



Department of Administration
Purchasing Division
2019 Washington Street East
Post Office Box 50130
Charleston, WV 25305-0130

State of West Virginia Purchase Order

Order Date: 07-22-2022

CORRECT ORDER NUMBER MUST APPEAR
ON ALL PACKAGES, INVOICES, AND
SHIPPING PAPERS. QUESTIONS
CONCERNING THIS ORDER SHOULD BE
DIRECTED TO THE DEPARTMENT
CONTACT.

Order Number:	CPO 0705 0705 LOT2300000002 1	Procurement Folder:	1026749
Document Name:	Refresh of (2) UPS Battery Systems AT BDC	Reason for Modification:	
Document Description:	Refresh of (2) UPS Battery Systems AT BDC		
Procurement Type:	Central Sole Source		
Buyer Name:	Toby L Welch		
Telephone:	(304) 558-8802		
Email:	toby.l.welch@wv.gov		
Shipping Method:	Best Way	Effective Start Date:	
Free on Board:	FOB Dest, Freight Prepaid	Effective End Date:	

VENDOR	DEPARTMENT CONTACT																				
Vendor Customer Code: 000000176081 EATON CORP PO BOX 93531 CHICAGO IL 60673-3531 US Vendor Contact Phone: 919-870-3400 Extension: Discount Details: <table><thead><tr><th></th><th>Discount Allowed</th><th>Discount Percentage</th><th>Discount Days</th></tr></thead><tbody><tr><td>#1</td><td>No</td><td>0.0000</td><td>0</td></tr><tr><td>#2</td><td>Not Entered</td><td></td><td></td></tr><tr><td>#3</td><td>Not Entered</td><td></td><td></td></tr><tr><td>#4</td><td>Not Entered</td><td></td><td></td></tr></tbody></table>		Discount Allowed	Discount Percentage	Discount Days	#1	No	0.0000	0	#2	Not Entered			#3	Not Entered			#4	Not Entered			Requestor Name: Jodi R Hash Requestor Phone: (304) 558-0500 Requestor Email: jhash@wvlottery.com 23 FILE LOCATION _____
	Discount Allowed	Discount Percentage	Discount Days																		
#1	No	0.0000	0																		
#2	Not Entered																				
#3	Not Entered																				
#4	Not Entered																				

INVOICE TO	SHIP TO
ACCOUNTS PAYABLE LOTTERY PO BOX 2067 CHARLESTON WV 25327-2067 US	LOTTERY 64 STERLING DRIVE BRIDGEPORT WV 26330 US

July 19/09/2022
Purchasing Division's File Copy

Total Order Amount: \$96,201.74

ENTERED

<i>TLW 7/22/22</i> PURCHASING DIVISION AUTHORIZATION DATE: <i>Mark A. Cox 8/15/2022</i> ELECTRONIC SIGNATURE ON FILE	ATTORNEY GENERAL APPROVAL AS TO FORM DATE: <i>John D. Gray</i> ELECTRONIC SIGNATURE ON FILE	ENCUMBRANCE CERTIFICATION DATE: ELECTRONIC SIGNATURE ON FILE
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9/9/2022

Extended Description:

One Time Purchase:

Direct Award: Pursuant to WV Code 5A-3-10c

REFRESH OF UPS BATTERIES AT BDC

The Vendor, Eaton Corp. Chicago IL, agrees to enter with the Agency, the West Virginia Lottery(IT Dept), into a one-time purchase to provide a refresh of two (2) UPS batteries, which will add four (4) years to the end of life for the units at BDC location - 64 Sterling Drive, Bridgeport WV, 26330 per the attached documentation incorporated herein by reference, and made a part of hereof.

Line	Commodity Code	Quantity	Unit	Unit Price	Total Price
1	26111700	0.00000		0.000000	96201.74
Service From	Service To	Manufacturer	Model No		

Commodity Line Description: Batteries and cells and accessories

Extended Description:

Qty 2- UPS Battery Refresh:

Powerware UPS Model 9390

(1) Serial: Ey213CAA04

(2) Serial EJ454CBC01

UPS Unit W/ Capacitor & Fan Replacement = \$48,100.87 x 2 = \$96,201.74 as per quotation

ORDER OF PRECEDENT AND MODIFICATION ADDENDUM

THIS ORDER OF PRECEDENT AND MODIFICATION ADDENDUM, (hereinafter "Addendum") by and between Eaton Corp. ("Eaton") and the West Virginia Lottery (hereinafter "State"), (both referred to as "Parties"), is intended to memorialize certain terms and conditions and to provide an order of precedent for all documents that comprise the contract resulting from the direct award solicitation for a UPS battery replacement identified as CSSD LOT2200000002 "Contract").

NOW THEREFORE, the Parties hereto hereby agree as follows:

- 1. Order of Precedence:** The Contract is comprised of the documents listed in this section. The terms and conditions contained in the various documents shall be interpreted according to the priority given to the Contract document in this section. In that way, any terms and conditions contained in the first priority document shall prevail over conflicting terms in the second priority document, and so on.

Contract Documents:

- a. **Order of Precedence and Modification Addendum (this document) – First Priority**
- b. **WV-96 Agreement Addendum (Attached as Exhibit A) – Second Priority**
- c. **State of West Virginia General Terms and Conditions (Attached as Exhibit B) – Third Priority**
- d. **Eaton Documents (Attached hereto as Exhibit C) – Fourth Priority**

- 2. Modifications:** The documents listed below are modified as indicated below.

- a. **WV-96:** The WV-96 document is modified as shown below:

- i. The term entitled "9 Limiting Liability" is removed in its entirety and replaced with the following:

"9. Limiting Liability – The Agency as a State Entity cannot agree to assume the potential liability of a Vendor. Vendor's liability shall not exceed ten (10) times the overall value of the underlying contract. Any claims arising under Vendor's indemnity obligations and/or Vendor's gross negligence, willful misconduct, fraud, or violation of law are not subject to the above limitations(c). Limitations on special, incidental or consequential damages are acceptable."

- b. **State of West Virginia General Terms and Conditions:** The State of West Virginia General Terms and Conditions are modified as shown below.

- i. The term entitled "8. INSURANCE" is modified by adding the phrase ", to the extent of Vendor's negligence herein," after the word "policy".

