGREEMENT SHALL NEITHER BE EFFECTIVE NOR BINDING UNTIL APPROVED BY THE STATE PURCHASING AGENT. This agreement shall terminate four (4) years from the date of the State Purchasing Agent signature, unless terminated pursuant to Article 6. Contract term, including extensions and renewals, shall not exceed four (4) years, except as set forth in Section 13-1-150 NMSA 1978.

ARTICLE 6 – TERMINATION

- A. Grounds. The Agency may terminate this Agreement for convenience or cause. The Contractor may only terminate this Agreement based upon the Agency's uncured, material breach of this Agreement.
- B. Appropriations. By the Procuring Agency, if required by changes in State or federal law, or because of court order, or because of insufficient appropriations made available by the United States Congress and/or the New Mexico State Legislature for the performance of this Agreement. The Procuring Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Procuring Agency terminates this Agreement pursuant to this subsection, the Procuring Agency shall provide the Contractor written notice of such termination at least fifteen (15) Business Days prior to the effective date of the termination.
- C. Notice; Agency Opportunity to Cure.

1. Except as otherwise provided in Article 6.A and Article 6.B, the Agency shall give Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.
 2. Contractor shall give Agency written notice of termination at least thirty (30) days prior to the intended date of termination, which notice shall (i) identify all the Agency's material breaches of this Agreement upon which the termination is based and (ii) state what the Agency **must** do to cure such material breaches. Contractor's notice of termination shall only be effective (i) if the Agency does not cure all material breaches within the thirty (30) day notice period or (ii) in the case of material breaches that cannot be cured within thirty (30) days, the Agency does not, within the thirty (30) day notice period, notify the Contractor of its intent to cure and begin with due diligence to cure the material breach.
 3. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor (i) if the Contractor becomes unable to perform the services contracted for, as determined by the Agency; (ii) if, during the term of this Agreement, the Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to Article 6.B, "Appropriations", of this Agreement.
- D. Liability. Except as otherwise expressly allowed or provided under this Agreement, the Agency's sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE AGENCY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

ARTICLE 7 – TERMINATION MANAGEMENT

- A. Contractor. In the event this Agreement is terminated for any reason, or upon expiration, and in addition to all other rights to property set forth in this Agreement, the Contractor shall:
1. Transfer, deliver, and/or make readily available to the Procuring Agency property in which the Procuring Agency has a financial interest and any and all data, Know How, Intellectual Property, inventions or property of the Procuring Agency;
 2. Incur no further financial obligations for materials, Services, or facilities under the Agreement without prior written approval of the Procuring Agency;
 3. Terminate all purchase orders or procurements and any subcontractors and cease all work, except as the Procuring Agency may direct, for orderly completion and transition;
 4. Take such action as the Procuring Agency may direct, for the protection and preservation of all property and all records related to and required by this Agreement;

5. Agree that the Procuring Agency is not liable for any costs arising out of termination and that the Procuring Agency is liable only for costs of Deliverables Accepted prior to the termination of the Agreement;
6. Cooperate fully in the closeout or transition of any activities to permit continuity in the administration of Procuring Agency's programs;
7. In the event that this Agreement is terminated due to the Contractor's course of performance, negligence or willful misconduct and that course of performance, negligence, or willful misconduct results in reductions in the Procuring Agency's receipt of program funds from any governmental agency, the Contractor shall remit to the Procuring Agency the full amount of the reduction;
8. Should this Agreement terminate due to the Contractor's Default, the Contractor shall reimburse the Procuring Agency for all costs arising from hiring new Contractor/subcontractors at potentially higher rates and for other costs incurred;
9. In the event this Agreement is terminated for any reason, or upon its expiration, the Contractor shall develop and submit to the Procuring Agency for approval an Agreement Turnover Plan at least ten (10) Business Days prior to the effective date of termination. Such Turnover Plan shall describe the Contractor's policies and procedures that will ensure: (1) the least disruption in the delivery of Services during the transition to a substitute Contractor; and (2) cooperation with the Procuring Agency and the substitute Contractor in transferring information and Services. The Turnover Plan shall consist of the orderly and timely transfer of files, data, computer software, documentation, system turnover plan, Know How, Intellectual Property and other materials, whether provided by the Procuring Agency or created by the Contractor under this Agreement, to the Procuring Agency, including but not limited to, user manuals with complete documentation, functional technical descriptions of each program and data flow diagrams. At the request of the Procuring Agency, the Contractor shall provide to the Procuring Agency a copy of the most recent versions of all files, software, Know How, Intellectual Property and documentation, whether provided by the Procuring Agency or created by the Contractor under this Agreement.

- B. Procuring Agency. In the event this Agreement is terminated for any reason, or upon expiration, and in addition to all other rights to property set forth in this Agreement, the Procuring Agency shall:
1. Retain ownership of all work products and documentation created pursuant to this Agreement; and
 2. Pay the Contractor all amounts due for Services Accepted prior to the effective date of such termination or expiration.

ARTICLE 8 – INDEMNIFICATION

- A. General. The Contractor shall defend, indemnify and hold harmless the Procuring Agency, the State of New Mexico and its employees from all actions, proceedings, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement,

caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, during the time when the Contractor, its officer, agent, employee, servant or subcontractor thereof has or is performing Services pursuant to this Agreement. In the event that any action, suit or proceeding related to the Services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable, but no later than two (2) Business Days after it receives notice thereof, notify, by certified mail, the legal counsel of the Risk Management Division of the New Mexico General Services Department and the New Mexico Public Education Department.

- B. The indemnification obligation under this Agreement shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor, and shall survive the termination of this Agreement. Money due or to become due to the Contractor under this Agreement may be retained by the Procuring Agency, as necessary, to satisfy any outstanding claim that the Procuring Agency may have against the Contractor.

