

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
101 Pleasant Street
CONCORD, NEW HAMPSHIRE 03301

DATE OF CHANGE: 4/7/22

ADDENDUM #2 – RFP 2022-DOE-DLS-Online Tutoring-01

DATE OF BID CLOSING: 4/12/22

TIME OF BID CLOSING: 4:00 PM

FOR: Online Tutoring Services

RESPONSES TO REQUEST FOR EXCEPTIONS TO P-37 CONTRACT:

Section 7.C. **(Property of the Agency)**. Contractor takes exception that the Proposal becomes the property of the State and confirms that it remains the property of the Contractor. Contractor herewith submits, as required pursuant to Section 7.E., its proposal noting such sections are confidential and should be restricted from public disclosure. Should the Contractor not be awarded the contract, the State shall have no right to further use the proposal or any information contained within it and must securely destroy all copies excluding one which the State shall be permitted to retain in order to comply with applicable laws.

RESPONSE: Denied

General Provisions, Section 2 (Services to be Performed) – There is no Exhibit B. Please clarify.

RESPONSE: References in the P-37 to Exhibits A, B and C are references to the required structure of any resulting contract (Exhibit A – Special Provisions/Amendments to the P-37, Exhibit B – Scope of Services, and Exhibit C – Payment Terms) and are not references to sections of this RFP. Exhibit A, B and C will be provided once a vendor is selected.

General Provisions, Section 4 (Conditional Nature of Agreement) – Delete in its entirety and replace with, “Intentionally Deleted.”

RESPONSE: Denied

General Provisions, Section 5 (Contract Price/Limitation/Payment).

Section 5.1 – There is no Exhibit C; Delete in its entirety and replace with: “The Contract price, method of payment and terms of payment are identified and set out in the Contractor’s proposal. Fees are payable in advance, on an annual basis, and within (30) days following the date of the invoice. All payments under this Agreement are non-refundable unless expressly indicated. All payments are exclusive of any tariffs, duties or taxes (including applicable transaction taxes) imposed or levied by any government or governmental agency. The State shall be liable for the payment of any and all such taxes, however designated, levied or based on the State or its end users’ possession or use of the Services including, federal, provincial, state or local sales taxes. The State agrees that all amounts payable by the State pursuant to this

Agreement shall be paid without any deduction or withholding on account of any taxes, monetary transfer fees, or other charges or withholdings of any nature. The State shall indemnify and hold the Contractor harmless for any and all costs and expenses to which the Contractor is subject as a result of the State's failure to pay such taxes."

RESPONSE: Denied. Cannot delete. References in the P-37 to Exhibits A, B and C are references to the required structure of any resulting contract (Exhibit A – Special Provisions/Amendments to the P-37, Exhibit B – Scope of Services, and Exhibit C – Payment Terms) and are not references to sections of this RFP. Exhibit A, B and C will be provided once a vendor is selected.

Section 5.2 – Delete: "The State shall have no liability to the Contractor other than the contract price."

RESPONSE: Denied. Cannot delete.

Section 5.3 – Delete in its entirety.

RESPONSE: Denied. Cannot delete. Required by statutes.

Section 5.4 – Add "for the Services" between "hereunder," and "exceed".

RESPONSE: Open to negotiate

General Provisions, Section 6 (Compliance by Contractor with Laws and Regulations/Equal Employment Opportunity)

Section 6.3 – Delete in its entirety and replace with: "Subject to applicable employment and privacy laws, the Contractor agrees to furnish copies of such books, records and accounts to the State or the United States as may be reasonably required to permit such party to ascertain compliance with all rules, regulations and order, and the covenants, terms and conditions of this Agreement."

RESPONSE: Open to negotiate

General Provisions, Section 8 (Event of Default/Remedies)

Section 8.1.1 – delete "satisfactorily" and replace it with "in accordance with the specifications of the RFP and the Contractor's proposal"

RESPONSE: Open to negotiate

Section 8.1.3 – insert "in any material respect" between "perform" and "any".

RESPONSE: Open to negotiate

Section 8.2.1 – Delete "or lesser"

RESPONSE: Open to negotiate

Section 8.2.2 – Delete in its entirety and replace with "Intentionally deleted".

RESPONSE: Open to negotiate

Section 8.2.3 – Delete in its entirety and replace with "Intentionally deleted."

RESPONSE: Open to negotiate

General Provisions, Section 9 (Termination)

Section 9.1 – Delete in its entirety and replace with “Intentionally deleted.”

RESPONSE: Open to negotiate

Section 9.2 – There is no Exhibit B. Please clarify.