- ii. The term entitled "14. PAYMENT IN ARREARS" is modified by adding an additional sentence at the end as follows: "Payment shall be made Net 30 days from the date of Vendor's invoice."

- iii. The term entitled "19. CANCELLATION" is modified by adding an additional sentence at the end as follows: "If this right is exercised, the Agency agrees to pay Vendor only for all undisputed services rendered or goods received before the termination's effective date."

- iv. The term entitled "20. TIME" is modified by changing "the essence" to "importance".

- v. The term entitled "27. ASSIGNMENT" is modified by adding the phrase "which shall not be unreasonably delayed or denied," after the phrase "(as to form only)."

- vi. The term entitled "28. WARRANTY" is modified by removing it in its entirety.

- vii. The term entitled "30. PRIVACY, SECURITY, AND CONFIDENTIALITY" is removed in its entirety and replaced with the following:

"Vendor and Agency agree that at no time will Vendor be permitted to have physical or electronic access to Agency data."

viii. The term entitled "36. INDEMNIFICATION" is removed in its entirety.

ix. The term entitled "41. BACKGROUND CHECK" is removed in its entirety and replaced with the following:

"The State reserves the right to prohibit a service provider's employees from accessing sensitive or critical information or to be present at the Capitol complex based upon the results addressed from a criminal background check."

c. Additional Terms: The following additional terms are added to the Contract:

- i. 46. FORCE MAJEURE: Vendor shall not be liable for any failure to perform, or delay in performing services for the Agency to the extent such failure or delay results from causes beyond its reasonable control including, without limitation, any act of God, war, revolution, riot, civil commotion, labor strike, pandemic or epidemic, or any applicable governmental or judicial law or regulation order or decree.

IN WITNESS WHEREOF, the Parties have entered into this Addendum as of the date of last signature below.

STATE OF WEST VIRGINIA

By: Jocithash
Name: Jocithash
Its: Proc. Spec. Sr.
Date: 7/22/22

EATON CORP.

DocuSigned by:

By: Chris Super John Butler
Name: Christopher J Butler
Its: President, CPDI
Date: July 22, 2022 | 6:35 PDT

WV-96
1/1/2019

**STATE OF WEST VIRGINIA
ADDENDUM TO VENDOR'S STANDARD CONTRACTUAL FORMS**

State Agency, Board, or Commission (the "State"): WV Lottery
 Vendor: Eaton Corp.
 Contract/Lease Number ("Contract"): CPO WT23 *002
 Commodity/Service: Refresh of 2 Eaton UPS Systems

The State and the Vendor are entering into the Contract identified above. The Vendor desires to incorporate one or more forms it created into the Contract. Vendor's form(s), however, include(s) one or more contractual terms and conditions that the State cannot or will not accept. In consideration for the State's incorporating Vendor's form(s) into the Contract, the Vendor enters into this Addendum which specifically eliminates or alters the legal enforceability of certain terms and conditions contained in Vendor's form(s). Therefore, on the date shown below each signature line, the parties agree to the following contractual terms and conditions in this Addendum are dominate over any competing terms made a part of the Contract:

1. **ORDER OF PRECEDENCE:** This Addendum modifies and supersedes anything contained on Vendor's form(s) whether or not they are submitted before or after the signing of this Addendum. IN THE EVENT OF ANY CONFLICT BETWEEN VENDOR'S FORM(S) AND THIS ADDENDUM, THIS ADDENDUM SHALL CONTROL.
2. **PAYMENT** - Payments for goods/services will be made in arrears only upon receipt of a proper invoice, detailing the goods/services provided or receipt of the goods/services, whichever is later. Notwithstanding the foregoing, payments for software licenses, subscriptions, or maintenance may be paid annually in advance.

Any language imposing any interest or charges due to late payment is deleted.

3. **FISCAL YEAR FUNDING** - Performance of this Contract is contingent upon funds being appropriated by the WV Legislature or otherwise being available for this Contract. In the event funds are not appropriated or otherwise available, the Contract becomes of no effect and is null and void after June 30 of the current fiscal year. If that occurs, the State may notify the Vendor that an alternative source of funding has been obtained and thereby avoid the automatic termination. Non-appropriation or non-funding shall not be considered an event of default.
4. **RIGHT TO TERMINATE** - The State reserves the right to terminate this Contract upon thirty (30) days written notice to the Vendor. If this right is exercised, the State agrees to pay the Vendor only for all undisputed services rendered or goods received before the termination's effective date. All provisions are deleted that seek to require the State to (1) compensate Vendor, in whole or in part, for lost profit, (2) pay a termination fee, or (3) pay liquidated damages if the Contract is terminated early.

Any language seeking to accelerate payments in the event of Contract termination, default, or non-funding is hereby deleted.

5. **DISPUTES** - Any language binding the State to any arbitration or to the decision of any arbitration board, commission, panel or other entity is deleted; as is any requirement to waive a jury trial.

Any language requiring or permitting disputes under this Contract to be resolved in the courts of any state other than the State of West Virginia is deleted. All legal actions for damages brought by Vendor against the State shall be brought in the West Virginia Claims Commission. Other causes of action must be brought in the West Virginia court authorized by statute to exercise jurisdiction over it.

Any language requiring the State to agree to, or be subject to, any form of equitable relief not authorized by the Constitution or laws of State of West Virginia is deleted.

6. **FEES OR COSTS:** Any language obligating the State to pay costs of collection, court costs, or attorney's fees, unless ordered by a court of competent jurisdiction is deleted.
7. **GOVERNING LAW** - Any language requiring the application of the law of any state other than the State of West Virginia in interpreting or enforcing the Contract is deleted. The Contract shall be governed by the laws of the State of West Virginia.
8. **RISK SHIFTING** - Any provision requiring the State to bear the costs of all or a majority of business/legal risks associated with this Contract, to indemnify the Vendor, or hold the Vendor or a third party harmless for any act or omission is hereby deleted.
9. **LIMITING LIABILITY** - ~~Any language limiting the Vendor's liability for direct damages to person or property is deleted.~~ The Agency as a State Entity cannot agree to assume the potential liability of a Vendor. Vendor's liability shall not exceed ten (10) times the overall value of the Purchase Order and/or underlying contract. Any claims arising under Vendor's Indemnity obligations and/or Vendor's gross negligence, willful misconduct, fraud, or violation of law are not subject to the above limitation(s). Limitations on special, incidental or consequential damages are acceptable.