ARTICLE 9 – INTELLECTUAL PROPERTY

- A. Contractor hereby acknowledges and grants to the Procuring Agency and the State of New Mexico, a perpetual, non-exclusive, royalty free license to reproduce, publish, use, copy and modify the Intellectual Property and Know How created or conceived pursuant to, or as a result of, performance of this Agreement.

ARTICLE 10 – INTELLECTUAL PROPERTY INDEMNIFICATION

- A. Intellectual Property Indemnification. The Contractor shall defend, at its own expense, the Procuring Agency, the State of New Mexico and/or any other State of New Mexico body against any claim that any product or service provided under this Agreement infringes any patent, copyright or trademark, and shall pay all costs, damages and attorney's fees that may be awarded as a result of such claim. In addition, if any third party obtains a judgment against the Procuring Agency based upon Contractor's trade secret infringement relating to any product or Services provided under this Agreement, the Contractor agrees to reimburse the Procuring Agency for all costs, attorneys' fees and the amount of the judgment. To qualify for such defense and/or payment, the Procuring Agency shall:
1. Give the Contractor written notice, within forty-eight (48) hours, of its notification of any claim;
 2. Work with the Contractor to control the defense and settlement of the claim; and
 3. Cooperate with the Contractor, in a reasonable manner, to facilitate the defense or settlement of the claim.

- B. Procuring Agency Rights. If any product or service becomes, or in the Contractor's opinion is likely to become, the subject of a claim of infringement, the Contractor shall, at its sole expense:
1. Provide the Procuring Agency the right to continue using the product or service and fully indemnify the Procuring Agency against all claims that may arise out of the Procuring Agency's use of the product or service;
 2. Replace or modify the product or service so that it becomes non-infringing; or
 3. Accept the return of the product or service and refund an amount equal to the value of the returned product or service, less the unpaid portion of the purchase price and any other amounts, which are due to the Contractor. The Contractor's obligation will be void as to any product or service modified by the Procuring Agency to the extent such modification is the cause of the claim.

ARTICLE 11 - WARRANTIES

- A. General. The Contractor hereby expressly warrants the Deliverable(s) as being correct and compliant with the terms of this Agreement, Contractor's official published specification and technical specifications of this Agreement and all generally accepted industry standards. This warranty encompasses correction of defective Deliverable(s) and revision of the same, as necessary, including deficiencies found during testing, implementation, or post-implementation phases.
- B. Software. Not Applicable. The Parties agree there is no Software to be purchased or developed for the Services outlined in Exhibit A of this Agreement.

ARTICLE 12 – CONTRACTOR PERSONNEL

- A. Key Personnel. Contractor's key personnel shall not be diverted from this Agreement without the prior written approval of the Procuring Agency. Key personnel are those individuals considered by the Procuring Agency to be mandatory to the work to be performed under this Agreement. Key personnel shall be:

Regan Conroy - Sales Territory Manager
Anna Hanson - Sales Director (Back-up contact)
Robert Ogan - Technical Engineering Manager
Chris Polley - Technical Support Engineer
Jason Verbout - Network Engineer
Paul Schumaier - Wireless Engineer
Andy Benson - Network Administrator
Kevin Fritz - Technical Support Engineer

- B. Personnel Changes. Replacement of any personnel shall be made with personnel of equal ability, experience, and qualification and shall be approved by the Procuring Agency. For all personnel, the Procuring Agency reserves the right to require submission of their

resumes prior to approval. If the number of Contractor's personnel assigned to the Project is reduced for any reason, Contractor shall, within ten (10) Business Days of the reduction, replace with the same or greater number of personnel with equal ability, experience, and qualifications, subject to Procuring Agency approval. The Procuring Agency, in its sole discretion, may approve additional time beyond the ten (10) Business Days for replacement of personnel. The Contractor shall include status reports of its efforts and progress in finding replacements and the effect of the absence of the personnel on the progress of the Project. The Contractor shall also make interim arrangements to assure that the Project progress is not affected by the loss of personnel. The Procuring Agency reserves the right to require a change in Contractor's personnel if the assigned personnel are not, in the sole opinion of the Procuring Agency, meeting the Procuring Agency's expectations.

ARTICLE 13 – STATUS OF CONTRACTOR

- A. Independent Contractor. The Contractor and its agents and employees are independent contractors performing professional Services for the Procuring Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are personally reportable by it for income tax purposes as self-employment or business income and are reportable for self-employment tax.
- B. Subject of Proceedings. Contractor warrants that neither the Contractor nor any officer, stockholder, director or employee of the Contractor, is presently subject to any litigation or administrative proceeding before any court or administrative body which would have an adverse effect on the Contractor's ability to perform under this Agreement; nor, to the best knowledge of the Contractor, is any such litigation or proceeding presently threatened against it or any of its officers, stockholders, directors or employees. If any such proceeding is initiated or threatened during the term of this Agreement, the Contractor shall immediately disclose such fact to the Procuring Agency.

ARTICLE 14 - CHANGE MANAGEMENT

- A. Changes. Contractor may only make changes or revisions within the Scope of Work as defined by Article 2 and Exhibit A after receipt of written approval by the Executive Level Representative. Such change may only be made to Tasks or Sub-Task as defined in the Exhibit A. Under no circumstance shall such change affect the:
1. Deliverable requirements, as outlined in Exhibit A;
 2. Due date of any Deliverable, as outlined in Exhibit A;
 3. Compensation of any Deliverable, as outlined in Exhibit A;
 4. Agreement compensation, as outlined in Article 3; or
 5. Agreement termination, as outlined in Article 5.