RESPONSE: References in the P-37 to Exhibits A, B and C are references to the required structure of any resulting contract (Exhibit A – Special Provisions/Amendments to the P-37, Exhibit B – Scope of Services, and Exhibit C – Payment Terms) and are not references to sections of this RFP. Exhibit A, B and C will be provided once a vendor is selected.

General Provisions, Section 10 (Data/Access/Confidentiality/Preservation)

RESPONSE: Open to negotiate

Section 10.1. – Add “For clarity, data excludes personally identifiable information, the storage, processing and handling of which shall be governed by the terms of a data processing addendum executed between the parties, if applicable, or the privacy policy of the Contractor.”

Section 10.2 – Delete “and any property” and “or purchased with funds provided for that purpose”.

Section 10.3 – Insert “State” between “of” and “data” in both sentences.

ADD Section 10.4 – Insert: “A. Except as may be expressly provided by this Agreement or applicable laws, the Parties acknowledge that content contributed by users to the platform is not confidential as the functionality of the platform is based on student interactions being visible in whole or in part to administrators and teachers. Contractor may use such content for the purposes of providing the services and may use aggregated and de-identified data (provided that no personally identifiable information (“PII”) remains) for such other purposes as may be permitted by applicable laws, including but not limited to for marketing purposes, further development of the platform, and machine learning. PII provided to Contractor shall be treated as confidential information and shall be handled in accordance with the Contractor’s then applicable privacy policy and/or the provisions of any data processing addendum or agreement that may be executed by Contractor and the State (or its representative). Except as may be required by applicable laws, the terms of the agreement between the Contractor and the State are confidential.

B. During the performance of this Agreement, one Party (the “Disclosing Party”) may authorize the other Party (the “Receiving Party”) to access or host confidential information (hereinafter the “Confidential Information”). Subject to the other terms of this Agreement, Confidential Information shall include, without limitation, PII, log-in credentials, contracts, technical or financial information, databases, trade secrets and know-how. Confidential Information shall not include information that (i) is or will become public other than as a result of a breach of this Agreement, or (ii) was known to the Receiving Party prior to the disclosure thereof by the Disclosing Party, as evidenced by written documents.

C. The Receiving Party shall preserve the confidentiality of any Confidential Information, and shall refrain from using or disclosing the same for any purpose not previously approved in writing by the Disclosing Party or otherwise provided in this Agreement. However, the Receiving Party may

disclose Confidential Information in cases where (i) the information is made public through no fault of or contribution by the Receiving Party; (ii) the information was made available to the Receiving Party by a third party that was legally in possession thereof and was free to disclose same; (iii) the information was independently acquired by third parties without access to or knowledge of the Confidential Information; or (iv) disclosure was required by law or a court order, provided that the Receiving Party gives the Disclosing Party enough advance warning of this requirement so as to give the latter enough time to adopt whatever measures may be needed to avoid or limit the disclosure.

D. Upon request or upon termination of this Agreement, excluding such information that (i) has been de-identified, (ii) is required for business continuity, archival or accounting purposes, or (iii) is required by law to be retained, the Receiving Party shall immediately return or destroy the Confidential Information. Moreover, at the request of the Disclosing Party, the Receiving Party agrees to certify that all of the Confidential Information has been returned or destroyed, as the case may be."

ADD Section 10.5: "All content developed through the use of the platform shall be the property of the State and shall constitute State data, and the State hereby provides the Contractor and its affiliates and successors an irrevocable, perpetual, fully paid, worldwide, non-exclusive license to use, sub-license, copy, perform, display, make available, distribute, reproduce, adapt, modify, aggregate, and prepare derivative works, or incorporate into other works, such content within its discretion, provided that such content has been de-identified such that no PII remains."

General Provisions, Section 12 (Assignment/Delegation/Subcontracts)

Section 12.1 - Delete in its entirety and replace with "Intentionally deleted."

RESPONSE: Denied. Can't be deleted.

Section 12.2 – Delete in its entirety and replace with "Intentionally deleted."

RESPONSE: Denied. Can't be deleted.