WV-86
1/1/2019

10. **TAXES** - Any provisions requiring the State to pay Federal, State or local taxes or file tax returns or reports on behalf of Vendor are deleted. The State will, upon request, provide a tax exempt certificate to confirm its tax exempt status.
11. **NO WAIVER** - Any provision requiring the State to waive any rights, claims or defenses is hereby deleted.
12. **STATUTE OF LIMITATIONS** - Any clauses limiting the time in which the State may bring suit against the Vendor or any other third party are deleted.
13. **ASSIGNMENT** - The Vendor agrees not to assign the Contract to any person or entity without the State's prior written consent, which will not be unreasonably delayed or denied. The State reserves the right to assign this Contract to another State agency, board or commission upon thirty (30) days written notice to the Vendor. These restrictions do not apply to the payments made by the State. Any assignment will not become effective and binding upon the State until the State is notified of the assignment, and the State and Vendor execute a change order to the Contract.
14. **RENEWAL** - Any language that seeks to automatically renew, modify, or extend the Contract beyond the initial term or automatically continue the Contract period from term to term is deleted. The Contract may be renewed or continued only upon mutual written agreement of the Parties.
15. **INSURANCE** - Any provision requiring the State to maintain any type of insurance for either its or the Vendor's benefit is deleted.
16. **RIGHT TO REPOSSESSION NOTICE** - Any provision for repossession of equipment without notice is hereby deleted. However, the State does recognize a right of repossession with notice.
17. **DELIVERY** - All deliveries under the Contract will be FOB destination unless the State expressly and knowingly agrees otherwise. Any contrary delivery terms are hereby deleted.
18. **CONFIDENTIALITY** - Any provisions regarding confidential treatment or non-disclosure of the terms and conditions of the Contract are hereby deleted. State contracts are public records under the West Virginia Freedom of Information Act ("FOIA") (W. Va. Code §29B-a-1, et seq.) and public procurement laws. This Contract and other public records may be disclosed without notice to the vendor at the State's sole discretion.
- Any provisions regarding confidentiality or non-disclosure related to contract performance are only effective to the extent they are consistent with FOIA and incorporated into the Contract through a separately approved and signed non-disclosure agreement.
19. **THIRD-PARTY SOFTWARE** - If this Contract contemplates or requires the use of third-party software, the vendor represents that none of the mandatory click-through, unsigned, or web-linked terms and conditions presented or required before using such third-party software conflict with any term of this Addendum or that it has the authority to modify such third-party software's terms and conditions to be subordinate to this Addendum. The Vendor shall indemnify and defend the State against all claims resulting from an assertion that such third-party terms and conditions are not in accord with, or subordinate to, this Addendum.
20. **AMENDMENTS** - The parties agree that all amendments, modifications, alterations or changes to the Contract shall be by mutual agreement, in writing, and signed by both parties. Any language to the contrary is deleted.

Notwithstanding the foregoing, this Addendum can only be amended by (1) identifying the alterations to this form by using *italics* to identify language being added and ~~strike through~~ for language being deleted (do not use track-changes) and (2) having the Office of the West Virginia Attorney General's authorized representative expressly agree to and knowingly approve those alterations.

State: WV
By: Jodi Hash
Printed Name: Jodi Hash
Title: Procurement Spec. Sr.

7/22/22

Vendor: Eaton
Signed by: Chris J. Butler
By: Chris J. Butler
Printed Name: Christopher J Butler
Title: President, CPDI
March 28, 2022 | 5:01 PDT

GENERAL TERMS AND CONDITIONS:

1. CONTRACTUAL AGREEMENT: Issuance of an Award Document signed by the Purchasing Division Director, or his designee, and approved as to form by the Attorney General's office constitutes acceptance by the State of this Contract made by and between the State of West Virginia and the Vendor. Vendor's signature on its bid, or on the Contract if the Contract is not the result of a bid solicitation, signifies Vendor's agreement to be bound by and accept the terms and conditions contained in this Contract.

2. DEFINITIONS: As used in this Solicitation/Contract, the following terms shall have the meanings attributed to them below. Additional definitions may be found in the specifications included with this Solicitation/Contract.

2.1. "Agency" or "Agencies" means the agency, board, commission, or other entity of the State of West Virginia that is identified on the first page of the Solicitation or any other public entity seeking to procure goods or services under this Contract.

2.2. "Bid" or "Proposal" means the vendors submitted response to this solicitation.

2.3. "Contract" means the binding agreement that is entered into between the State and the Vendor to provide the goods or services requested in the Solicitation.

2.4. "Director" means the Director of the West Virginia Department of Administration, Purchasing Division.

2.5. "Purchasing Division" means the West Virginia Department of Administration, Purchasing Division.

2.6. "Award Document" means the document signed by the Agency and the Purchasing Division, and approved as to form by the Attorney General, that identifies the Vendor as the contract holder.

2.7. "Solicitation" means the official notice of an opportunity to supply the State with goods or services that is published by the Purchasing Division.

2.8. "State" means the State of West Virginia and/or any of its agencies, commissions, boards, etc. as context requires.

2.9. "Vendor" or "Vendors" means any entity submitting a bid in response to the Solicitation, the entity that has been selected as the lowest responsible bidder, or the entity that has been awarded the Contract as context requires.

3. CONTRACT TERM; RENEWAL; EXTENSION: The term of this Contract shall be determined in accordance with the category that has been identified as applicable to this Contract below:

☐ **Term Contract**

Initial Contract Term: The Initial Contract Term will be for a period of _____. The Initial Contract Term becomes effective on the effective start date listed on the first page of this Contract, identified as the State of West Virginia contract cover page containing the signatures of the Purchasing Division, Attorney General, and Encumbrance clerk (or another page identified as _____), and the Initial Contract Term ends on the effective end date also shown on the first page of this Contract.