- B. Change Request Process. In the event that circumstances warrant a change to accomplish the Scope of Work as described above, a Change Request shall be submitted that meets the following criteria:
1. The Project Manager shall draft a written Change Request for review and approval by the Executive Level Representative to include:
 - (a) The name of the person requesting the change;
 - (b) A summary of the required change;
 - (c) The start date for the change;
 - (d) The reason and necessity for change;
 - (e) The elements to be altered; and
 - (f) The impact of the change.
 2. The Executive Level Representative shall provide a written decision on the Change Request to the Contractor within a maximum of ten (10) Business Days of receipt of the Change Request. All decisions made by the Executive Level Representative are final. Change Requests, once approved, become a part of the Agreement and become binding as a part of the original Agreement.

ARTICLE 15 – INDEPENDENT VERIFICATION AND VALIDATION

NOT APPLICABLE

ARTICLE 16 – DEFAULT/BREACH

In case of Default and/or Breach by the Contractor, for any reason whatsoever, the Procuring Agency and the State of New Mexico may procure the goods or Services from another source and hold the Contractor responsible for any resulting excess costs and/or damages, including but not limited to, direct damages, indirect damages, consequential damages, special damages and the Procuring Agency and the State of New Mexico may also seek all other remedies under the terms of this Agreement and under law or equity.

ARTICLE 17 – EQUITABLE REMEDIES

Contractor acknowledges that its failure to comply with any provision of this Agreement will cause the Procuring Agency irrevocable harm and that a remedy at law for such a failure would be an inadequate remedy for the Procuring Agency, and the Contractor consents to the Procuring Agency's obtaining from a court of competent jurisdiction, specific performance, or injunction, or any other equitable relief in order to enforce such compliance. Procuring Agency's rights to obtain equitable relief pursuant to this Agreement shall be in addition to, and not in lieu of, any other remedy that Procuring Agency may have under applicable law, including, but not limited to, monetary damages.

ARTICLE 18 - LIABILITY

Contractor shall be liable for damages arising out of injury to persons and/or damage to real or tangible personal property at any time, in any way, if and to the extent that the injury or damage was caused by or due to the fault or negligence of the Contractor or a defect of any equipment provided or installed, provided in whole or in part by the Contractor pursuant to the Agreement. Contractor shall not be liable for damages arising out of, or caused by, alterations made by the Procuring Agency to any equipment or its installation or for losses caused by the Procuring Agency's fault or negligence. Nothing in this Agreement shall limit the Contractor's liability, if any, to third parties and/or employees of the Procuring Agency or the State of New Mexico, or any remedy that may exist under law or equity in the event a defect in the manufacture or installation of the equipment, or the negligent act or omission of the Contractor, its officers, employees, or agents, is the cause of injury to such person.

ARTICLE 19 – ASSIGNMENT

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of this Agreement's approval authorities.

ARTICLE 20 – SUBCONTRACTING

- A. General Provision. The Contractor shall not subcontract any portion of this Agreement without the prior written approval of the Procuring Agency. No such subcontracting shall relieve the Contractor from its obligations and liabilities under this Agreement, nor shall any subcontracting obligate payment from the Procuring Agency.
- B. Responsibility for subcontractors. The Contractor **must** not disclose Confidential Information of the Procuring Agency or of the State of New Mexico to a subcontractor unless and until such subcontractor has agreed in writing to protect the confidentiality of such Confidential Information in the manner required of the Contractor under this Agreement.

ARTICLE 21 – RELEASE

The Contractor's Acceptance of final payment of the amount due under this Agreement shall operate as a release of the Procuring Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

ARTICLE 22 – CONFIDENTIALITY

Any Confidential Information provided to the Contractor by the Procuring Agency or, developed by the Contractor based on information provided by the Procuring Agency in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Procuring Agency. Upon termination of this Agreement, Contractor shall deliver all Confidential Information in its possession to the Procuring Agency within thirty (30) Business Days of such termination. Contractor acknowledges that failure to deliver such Confidential Information to the Procuring Agency will result in direct, special and incidental damages.

ARTICLE 23 –CONFLICT OF INTEREST

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or Services required under the Agreement. The Contractor certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer, state employee or former state employee have been followed.

ARTICLE 24 - RECORDS AND AUDIT

The Contractor shall maintain detailed time and expenditure records that indicate the date, time, nature and cost of Services rendered during this Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Procuring Agency, CIO, SPA, and DFA and the New Mexico State Auditor's Office. The Procuring Agency shall have the right to audit billings both before and after payment. Payment for Services under this Agreement shall not foreclose the right of the Procuring Agency to recover excessive or illegal payments.

ARTICLE 25 - AMENDMENT

This Agreement shall not be altered, changed, or amended except by an instrument in writing executed by the Parties hereto. No amendment shall be effective or binding unless approved by all of the approval authorities. Amendments are required for the following:

1. Deliverable requirements, as outlined in Exhibit A;
2. Due Date of any Deliverable, as outlined in Exhibit A;
3. Compensation of any Deliverable, as outlined in Exhibit A;
4. Agreement Compensation, as outlined in Article 3; or
5. Agreement termination, as outlined in Article 5.

ARTICLE 26 – NEW MEXICO EMPLOYEES HEALTH COVERAGE

- A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the

term of the contract, Contractor certifies, by signing this agreement, to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.

- B. Contractor agrees to maintain a record of the number of employees who have (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.
- C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information: <http://insurenemexico.state.nm.us/>.
- D. For Indefinite Quantity, Indefinite Delivery contracts (state price agreements without specific limitations on quantity and providing for an indeterminate number of orders to be placed against it); Contractor agrees these requirements shall apply the first day of the second month after the Contractor reports combined sales (from state and, if applicable, from local public bodies if from a state price agreement) of \$250,000.