General Provisions, Section 13 (Indemnification) – Delete "(or which may be claimed to arise out of)"; Delete "The State shall not be liable for any costs incurred by the Contractor arising out of this paragraph 13. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the State, which immunity is hereby reserved to the State." and replace it with: "NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN: A. IN NO EVENT SHALL THE CONTRACTOR BE LIABLE FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY COSTS OR DAMAGES, EVEN IF ADVISED OF THE POSSIBILITY THEREOF; B. IN NO EVENT SHALL THE CONTRACTOR'S AGGREGATE LIABILITY TO THE STATE UNDER THIS AGREEMENT AND/OR IN CONNECTION WITH THE DELIVERY OF THE SERVICES, FOR ANY AND ALL CLAIMS, LOSSES, EXPENSES, LIABILITIES, DAMAGES OR COSTS, OF ANY KIND OR FOR ANY REASON WHATSOEVER, INCLUDING WITHOUT LIMITATION EMOTIONAL DISTRESS OR BODILY INJURY, EXCEED THE TOTAL AMOUNT OF FEES PAID BY THE STATE TO THE CONTRACTOR IN THE SIX (6) MONTH PERIOD PRIOR TO ANY SUCH CLAIM, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. CONTRACTOR MAKES NO REPRESENTATION OR WARRANTY REGARDING THE SUITABILITY OF ANY SERVICE PROVIDER ON THE PLATFORM OR WITH RESPECT TO ANY THIRD PARTY VERIFICATION SERVICES THAT MAY BE REQUIRED. CONTRACTOR DOES NOT GUARANTEE THE ACCURACY, COMPLETENESS OR USEFULNESS OF ANY INFORMATION OBTAINED THROUGH THE PLATFORM OR ADOPT OR ENDORSE ANY OPINION, ADVICE OR STATEMENT PROVIDED, AND ANY RELIANCE IS AT THE SOLE RISK OF THE STATE AND/OR END USER, AS APPLICABLE. NOTWITHSTANDING ANYTHING TO THE CONTRARY, THE LIMITATIONS AND DISCLAIMERS OF LIABILITY IN THIS AGREEMENT AND IN THE

CONTRACTOR'S TERMS OF SERVICE ARE EFFECTIVE FOR ANY INDEMNIFICATION AND LIABILITY OBLIGATIONS HEREUNDER AS IF FULLY REPEATED HEREIN."

RESPONSE: Denied. Can't be deleted.

General Provisions, Section 14 (Insurance)

Section 14.1.2 – Delete in its entirety and replace with "Intentionally deleted."

RESPONSE: Denied. Can't be deleted.

General Provisions, Section 18 (Choice of Law and Forum) – Delete "New Hampshire" in two places and replace it with "New York".

RESPONSE: Denied. Can't be deleted.

General Provisions, Section 19 (Conflicting Terms) – There is no Exhibit A.

RESPONSE: References in the P-37 to Exhibits A, B and C are references to the required structure of any resulting contract (Exhibit A – Special Provisions/Amendments to the P-37, Exhibit B – Scope of Services, and Exhibit C – Payment Terms) and are not references to sections of this RFP. Exhibit A, B and C will be provided once a vendor is selected

General Provisions, Section 22 (Special Provisions) – There is no Exhibit A.

RESPONSE: References in the P-37 to Exhibits A, B and C are references to the required structure of any resulting contract (Exhibit A – Special Provisions/Amendments to the P-37, Exhibit B – Scope of Services, and Exhibit C – Payment Terms) and are not references to sections of this RFP. Exhibit A, B and C will be provided once a vendor is selected

General Provisions, Section 24 (Entire Agreement) – Add "together with its attachments and any documents incorporated by reference" between "Agreement," and "which".

RESPONSE: Denied

In addition, please ADD the following additional terms:

ADD Section 25 (Terms of Service, Privacy and Acceptable Use Policies) – "The State acknowledges that the access and use of the services shall be subject to the Contractor's then applicable terms of service, privacy policy, and acceptable use policy, each as may be updated or amended from time to time and are available on Contractor's website."

RESPONSE: Denied

ADD Section 26 (Intellectual Property) – "State recognizes and agrees that all trade-marks, inventions (whether patentable or not), patent applications, patents, industrial designs, works protected by copyright, trade secrets, know-how or other intellectual property in or related to the Services, including any suggestions that State or any final end user may make regarding the functionalities or other technical aspects (the "Intellectual Property") are, as between the parties, the exclusive property of Contractor. Upon the request of Contractor, State shall provide any reasonable documentation required to confirm Contractor's ownership in the Intellectual Property. All rights, titles and interests that are not specifically addressed in this Agreement are expressly reserved by the Contractor."

RESPONSE: Open to negotiate

AGENCY CONTACT: Ellie Riel
E:Mail: Eleanor.M.Riel@doe.nh.gov

NOTE: ALL CHANGES TO BID SOLICITATION NOTED IN ADDENDUMS WILL SUPERSEDE PREVIOUSLY SUBMITTED DOCUMENTS AND MUST BE SUBMITTED WITH THE BID. ALL OTHER SPECIFICATIONS REMAIN UNCHANGED AND VALID.

BIDDER _____ ADDRESS _____

BY _____
(this document must be signed)

_____ TEL. NO. _____
(please type or print name)

Please visit: <https://das.nh.gov/purchasing/vendorresources.aspx> (click on "Bid and Proposals") for complete bid and addendums.

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