Renewal Term: This Contract may be renewed upon the mutual written consent of the Agency, and the Vendor, with approval of the Purchasing Division and the Attorney General's office (Attorney General approval is as to form only). Any request for renewal should be delivered to the Agency and then submitted to the Purchasing Division thirty (30) days prior to the expiration date of the initial contract term or appropriate renewal term. A Contract renewal shall be in accordance with the terms and conditions of the original contract. Unless otherwise specified below, renewal of this Contract is limited to _____ successive one (1) year periods or multiple renewal periods of less than one year, provided that the multiple renewal periods do not exceed the total number of months available in all renewal years combined. Automatic renewal of this Contract is prohibited. Renewals must be approved by the Vendor, Agency, Purchasing Division and Attorney General's office (Attorney General approval is as to form only)

☐ **Alternate Renewal Term** – This contract may be renewed for _____ successive _____ year periods or shorter periods provided that they do not exceed the total number of months contained in all available renewals. Automatic renewal of this Contract is prohibited. Renewals must be approved by the Vendor, Agency, Purchasing Division and Attorney General's office (Attorney General approval is as to form only)

Delivery Order Limitations: In the event that this contract permits delivery orders, a delivery order may only be issued during the time this Contract is in effect. Any delivery order issued within one year of the expiration of this Contract shall be effective for one year from the date the delivery order is issued. No delivery order may be extended beyond one year after this Contract has expired.

☐ **Fixed Period Contract:** This Contract becomes effective upon Vendor's receipt of the notice to proceed and must be completed within _____ days.

☐ **Fixed Period Contract with Renewals:** This Contract becomes effective upon Vendor's receipt of the notice to proceed and part of the Contract more fully described in the attached specifications must be completed within _____ days. Upon completion of the work covered by the preceding sentence, the vendor agrees that:

☐ the contract will continue for _____ years;

☐ the contract may be renewed for _____ successive _____ year periods or shorter periods provided that they do not exceed the total number of months contained in all available renewals. Automatic renewal of this Contract is prohibited. Renewals must be approved by the Vendor, Agency, Purchasing Division and Attorney General's Office (Attorney General approval is as to form only).

☒ **One-Time Purchase:** The term of this Contract shall run from the issuance of the Award Document until all of the goods contracted for have been delivered, but in no event will this Contract extend for more than one fiscal year.

☐ **Construction/Project Oversight:** This Contract becomes effective on the effective start date listed on the first page of this Contract, identified as the State of West Virginia contract cover page containing the signatures of the Purchasing Division, Attorney General, and Encumbrance clerk (or another page identified as _____), and continues until the project for which the vendor is providing oversight is complete.

☐ **Other:** Contract Term specified in _____

4. AUTHORITY TO PROCEED: Vendor is authorized to begin performance of this contract on the date of encumbrance listed on the front page of the Award Document unless either the box for "Fixed Period Contract" or "Fixed Period Contract with Renewals" has been checked in Section 3 above. If either "Fixed Period Contract" or "Fixed Period Contract with Renewals" has been checked, Vendor must not begin work until it receives a separate notice to proceed from the State. The notice to proceed will then be incorporated into the Contract via change order to memorialize the official date that work commenced.

5. QUANTITIES: The quantities required under this Contract shall be determined in accordance with the category that has been identified as applicable to this Contract below.

☐ **Open End Contract:** Quantities listed in this Solicitation/Award Document are approximations only, based on estimates supplied by the Agency. It is understood and agreed that the Contract shall cover the quantities actually ordered for delivery during the term of the Contract, whether more or less than the quantities shown.

☐ **Service:** The scope of the service to be provided will be more clearly defined in the specifications included herewith.

☒ **Combined Service and Goods:** The scope of the service and deliverable goods to be provided will be more clearly defined in the specifications included herewith.

☐ **One-Time Purchase:** This Contract is for the purchase of a set quantity of goods that are identified in the specifications included herewith. Once those items have been delivered, no additional goods may be procured under this Contract without an appropriate change order approved by the Vendor, Agency, Purchasing Division, and Attorney General's office.

6. EMERGENCY PURCHASES: The Purchasing Division Director may authorize the Agency to purchase goods or services in the open market that Vendor would otherwise provide under this Contract if those goods or services are for immediate or expedited delivery in an emergency. Emergencies shall include, but are not limited to, delays in transportation or an unanticipated increase in the volume of work. An emergency purchase in the open market, approved by the Purchasing Division Director, shall not constitute of breach of this Contract and shall not entitle the Vendor to any form of compensation or damages. This provision does not excuse the State from fulfilling its obligations under a One-Time Purchase contract.

7. REQUIRED DOCUMENTS: All of the items checked in this section must be provided to the Purchasing Division by the Vendor as specified:

☐ **BID BOND (Construction Only):** Pursuant to the requirements contained in W. Va. Code § 5-22-1(c), All Vendors submitting a bid on a construction project shall furnish a valid bid bond in the amount of five percent (5%) of the total amount of the bid protecting the State of West Virginia. The bid bond must be submitted with the bid.

☐ **PERFORMANCE BOND:** The apparent successful Vendor shall provide a performance bond in the amount of 100% of the contract. The performance bond must be received by the Purchasing Division prior to Contract award.

☐ **LABOR/MATERIAL PAYMENT BOND:** The apparent successful Vendor shall provide a labor/material payment bond in the amount of 100% of the Contract value. The labor/material payment bond must be delivered to the Purchasing Division prior to Contract award.

In lieu of the Bid Bond, Performance Bond, and Labor/Material Payment Bond, the Vendor may provide certified checks, cashier's checks, or irrevocable letters of credit. Any certified check, cashier's check, or irrevocable letter of credit provided in lieu of a bond must be of the same amount and delivered on the same schedule as the bond it replaces. A letter of credit submitted in lieu of a performance and labor/material payment bond will only be allowed for projects under \$100,000. Personal or business checks are not acceptable. Notwithstanding the foregoing, West Virginia Code § 5-22-1 (d) mandates that a vendor provide a performance and labor/material payment bond for construction projects. Accordingly, substitutions for the performance and labor/material payment bonds for construction projects is not permitted.

☐ **MAINTENANCE BOND:** The apparent successful Vendor shall provide a two (2) year maintenance bond covering the roofing system. The maintenance bond must be issued and delivered to the Purchasing Division prior to Contract award.

☐ **LICENSE(S) / CERTIFICATIONS / PERMITS:** In addition to anything required under the Section of the General Terms and Conditions entitled Licensing, the apparent successful Vendor shall furnish proof of the following licenses, certifications, and/or permits upon request and in a form acceptable to the State. The request may be prior to or after contract award at the State's sole discretion.