ARTICLE 27 – NEW MEXICO EMPLOYEES PAY EQUITY REPORTING

- A. The Contractor agrees if it has ten (10) or more New Mexico employees OR eight (8) or more employees in the same job classification, at any time during the term of this Agreement, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for Agreements up to one (1) year in duration. If Contractor has (250) or more employees Contractor **must** complete and submit the PE250 form on the annual anniversary of the initial report submittal for Agreements up to one (1) year in duration. For Agreements that extend beyond one (1) calendar year, or are extended beyond one (1) calendar year, Contractor also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within thirty (30) days of the annual Agreements anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the Agreements, whichever comes first. Should Contractor not meet the size requirement for reporting as of the effective date of this Agreement but subsequently grows such that they meet or exceed the size requirement for reporting, Contractor agrees to provide the required report within ninety (90) days of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter.
- B. Contractor also agrees to levy this requirement on any subcontractor(s) performing more than ten percent (10%) of the dollar value of this Agreement if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of this Agreement. Contractor further agrees that, should one or more subcontractor not meet the size requirement for reporting as of the effective date of this Agreement but

subsequently grows such that they meet or exceed the size requirement for reporting, Contractor will submit the required report, for each such subcontractor, within ninety (90) calendar days of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal. Contractor shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this paragraph. Contractor acknowledges that this subcontractor requirement applies even though Contractor itself may not meet the size requirement for reporting and be required to report itself.

- C. Notwithstanding the foregoing, if this Agreement was procured pursuant to a solicitation, and if Contractor has already submitted the required report accompanying their response to such solicitation, the report does not need to be re-submitted with this Agreement.

ARTICLE 28 – MERGER, SCOPE, ORDER OF PRECEDENCE

- A. Severable. The provisions of this Agreement are severable, and if for any reason, a clause, sentence or paragraph of this Agreement is determined to be invalid by a court or agency or commission having jurisdiction over the subject matter hereof, such invalidity shall not affect other provisions of this Agreement, which can be given effect without the invalid provision.
- B. Merger/Scope/Order. This Agreement incorporates any and all agreements, covenants and understandings between the Parties concerning the subject matter hereof, and all such agreements, covenants and understanding have been merged into this Agreement. No prior agreement or understanding, verbal or otherwise, of the Parties or their agents or assignees shall be valid or enforceable unless embodied in this Agreement. In the event of any inconsistencies between various documents comprising this Agreement, the order of precedence will apply in ascending order of control: (1) This Agreement, (2) the Exhibit A to the Agreement, (3) other exhibits to this Agreement, (4) Contractor’s RFP response, and (5) the RFP including RFP amendments. Contractor agrees all purchases made under or resulting from this Price Agreement shall be controlled and governed by the terms and conditions as set forth in this Agreement regardless of type of purchase or language in subsequent agreements including but not limited to end user licenses, leases, scopes of work, other license agreements, or quotes provided by the Contractor or a third party. This Agreement will be the controlling and governing document for any claims questions or differences between the parties arising from purchases made from this Agreement.

ARTICLE 29 – NOTICES

All deliveries, notices, requests, demands or other communications provided for or required by this Agreement shall be in writing and shall be deemed to have been given when sent by registered or certified mail (return receipt requested), when sent by overnight carrier, or upon

telephone confirmation by Contractor to the sender of receipt of a facsimile communication that is followed by a mailed hard copy from the sender. Notices shall be addressed as follows:

For PROCURING AGENCY

To SPA:
State Purchasing Agent
Purchasing Division
Joseph M. Montoya State Building, Room 2016
1100 St. Francis Drive
Phone: (505) 827-0472

With a copy to New Mexico Public Education Department:
Ben Naranjo
Purchasing Bureau Chief, Public Education Department
300 Don Gaspar
Santa Fe, New Mexico 87501-2786
505-827-6645

For CONTRACTOR

Anna Hanson, Sales Director

ByteSpeed

Email: ahanson@bytespeed.com

Phone: 877-553-0777 x457

Mailing Address: 3131 24th Ave S., Moorhead, MN 56560

Any change to the Notice individual or the address, shall be effective only in writing.

ARTICLE 30 – GENERAL PROVISIONS

- A. The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, including but not limited to:
1. Civil and Criminal Penalties. The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.
 2. Equal Opportunity Compliance. The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor agrees to assure that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.
 3. Workers Compensation. The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Procuring Agency.
- B. Applicable Law. The laws of the State of New Mexico shall govern this Agreement. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all such lawsuits arising under or out of any term of this Agreement.
- C. Waiver. A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless expressed and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.
- D. Headings. Any and all headings herein are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement. Numbered or lettered provisions, sections and subsections contained herein, refer only to provisions, sections and subsections of this Agreement unless otherwise expressly stated.

ARTICLE 31 - SURVIVAL

The Articles entitled Intellectual Property, Intellectual Property Ownership, Confidentiality, and Warranties shall survive the expiration or termination of this Agreement. Software License and Software Escrow agreements entered into in conjunction with this Agreement shall survive the expiration or termination of this Agreement.

ARTICLE 32 - TIME

Calculation of Time. Any time period herein calculated by reference to "days" means calendar days, unless Business Days are used; provided, however, that if the last day for a given act falls on a Saturday, Sunday, or a holiday as observed by the State of New Mexico, the day for such act shall be the first day following that is not a Saturday, Sunday, or such observed holiday.

ARTICLE 33 – FORCE MAJEURE

Neither party shall be liable in damages or have any right to terminate this Agreement for any delay or Default in performing hereunder if such delay or Default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.