☐☐☐☐

The apparent successful Vendor shall also furnish proof of any additional licenses or certifications contained in the specifications regardless of whether or not that requirement is listed above.

8. INSURANCE: The apparent successful Vendor shall furnish proof of the insurance identified by a checkmark below and must include the State as an additional insured on each policy prior to Contract award. The insurance coverages identified below must be maintained throughout the life of this contract. Thirty (30) days prior to the expiration of the insurance policies, Vendor shall provide the Agency with proof that the insurance mandated herein has been continued. Vendor must also provide Agency with immediate notice of any changes in its insurance policies, including but not limited to, policy cancelation, policy reduction, or change in insurers. The apparent successful Vendor shall also furnish proof of any additional insurance requirements contained in the specifications prior to Contract award regardless of whether that insurance requirement is listed in this section.

Vendor must maintain:

☒ **Commercial General Liability Insurance** in at least an amount of: \$1,000,000.00 per occurrence.

☐ **Automobile Liability Insurance** in at least an amount of: _____ per occurrence.

☐ **Professional/Malpractice/Errors and Omission Insurance** in at least an amount of: _____ per occurrence. Notwithstanding the forgoing, Vendor's are not required to list the State as an additional insured for this type of policy.

☐ **Commercial Crime and Third Party Fidelity Insurance** in an amount of: _____ per occurrence.

☐ **Cyber Liability Insurance** in an amount of: _____ per occurrence.

☐ **Builders Risk Insurance** in an amount equal to 100% of the amount of the Contract.

☐ **Pollution Insurance** in an amount of: _____ per occurrence.

☐ **Aircraft Liability** in an amount of: _____ per occurrence.

☐

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☐

☐

Notwithstanding anything contained in this section to the contrary, the Director of the Purchasing Division reserves the right to waive the requirement that the State be named as an additional insured on one or more of the Vendor's insurance policies if the Director finds that doing so is in the State's best interest.

9. WORKERS' COMPENSATION INSURANCE: Vendor shall comply with laws relating to workers compensation, shall maintain workers' compensation insurance when required, and shall furnish proof of workers' compensation insurance upon request.

10. [Reserved]

11. LIQUIDATED DAMAGES: This clause shall in no way be considered exclusive and shall not limit the State or Agency's right to pursue any other available remedy. Vendor shall pay liquidated damages in the amount specified below or as described in the specifications:

☐ _____ for _____.

☐ Liquidated Damages Contained in the Specifications.

☒ Liquidated Damages Are Not Included in this Contract.

12. ACCEPTANCE: Vendor's signature on its bid, or on the certification and signature page, constitutes an offer to the State that cannot be unilaterally withdrawn, signifies that the product or service proposed by vendor meets the mandatory requirements contained in the Solicitation for that product or service, unless otherwise indicated, and signifies acceptance of the terms and conditions contained in the Solicitation unless otherwise indicated.

13. PRICING: The pricing set forth herein is firm for the life of the Contract, unless specified elsewhere within this Solicitation/Contract by the State. A Vendor's inclusion of price adjustment provisions in its bid, without an express authorization from the State in the Solicitation to do so, may result in bid disqualification. Notwithstanding the foregoing, Vendor must extend any publicly advertised sale price to the State and invoice at the lower of the contract price or the publicly advertised sale price.

14. PAYMENT IN ARREARS: Payments for goods/services will be made in arrears only upon receipt of a proper invoice, detailing the goods/services provided or receipt of the goods/services, whichever is later. Notwithstanding the foregoing, payments for software maintenance, licenses, or subscriptions may be paid annually in advance.

15. PAYMENT METHODS: Vendor must accept payment by electronic funds transfer and P-Card. (The State of West Virginia's Purchasing Card program, administered under contract by a banking institution, processes payment for goods and services through state designated credit cards.)

16. TAXES: The Vendor shall pay any applicable sales, use, personal property or any other taxes arising out of this Contract and the transactions contemplated thereby. The State of West Virginia is exempt from federal and state taxes and will not pay or reimburse such taxes.

17. ADDITIONAL FEES: Vendor is not permitted to charge additional fees or assess additional charges that were not either expressly provided for in the solicitation published by the State of West Virginia, included in the Contract, or included in the unit price or lump sum bid amount that Vendor is required by the solicitation to provide. Including such fees or charges as notes to the solicitation may result in rejection of vendor's bid. Requesting such fees or charges be paid after the contract has been awarded may result in cancellation of the contract.

18. FUNDING: This Contract shall continue for the term stated herein, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise made available, this Contract becomes void and of no effect beginning on July 1 of the fiscal year for which funding has not been appropriated or otherwise made available. If that occurs, the State may notify the Vendor that an alternative source of funding has been obtained and thereby avoid the automatic termination. Non-appropriation or non-funding shall not be considered an event of default.

19. CANCELLATION: The Purchasing Division Director reserves the right to cancel this Contract immediately upon written notice to the vendor if the materials or workmanship supplied do not conform to the specifications contained in the Contract. The Purchasing Division Director may also cancel any purchase or Contract upon 30 days written notice to the Vendor in accordance with West Virginia Code of State Rules § 148-1-5.2.b.

20. TIME: Time is of the essence regarding all matters of time and performance in this Contract.

21. APPLICABLE LAW: This Contract is governed by and interpreted under West Virginia law without giving effect to its choice of law principles. Any information provided in specification manuals, or any other source, verbal or written, which contradicts or violates the West Virginia Constitution, West Virginia Code, or West Virginia Code of State Rules is void and of no effect.

22. COMPLIANCE WITH LAWS: Vendor shall comply with all applicable federal, state, and local laws, regulations and ordinances. By submitting a bid, Vendor acknowledges that it has reviewed, understands, and will comply with all applicable laws, regulations, and ordinances.

SUBCONTRACTOR COMPLIANCE: Vendor shall notify all subcontractors providing commodities or services related to this Contract that as subcontractors, they too are required to comply with all applicable laws, regulations, and ordinances. Notification under this provision must occur prior to the performance of any work under the contract by the subcontractor.

23. ARBITRATION: Any references made to arbitration contained in this Contract, Vendor's bid, or in any American Institute of Architects documents pertaining to this Contract are hereby deleted, void, and of no effect.