ARTICLE 34 – ADDITIONAL PROVISIONS

1. Standard Escalation Procedures.

The Contractor MUST submit and attach to the final award its proposed formal standard escalation procedures that define the escalation path(s) for persistent problems and the threshold(s) at which the escalation procedure has to be triggered. The escalation procedure should include the following:

- a. Name(s) of person(s) and/or titles to contact under specific circumstances, their telephone numbers (office, cell, pager, or as appropriate) and the e-mail address.
- b. Each level of the account team involved in the escalation procedures.

2. Resolution Plan.

The Contractor MUST submit and attach to the final award a clear resolution plan that will be utilized for problems that are resolved utilizing its proposed escalation procedures for this account.

3. Cost Guidance Worksheet

The Contractor MUST submit and attach to the final award an updated copy of their Cost Guidance Worksheet submitted as part of the Cost Proposal. This should reflect all costs to be paid for eligible and ineligible E-Rate Category 2 products and/or services rendered and accepted excluding New Mexico gross receipts tax (See Article 3.B).

4. Lowest Corresponding Price (LCP).

The Contractor MUST agree to the lowest corresponding price (LCP) that it charges to nonresidential customers that are similarly situated to a particular applicant (Educational Entity or Entities) for similar services within the Contractor's service area for the particular location. For more details, refer to:

<http://www.usac.org/sl/service-providers/step02/lowest-corresponding-price.aspx>.

This requirement includes any type of existing contract(s) the Educational Entity or Entities have with the Contractor in addition to the Agreement.

5. E-Rate Program Process.

The Contractor must comply with the E-Rate Program process and terms and conditions as described by the Universal Service Administrative Company (USAC) in Exhibit A and as defined within the USAC website

<http://www.usac.org/sl/>

and any other E-Rate Program federal requirements.


6. Security Level.

This requirement is at no added cost to the procuring entity based upon the contractor's price listing for managed services. The Contractor must maintain its own internal security policy to protect its own network.


7. Monitoring Capability.

This requirement is at no added cost to the procuring entity based upon the Contractor's Price Listing for Category 2 eligible and ineligible goods or services as outlined in Exhibit A of this agreement. The Contractor may provide defined network monitoring of managed services contracted for Category 2 eligible and ineligible goods or services outlined in Exhibit A. Hours of monitoring and help desk availability must be agreed upon by the Contractor and the procuring entity and provided to them at their request.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date of the signature by the required approval authorities below.

By:  Date: 1.29.18
Anna Hanson
Sales Director, ByteSpeed

This Agreement has been approved by the New Mexico State Purchasing Agent

By:  Date: 2/12/18
Lawrence O. Maxwell
Purchasing Agent for the State of New Mexico

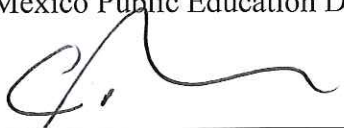
The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes:

Taxation and Revenue is only verifying the registration and will not confirm or deny taxability statements contained in this contract.

CRS ID Number: 03-390680-00-7

By:  Date: 2.6.18
Taxation & Revenue Department

The New Mexico Public Education Department approves of this only as a sponsoring entity

By:  Date: February 9, 2018
Christopher Ruskowski
Secretary-Designate, NM Public Education Department

By:  Date: 02/08/2018
NM Public Education Department, General Counsel

EXHIBIT A – Scope of Work

This section will consist of the Price Listings for both Eligible and Ineligible E-rate Category 2 Purchases and other Related Products and/or Services awarded.

The scope is intended to provide affordable purchasing of both E-rate Category 2 eligible and ineligible options to the Educational Entity or Entities at a cost savings for the State of New Mexico.

There are no volume or purchase commitments by the Educational Entity or Entities or the State of New Mexico for the products and services awarded from this procurement. However, the products and services included in the awarded agreements **must** be available to the Educational Entity or Entities should they elect to make any purchases.

The Statewide Price Agreement(s) awarded shall be for **four (4) calendar years** in duration with no option for renewal. The State reserves the option to contract with any one of the awarded Contractor(s) for all, or part, or none of the services that are included in the awarded agreements.

The pricing of the awarded agreements shall not increase for the term of the awarded agreements. Any changes to the Agency agreement(s) that include pricing reductions shall be submitted to the Agency for review and approval and may be negotiated at any point throughout the duration of the agreement with the procuring entity. The proposed pricing submitted for all services by the submitting awarded Contractor **must** not include New Mexico Gross Receipts Tax (NMGRT) or other additional taxes and/or surcharges mandated by law. However, the purchase of the products and support services are subject to the NMGRT and are applicable to the current rate for the period which the services are performed. If there are any E-rate Category 2 eligible and ineligible products or services with pricing published by the awarded Contractor that is offered to any other private or public entity, that is less than the pricing being contracted for not to exceed the maximum pricing, the lower published pricing will be made available to the Educational Entity or Entities.

The Statewide Price Agreement(s) will provide the procuring method made available to the Educational Entity or Entities. The terms and conditions of the awarded agreement shall be the baseline for any contracted Category 2 purchases.

The Educational Entity or Entities within the State of New Mexico reserve the right to add and/or change new or existing eligible locations to the list of locations included in the awarded statewide price agreements. If additional locations are added, the Educational Entity or Entities will require related pricing for the new location(s). If an awarded Contractor's service area changes, the Contractor may submit its changes to the procuring Educational Entity or Entities with its related pricing for any new eligible locations in its service area. The pricing for new locations must be consistent with existing pricing and offer a cost-effective solution. The E-Rate eligible and ineligible Category 2 products and services that are included in the awards are listed here: <http://usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx>. These are items that may be updated on the awarded agreements per the State of NM's process for amending statewide pricing agreements. For any changes requested to the Statewide Price

Agreements, they must be reviewed by the Educational Entity or Entities that will work in coordination with PED's E-Rate Coordinator for signature approval of the changes to the Agreement through the Agency's statewide price agreement amendment process.