24. MODIFICATIONS: This writing is the parties' final expression of intent. Notwithstanding anything contained in this Contract to the contrary no modification of this Contract shall be binding without mutual written consent of the Agency, and the Vendor, with approval of the Purchasing Division and the Attorney General's office (Attorney General approval is as to form only). Any change to existing contracts that adds work or changes contract cost, and were not included in the original contract, must be approved by the Purchasing Division and the Attorney General's Office (as to form) prior to the implementation of the change or commencement of work affected by the change.

25. WAIVER: The failure of either party to insist upon a strict performance of any of the terms or provision of this Contract, or to exercise any option, right, or remedy herein contained, shall not be construed as a waiver or a relinquishment for the future of such term, provision, option, right, or remedy, but the same shall continue in full force and effect. Any waiver must be expressly stated in writing and signed by the waiving party.

26. SUBSEQUENT FORMS: The terms and conditions contained in this Contract shall supersede any and all subsequent terms and conditions which may appear on any form documents submitted by Vendor to the Agency or Purchasing Division such as price lists, order forms, invoices, sales agreements, or maintenance agreements, and includes internet websites or other electronic documents. Acceptance or use of Vendor's forms does not constitute acceptance of the terms and conditions contained thereon.

27. ASSIGNMENT: Neither this Contract nor any monies due, or to become due hereunder, may be assigned by the Vendor without the express written consent of the Agency, the Purchasing Division, the Attorney General's office (as to form only), and any other government agency or office that may be required to approve such assignments.

28. WARRANTY: The Vendor expressly warrants that the goods and/or services covered by this Contract will: (a) conform to the specifications, drawings, samples, or other description furnished or specified by the Agency; (b) be merchantable and fit for the purpose intended; and (c) be free from defect in material and workmanship.

29. STATE EMPLOYEES: State employees are not permitted to utilize this Contract for personal use and the Vendor is prohibited from permitting or facilitating the same.

30. PRIVACY, SECURITY, AND CONFIDENTIALITY: The Vendor agrees that it will not disclose to anyone, directly or indirectly, any such personally identifiable information or other confidential information gained from the Agency, unless the individual who is the subject of the information consents to the disclosure in writing or the disclosure is made pursuant to the Agency's policies, procedures, and rules. Vendor further agrees to comply with the Confidentiality Policies and Information Security Accountability Requirements, set forth in <http://www.state.wv.us/admin/purchase/privacy/default.html>.

31. YOUR SUBMISSION IS A PUBLIC DOCUMENT: Vendor's entire response to the Solicitation and the resulting Contract are public documents. As public documents, they will be disclosed to the public following the bid/proposal opening or award of the contract, as required by the competitive bidding laws of West Virginia Code §§ 5A-3-1 et seq., 5-22-1 et seq., and 5G-1-1 et seq. and the Freedom of Information Act West Virginia Code §§ 29B-1-1 et seq.

DO NOT SUBMIT MATERIAL YOU CONSIDER TO BE CONFIDENTIAL, A TRADE SECRET, OR OTHERWISE NOT SUBJECT TO PUBLIC DISCLOSURE.

Submission of any bid, proposal, or other document to the Purchasing Division constitutes your explicit consent to the subsequent public disclosure of the bid, proposal, or document. The Purchasing Division will disclose any document labeled "confidential," "proprietary," "trade secret," "private," or labeled with any other claim against public disclosure of the documents, to include any "trade secrets" as defined by West Virginia Code § 47-22-1 et seq. All submissions are subject to public disclosure without notice.

32. LICENSING: In accordance with West Virginia Code of State Rules § 148-1-6.1.e, Vendor must be licensed and in good standing in accordance with any and all state and local laws and requirements by any state or local agency of West Virginia, including, but not limited to, the West Virginia Secretary of State's Office, the West Virginia Tax Department, West Virginia Insurance Commission, or any other state agency or political subdivision. Obligations related to political subdivisions may include, but are not limited to, business licensing, business and occupation taxes, inspection compliance, permitting, etc. Upon request, the Vendor must provide all necessary releases to obtain information to enable the Purchasing Division Director or the Agency to verify that the Vendor is licensed and in good standing with the above entities.

SUBCONTRACTOR COMPLIANCE: Vendor shall notify all subcontractors providing commodities or services related to this Contract that as subcontractors, they too are required to be licensed, in good standing, and up-to-date on all state and local obligations as described in this section. Obligations related to political subdivisions may include, but are not limited to, business licensing, business and occupation taxes, inspection compliance, permitting, etc. Notification under this provision must occur prior to the performance of any work under the contract by the subcontractor.

33. ANTITRUST: In submitting a bid to, signing a contract with, or accepting a Award Document from any agency of the State of West Virginia, the Vendor agrees to convey, sell, assign, or transfer to the State of West Virginia all rights, title, and interest in and to all causes of action it may now or hereafter acquire under the antitrust laws of the United States and the State of West Virginia for price fixing and/or unreasonable restraints of trade relating to the particular commodities or services purchased or acquired by the State of West Virginia. Such assignment shall be made and become effective at the time the purchasing agency tenders the initial payment to Vendor.

34. VENDOR CERTIFICATIONS: By signing its bid or entering into this Contract, Vendor certifies (1) that its bid or offer was made without prior understanding, agreement, or connection with any corporation, firm, limited liability company, partnership, person or entity submitting a bid or offer for the same material, supplies, equipment or services; (2) that its bid or offer is in all respects fair and without collusion or fraud; (3) that this Contract is accepted or entered into without any prior understanding, agreement, or connection to any other entity that could be considered a violation of law; and (4) that it has reviewed this Solicitation in its entirety; understands the requirements, terms and conditions, and other information contained herein.

Vendor's signature on its bid or offer also affirms that neither it nor its representatives have any interest, nor shall acquire any interest, direct or indirect, which would compromise the performance of its services hereunder. Any such interests shall be promptly presented in detail to the Agency. The individual signing this bid or offer on behalf of Vendor certifies that he or she is authorized by the Vendor to execute this bid or offer or any documents related thereto on Vendor's behalf; that he or she is authorized to bind the Vendor in a contractual relationship; and that, to the best of his or her knowledge, the Vendor has properly registered with any State agency that may require registration.