E-Rate Eligible Cost, Material and Labor: All Contractor pricing must clearly identify the E-rate eligible costs associated with a given product or service. If a product or service is partially eligible, the Contractor must clearly identify the E-rate eligible portion.

E-Rate Ineligible Cost, Material and Labor: All Contractor proposals must clearly identify the E-rate ineligible costs associated with a given product or service. If a product or service is partially ineligible, the Contractor must clearly identify the E-rate ineligible portion.

End User(s) and the educational entity or entities may elect to contract directly with the Contractor(s) for any of the goods, services, or any combination of goods and services described. The Contractor(s) shall provide the goods or services in the Requirement Sets offered by the Contractor and awarded by the State directly to the electing End Users and educational entity or entities at the fixed prices established. . The goods and/or services provided to End Users and the educational entity or entities by the Contractor(s) shall, at a minimum, comply with the applicable requirements and specifications and the resulting Statewide Price Agreement(s). The Contractor(s) and electing End Users and the educational entity or entities will contract between themselves for the goods or services and shall incorporate the terms and conditions established pursuant to the original RFP and the resulting Statewide Price Agreement(s).

Educational Entity or Entities and Contractors are encouraged to use the Mini Quote system provided by PED at no charge to Contractors, end users and educational entity or entities. The system assists the educational entity or entities in documenting the competitive bidding requirements from the State of New Mexico

<http://www.generalservices.state.nm.us/uploads/files/SPD/SPDPolicyMemoFY18-001.pdf>
and USAC

<http://www.usac.org/sl/applicants/step02/state-master-contracts.aspx>

Technical Specifications:

The requirements/specifications for each Requirement Set are set forth below. Contractor(s) shall comply with all "Mandatory" requirements in each group of goods, services, or combination of goods and services. For each group, the "Desired" requirements may or may not apply depending on the goods, services, or combination of goods and services contained in the Contractor's offer. Contractors are therefore required to review the desired requirements and respond as applicable to the goods, services, or combination of goods and services to the educational entity or entities .

Contractors must have a Service Provider Identification Number (SPIN) issued by the USAC, must not be in red light status with USAC, and must comply with all E-rate rules.

Contractors Service Provider Identification Number (SPIN): 143022706

a) Group 1: Wireless Network Equipment

(1) Mandatory:

- i. The proposed hardware must be IEEE 802.11 compliant.
- ii. The proposed hardware must provide IEEE 802.11ac support as well as backward compatibility with IEEE 802.11b/g/n in 2.4GHz band.
- iii. The proposed hardware must have at least one 1000 Base-T Ethernet Port.
- iv. Each Contractor product shall include a minimum one year product warranty and the Contractor shall provide options for an extended warranty period up to three years.
- v. Contractors shall provide the annual maintenance and support costs quoted on an annual basis as required by E-rate rules.
- vi. Contractors shall provide copies, to the educational entity or entities of all warranties for the equipment offered.

(2) Desired:

- i. Contractor shall provide a description to the educational entity or entities as to how the wireless equipment should be managed, including RF spectrum, client authentication, roaming, and integration into a broader management framework.
- ii. Contractor shall provide to the educational entity or entities all methods available for command and control of the wireless network, be it through a physical appliance, virtual appliance or cloud offering.
- iii. Contractor shall provide a description to the educational entity or entities as to the compatibility with any existing wireless environment management platform.
- iv. Contractor shall describe the data plane flow to the educational entity or entities.
- v. Contractor shall provide in detail to the educational entity or entities the items and services to be covered under maintenance.
- vi. Contractor shall provide to the educational entity or entities how connectivity is affected by temporary loss of connection to the management system or controller.
- vii. Contractor shall provide to the educational entity or entities multiple options for wireless access point models which will include at least one standard indoor model, one high density indoor model and one long range outdoor model.
- viii. Contractor shall list and provide to the educational entity or entities which of the following features are supported in the proposed solution for each of the proposed access point models:
 - (a) Powered by IEEE 802.11af POE or IEEE 802.11at POE+
 - (b) Support for dual radio, 2.4GHz and 5GHz bands, simultaneously
 - (c) Support for 5GHz, specifically listing which of the bands are supported: UNII-1, UNII-2, UNII-2e and UNII-3
 - (d) Support for Dynamic Frequency Selection
 - (e) Support for Multiple-In, Multiple-Out (MIMO) radio; multiple spatial stream design with a minimum capacity of 2x2:2
 - (f) Support for at least 2 spatial streams in the 5GHz band
 - (g) Support for multiple SSIDs and per-SSID access policy
 - (h) Support for per-client policy while using only one SSID

- (i) Support for “captive portal” or other facility to ensure Acceptable Use Policy is affirmed by End Users
- (j) Support for rate limiting and traffic shaping of guest clients
- (k) Support for client isolation; prevent attached wireless devices from communicating directly with each other
- (l) Support for rogue AP detection
- (m) Number of 1000 Base-T Ethernet Ports
- (n) Support for multiple VLANs with assignable QoS
- (o) Support for IEEE 802.1X Authentication and IEEE 802.11i WPA2/Enterprise cryptography
- (p) Support for Layer 2 / 3 roaming/mobility without performance degradation or re-authentication required by clients (roaming within a single Educational Entity)
- (q) Any Contractor-specific features a solution provides, such as integration with Apple Bonjour, Google Chromecast, or Contractor-specific printing
- (r) Support to forward wireless client traffic without backhaul to centralized controller
- (s) Can centrally support and manage all Access Points from one management console/interface
- (t) Support for autonomous channel, power and RF configuration based on dynamic environment changes; explain how/if APs can adapt to changing RF conditions without human intervention.
- (u) Options for mounting hardware required for ceiling or wall