35. VENDOR RELATIONSHIP: The relationship of the Vendor to the State shall be that of an independent contractor and no principal-agent relationship or employer-employee relationship is contemplated or created by this Contract. The Vendor as an independent contractor is solely liable for the acts and omissions of its employees and agents. Vendor shall be responsible for selecting, supervising, and compensating any and all individuals employed pursuant to the terms of this Solicitation and resulting contract. Neither the Vendor, nor any employees or subcontractors of the Vendor, shall be deemed to be employees of the State for any purpose whatsoever. Vendor shall be exclusively responsible for payment of employees and contractors for all wages and salaries, taxes, withholding payments, penalties, fees, fringe benefits, professional liability insurance premiums, contributions to insurance and pension, or other deferred compensation plans, including but not limited to, Workers' Compensation and Social Security obligations, licensing fees, etc. and the filing of all necessary documents, forms, and returns pertinent to all of the foregoing.

Vendor shall hold harmless the State, and shall provide the State and Agency with a defense against any and all claims including, but not limited to, the foregoing payments, withholdings, contributions, taxes, Social Security taxes, and employer income tax returns.

36. INDEMNIFICATION: The Vendor agrees to indemnify, defend, and hold harmless the State and the Agency, their officers, and employees from and against: (1) Any claims or losses for services rendered by any subcontractor, person, or firm performing or supplying services, materials, or supplies in connection with the performance of the Contract; (2) Any claims or losses resulting to any person or entity injured or damaged by the Vendor, its officers, employees, or subcontractors by the publication, translation, reproduction, delivery, performance, use, or disposition of any data used under the Contract in a manner not authorized by the Contract, or by Federal or State statutes or regulations; and (3) Any failure of the Vendor, its officers, employees, or subcontractors to observe State and Federal laws including, but not limited to, labor and wage and hour laws.

37. NO DEBT CERTIFICATION: In accordance with West Virginia Code §§ 5A-3-10a and 5-22-1(i), the State is prohibited from awarding a contract to any bidder that owes a debt to the State or a political subdivision of the State. By submitting a bid, or entering into a contract with the State, Vendor is affirming that (1) for construction contracts, the Vendor is not in default on any monetary obligation owed to the state or a political subdivision of the state, and (2) for all other contracts, neither the Vendor nor any related party owe a debt as defined above, and neither the Vendor nor any related party are in employer default as defined in the statute cited above unless the debt or employer default is permitted under the statute.

38. CONFLICT OF INTEREST: Vendor, its officers or members or employees, shall not presently have or acquire an interest, direct or indirect, which would conflict with or compromise the performance of its obligations hereunder. Vendor shall periodically inquire of its officers, members and employees to ensure that a conflict of interest does not arise. Any conflict of interest discovered shall be promptly presented in detail to the Agency.

39. REPORTS: Vendor shall provide the Agency and/or the Purchasing Division with the following reports identified by a checked box below:

☒ Such reports as the Agency and/or the Purchasing Division may request. Requested reports may include, but are not limited to, quantities purchased, agencies utilizing the contract, total contract expenditures by agency, etc.

☐ Quarterly reports detailing the total quantity of purchases in units and dollars, along with a listing of purchases by agency. Quarterly reports should be delivered to the Purchasing Division via email at purchasing.division@wv.gov.

40. BACKGROUND CHECK: In accordance with W. Va. Code § 15-2D-3, the State reserves the right to prohibit a service provider's employees from accessing sensitive or critical information or to be present at the Capitol complex based upon results addressed from a criminal background check. Service providers should contact the West Virginia Division of Protective Services by phone at (304) 558-9911 for more information.

41. PREFERENCE FOR USE OF DOMESTIC STEEL PRODUCTS: Except when authorized by the Director of the Purchasing Division pursuant to W. Va. Code § 5A-3-56, no contractor may use or supply steel products for a State Contract Project other than those steel products made in the United States. A contractor who uses steel products in violation of this section may be subject to civil penalties pursuant to W. Va. Code § 5A-3-56. As used in this section:

- a. “State Contract Project” means any erection or construction of, or any addition to, alteration of or other improvement to any building or structure, including, but not limited to, roads or highways, or the installation of any heating or cooling or ventilating plants or other equipment, or the supply of and materials for such projects, pursuant to a contract with the State of West Virginia for which bids were solicited on or after June 6, 2001.
- b. “Steel Products” means products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more or such operations, from steel made by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process.
- c. The Purchasing Division Director may, in writing, authorize the use of foreign steel products if:
 1. The cost for each contract item used does not exceed one tenth of one percent (.1%) of the total contract cost or two thousand five hundred dollars (\$2,500.00), whichever is greater. For the purposes of this section, the cost is the value of the steel product as delivered to the project; or
 2. The Director of the Purchasing Division determines that specified steel materials are not produced in the United States in sufficient quantity or otherwise are not reasonably available to meet contract requirements.

42. PREFERENCE FOR USE OF DOMESTIC ALUMINUM, GLASS, AND STEEL: In Accordance with W. Va. Code § 5-19-1 et seq., and W. Va. CSR § 148-10-1 et seq., for every contract or subcontract, subject to the limitations contained herein, for the construction, reconstruction, alteration, repair, improvement or maintenance of public works or for the purchase of any item of machinery or equipment to be used at sites of public works, only domestic aluminum, glass or steel products shall be supplied unless the spending officer determines, in writing, after the receipt of offers or bids, (1) that the cost of domestic aluminum, glass or steel products is unreasonable or inconsistent with the public interest of the State of West Virginia, (2) that domestic aluminum, glass or steel products are not produced in sufficient quantities to meet the contract requirements, or (3) the available domestic aluminum, glass, or steel do not meet the contract specifications. This provision only applies to public works contracts awarded in an amount more than fifty thousand dollars (\$50,000) or public works contracts that require more than ten thousand pounds of steel products.

The cost of domestic aluminum, glass, or steel products may be unreasonable if the cost is more than twenty percent (20%) of the bid or offered price for foreign made aluminum, glass, or steel products. If the domestic aluminum, glass or steel products to be supplied or produced in a “substantial labor surplus area”, as defined by the United States Department of Labor, the cost of domestic aluminum, glass, or steel products may be unreasonable if the cost is more than thirty percent (30%) of the bid or offered price for foreign made aluminum, glass, or steel

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products. This preference shall be applied to an item of machinery or equipment, as indicated above, when the item is a single unit of equipment or machinery manufactured primarily of aluminum, glass or steel, is part of a public works contract and has the sole purpose or of being a permanent part of a single public works project. This provision does not apply to equipment or machinery purchased by a spending unit for use by that spending unit and not as part of a single public works project.