(3) Optional:

- i. Contractor should provide to the educational entity or entities any value added function their wireless solution provides with respect to Mobile Device Management (MDM). For example, if a wireless access point’s cost includes client device management software which provides valued added functions specifically in conjunction with the wireless products, this should be highlighted.
- ii. Contractor should provide to the educational entity or entities any value added function their wireless solution provides with respect to Classroom Management. For example, if a wireless solution cost includes classroom management software which provides valued added functions specifically useful to a teacher in a K-12 classroom, it should be highlighted.
- iii. Contractor should, if providing both Wireless and Ethernet Switch equipment, also provide to the educational entity or entities a narrative describing the value of the combined solutions, including network management, policy control, mobile device management (client management), network access control and other features/benefits gained in a holistic approach.

b) Group 2: Wired Network Equipment

(1) Mandatory:

- i. Routers must have:
 - (a) Layer 3

- (b) Protocols: IP Routing, OSPF, and BGP
 - (c) Two (2) 1GB copper interfaces
 - (d) One (1) SFP+ interface
 - (e) SNMP management capabilities
 - (f) Each Contractor product shall include a minimum one year product warranty and specify the options for an extended warranty up to three years
 - (g) Contractor shall provide an annual maintenance and support option (quoted on an annual basis as required by E-Rate rules)
 - (h) Contractors shall provide copies of all warranties for the equipment offered by Contractor.
- ii. Switches must have:
- (a) Layer 2 and 3 (Upgrade process or IOS/license info if Layer 3 routing is needed)
 - (b) Support for multiple VLANs
 - (c) Support for IEEE 802.3at POE+ on one or more
 - (d) Support for at least 15Watts of POE per port, on 90% 1GbE ports simultaneously
 - (e) Non-blocking switch backplane
 - (f) Stacking technology (minimum 10G backplane)
 - (g) Trunking (IEEE 802.3ad)
- iii. Contractor-specific management capabilities
- (a) Ethernet switches will have a minimum of 8 ports (POE preferred and 8 is standard for most Portals)
 - (b) Each Contractor product shall include a minimum one year product warranty and specify the options for an extended warranty up to three years
 - (c) Contractor shall provide an annual maintenance and support option (quoted on an annual basis as required by E-rate rules)
 - (d) Contractors shall provide copies of all warranties for the equipment offered by Contractor.

(2) Desired Switching:

- i. Contractor shall ensure the equipment is ideally managed.
- ii. Contractor shall provide all methods available for command and control of the hardware, be it through a physical appliance, virtual appliance or cloud offering.
- iii. Contractor shall provide a method to manage the equipment using an existing management console at Educational Entity. The Educational Entity or Entities shall not be required to employ multiple wired-network management platforms within any given Educational Entity building.
- iv. At a minimum, Contractor shall provide pricing options on all of the following configurations (if available):
 - (a) 24 Port POE GbE with 2 SFP+ connections
 - (b) 24 Port POE GbE with 4 SFP+ connections
 - (c) 24 Port GbE with 2 SFP+ connections
 - (d) 24 Port GbE with 4 SFP+ connections
 - (e) 48 Port GbE with 2 SFP+ connections
 - (f) 48 Port GbE with 4 SFP+ connections

- (g) 8 Port GbE with 1 SFP+ connection (appropriate for Portables)
- (h) 8 Port POE GbE with 1 SFP+ connection (appropriate for Portables)
- (i) 19 inch, two post, racks (floor mount or wall mount) with cable management for network hardware (grounded)

(3) Optional:

- i Contractor should include pricing for optional Redundant Power Supply, extra GbE SFP Modules and extra 10GbE SFP Modules to the educational entity or entities. Contractor should note ineligible costs in their proposal to the NM educational entity or entities.
- ii Contractor should, if providing both Wireless and Ethernet Switch equipment, also provide to the educational entity or entities a narrative describing the value of the combined solutions, including network management, policy control, mobile device management (client management), network access control and other features/benefits gained in a holistic approach.

c) Group 3: Content Distribution

(1) Mandatory:

- i. Caching Server must have:
 - (a) Contractor shall ensure their solution and its components support qualified and authorized teachers to push content to the student devices, monitor the impacts network load, increasing teacher effectiveness and allow the students to perform assignments in the temporary absence of an internet connection.
 - (b) Contractor shall describe, define and communicate with the educational entity or entities any client software that must be installed as well as any servers or appliances required and their operating locations (i.e. cloud, school central office, individual school, etc.).
 - (c) Contractor shall identify the devices supported. At a minimum, 3 of the following list must be supported: Apple iOS, Apple OS X, Google Android Tablet, Google Chromebooks, or Microsoft Windows.
 - (d) Contractor shall provide to the educational entity or entities copies of all warranties for all products provided by Contractor as part of its solution offered.
 - (e) All servers will have a power supply
Note: A dual power supply is highly recommended, but may not be E-rate eligible.
 - (f) Minimum caching server configuration:
 - i. TIER 1 - Basic Server (< 25 users)
 - (g) Operating System: Windows 2012 R2 Foundation (max 15 users) or Essentials (max 25 users) or Most any Version of Linux
 - (h) Size/Shape: Floor Standing Tower or 1 U Rackmount Chassis
 - (i) CPUs/CPU Cores: 1 @ CPU with 2 @ Cores
 - (j) RAM: 8 GB
 - (k) Local Disk/Storage: SATA-3 Hard Disk Minimum 1 TB.
 - (l) Network/NIC: 1 @ GB NIC
- ii. Firewalls must have:
 - (a) Next Generation Firewall (NGFW) Capabilities

- 1) Application awareness
 - 2) Packet Inspection
 - 3) Geo IP blocking
 - 4) Malware identification/blocking
 - 5) Virtual Private Network (VPN) capabilities
- (b) One (1) SFP+ Gigabyte throughput or higher (SFP+ provides 1GB or 10GB Capability)
- (c) IEEE 802.3ad Trunk aggregation standard
- (d) Starting configurations:
- 1) Tier 1 Firewall (1 – 100 or less end users)
 - Max concurrent sessions (IPv4 or IPv6) = 20000;
 - Max connections per second = 5000;
 - Memory = 4GB;
 - Flash = 8 GB;
 - Management interface = RJ45 console, 2 Ethernet 10/100/1000 ports;
 - Monitoring Interfaces = 8GE;
 - Threat prevention throughput = 90 Mbps;
 - ULR filtering entries = 20000;
 - Traffic throughput – 1 Gbps SFP
 - 2) Tier 2 Firewall (100 to 1000 end users)
 - Max concurrent sessions (IPv4 or IPv6) = 100000;
 - Max connections per second = 10000;
 - Memory = 8 GB;
 - Flash = 8 GB;
 - Management interface = RJ45 console, 2 Ethernet 10/100/1000 ports;
 - Monitoring Interfaces = 16GE, 4GE SFP;
 - Threat prevention throughput = 250 Mbps;
 - ULR filtering entries = 50000;
 - Traffic throughput – 1/10Gbps SFP
 - 3) Tier 3 Firewall (1000+ end users)
 - Max concurrent sessions (IPv4 or IPv6) = 500000;
 - Max connections per second = 20000;
 - Memory = 12 GB;
 - Flash = 8 GB;
 - Management interface = RJ45 console, 2 Ethernet 10/100/1000 ports;
 - Monitoring Interfaces = 16GE, 4GE SFP;
 - Threat prevention throughput = 1250 Mbps;
 - ULR filtering entries = 100000;
 - Traffic throughput - 10Gbps SFP
- iii. Each Contractor product shall include a minimum one year and not to exceed three years product warranty
- iv. Contractors shall provide copies of all warranties for the equipment offered by Contractor.

d) Group 7: Basic Maintenance of Eligible Broadband Internal Connections

(1) The State desires the Contractor provide the following basic maintenance services:

- i. Repair and upkeep of eligible hardware
- ii. Wire and cable maintenance
- iii. Configuration changes
- iv. Basic technical support including online and telephone based technical support
- v. Software upgrades and patches including bug fixes and security patches

(2) Mandatory

- i. Contractor shall provide to the educational entity or entities:
 - (a) Contact information to the educational entity or entities.; The information shall consist of their help desk telephone number, physical address, staff size, hours of operation and other characteristics as necessary.
 - (b) A copy of their Service Level Agreement or "SLA" along with a schedule of prices based on the pricing model to the educational entity or entities. Each educational entity network architecture is unique, but generally implements a hub-and-spoke design with the Educational Entity or all Entities connected to a central hub, which is then connected to the Internet.
- ii. The Educational Entity or Entities shall own or lease some or all network equipment. It is entirely up to each Educational Entity to select the best and most cost effective technical solution for their establishment.
- iii. Any additional wireless access points and Ethernet switches and any associated cable must be procured by the Educational Entity through this or other competitive bidding process, and titled in the name of the Educational Entity.
- iv. Contractor shall provide to the educational entity or entities an annual maintenance and support option quoted on an annual basis as required by E-rate rules.
- v. Contractor agrees any cabling installed becomes the property of the Educational Entity at the termination of the contract.
- vi. Under E-rate rules, only services provided can be billed. Contingency or stand-by billings are not allowed under E-rate rules.
- vii. Only internal connections as outlined in the E-rate 2016 Eligible Services List are eligible for coverage under the basic maintenance and technical support portion and exclusions from covered services in the 2016 Eligible Services List apply.
- viii. Contractor should list counties in New Mexico where they can provide up to a four (4) hour response time to make necessary onsite calls

- (c) Their detailed methods/practices for designing/installing/validating high-capacity wireless networks
 - (d) Their plans for staging equipment such that Educational Institutions take responsibility for equipment only once properly installed.
- iv. In addition to basic network configuration functions and tasks, the Vendor shall affirm that they can provide the following services:
- (a) Physically mount and install network hardware, including Access Points and Network Switches.
 - (b) Ensure latest firmware is installed in each wireless access point and switch
 - (c) Configure network management console to meet best practices as defined by the customer
 - (d) Maximize the use of available spectrum to minimize co-channel interference
 - (e) Test access from each AP and provide throughput report for each AP
 - (f) Configure and test the authorization of clients, which relies on MS Active Directory in most Educational Institutions
 - (g) Other configuration changes as recommended by the customer following feedback from site visits and network performance analysis.
 - (h) Configuring the network management console to integrate the new/upgraded Educational Institutions deployment into the management system. The following come to mind:
 1. Understand and agree to the network coverage and performance requirements
 2. Evaluate the current network infrastructure and develop a design plan to meet the network coverage and performance requirements
 3. Develop site-specific configuration recommendations including those for security and authentication
 4. Implement the design plan (installation) including configuration recommendations
 5. Test/validate that the deployment meets the network coverage and performance requirements through formal system acceptance testing to include connection of standard Educational Institution equipment
 6. Configure the network management console to integrate the new/upgraded Educational Institution deployment into the management system.