All bids and offers including domestic aluminum, glass or steel products that exceed bid or offer prices including foreign aluminum, glass or steel products after application of the preferences provided in this provision may be reduced to a price equal to or lower than the lowest bid or offer price for foreign aluminum, glass or steel products plus the applicable preference. If the reduced bid or offer prices are made in writing and supersede the prior bid or offer prices, all bids or offers, including the reduced bid or offer prices, will be reevaluated in accordance with this rule.

43. INTERESTED PARTY SUPPLEMENTAL DISCLOSURE: W. Va. Code § 6D-1-2 requires that for contracts with an actual or estimated value of at least \$1 million, the Vendor must submit to the Agency a disclosure of interested parties prior to beginning work under this Contract. Additionally, the Vendor must submit a supplemental disclosure of interested parties reflecting any new or differing interested parties to the contract, which were not included in the original pre-work interested party disclosure, within 30 days following the completion or termination of the contract. A copy of that form is included with this solicitation or can be obtained from the WV Ethics Commission. This requirement does not apply to publicly traded companies listed on a national or international stock exchange. A more detailed definition of interested parties can be obtained from the form referenced above.

44. PROHIBITION AGAINST USED OR REFURBISHED: Unless expressly permitted in the solicitation published by the State, Vendor must provide new, unused commodities, and is prohibited from supplying used or refurbished commodities, in fulfilling its responsibilities under this Contract.

45. VOID CONTRACT CLAUSES – This Contract is subject to the provisions of West Virginia Code § 5A-3-62, which automatically voids certain contract clauses that violate State law.

46. ISRAEL BOYCOTT: Bidder understands and agrees that, pursuant to W. Va. Code § 5A-3-63, it is prohibited from engaging in a boycott of Israel during the term of this contract.



Corporation

Eaton Corporation
REPRESENTED BY:
Lynn Associates, Inc.
8175 Sheridan Drive
Building # 1 Suite 1
Buffalo NY 14221
716-631-0054 ext 307
716-631-0101
lkieffer@lynninc.com

05.20.22

Quote #:0364065

Mark Plants
WV Lottery
Charleston WV
Subject: Eaton Powerware Service Update

Dear Mark:

On behalf of Eaton Corporation, I am pleased to provide the following quote for upgrades options for the Eaton UPS system at your location. Please see our options below:

<u>Product</u>	<u>UPS Model</u>	<u>Serial Number</u>
Powerware	9390	Ey213CAA04
Powerware	9390	EJ454CBC01

Eaton Service Life Extension Program Including the following items:

Install all new and improved electronics inside your UPS system

- *Power Modules/Supplies, control/interface boards & Terminal blocks*
- *Includes new component calibration, firmware updates, functional testing, cleaning of contactors and all other electronic components*
- *Capacitor and Fan replacement (Optional add on)*
- *Includes one year parts and labor warranty for electronics*
- *Includes service entitlement through 1/1/2032(extends current End of Service Life of unit from 1/1/2027 to 1/1/2031)*
- *½ the cost of a new UPS system with installation*
- *Quick implementation, 2-3 days vs up to 1 month*

PRICE: **\$41,538.40 / UPS Unit (Without capacitor replacement)**

PRICE: **\$48,100.87 / UPS Unit (With Capacitor / Fan Replacement)**

Prices are valid for thirty (30) days. Terms are net 30. **Eaton Corporation's Terms and Conditions (copy attached) apply to this proposal. Any additional or different terms proposed by the customer in its purchase order or otherwise, shall not be binding upon Eaton Corporation and hereby rejected unless expressly agreed to in writing by Eaton Corporation** **Important tax notice:** In order to comply with tax regulations, we will be including sales/use tax when you are invoiced. If you feel that you are not liable for this tax, fax an executed tax exemption or resale certificate for the appropriate state to **716-631-0101** and refer to Eaton Corporation proposal number **0364065**. Also include your contact name, and telephone number in case we have any questions. Should you have any questions, or require further information, please feel free to call me at **716-631-0054 ext. 307**. All orders should be issued to Eaton Corporation – C/O Lynn Associates Inc. – 8175 Sheridan Drive – Building #1 Suite 1 - Buffalo NY 14221.

All prices are FOB, shipping point and include dock-to-dock freight. Any special delivery requirements may require additional costs. Please advise immediately if you have any special delivery circumstances. Upon arrival of batteries, it is important to note any damage or missing batteries on the carrier's delivery receipt in order to avoid additional costs to your company.

Eaton Corporation manufactures a varied line of UPS (Uninterruptible Power Supply) systems in Raleigh, North Carolina, and handles all billing/collections direct (see attached Billing Authorization). Eaton Corporation employs over 160 factory trained technicians to work on UPS units throughout the country. Only Eaton Corporation technicians are provided with proprietary software and firmware for UPS upgrades and operation enhancement.

Bill To Address:

Ship to Address: (if different from Billing Address)

_____	_____
_____	_____
_____	_____

CUSTOMER WANT DATE: _____

*** For your information and records:

Purchase Order:

Eaton Corporation Federal ID - 34-0196300
c/o Lynn Associates, Inc.
8175 Sheridan Drive
Building #1 Suite #1
Buffalo NY 14221

Remit To:

Eaton Corporation
29085 Network Place
Chicago, IL 60673-1290

Sincerely,

Laurie Kieffer
Lynn Associates, Inc.



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EATON CORPORATION **UPS SERVICES – TERMS AND CONDITIONS (T-0)**

TERMS AND CONDITIONS: These terms and conditions, the quotation and Scope(s) of Work (the "Agreement"), are the final expression of the contract for the sale of UPS services by Eaton Corporation ("Contractor"), and supersede all prior terms, quotations, statements(s) of work, purchase orders, correspondence or communications whether written or oral between Eaton Corporation and the customer. ANY ADDITIONAL OR DIFFERENT TERMS PROPOSED BY CUSTOMER (THE "CUSTOMER"), ARE REJECTED UNLESS EXPRESSLY AGREED TO IN WRITING BY CONTRACTOR.

1. DEFINITIONS: The terms listed below shall have the following meanings:

- "Battery" is the electric storage portion of a UPS.
- "Covered Equipment" is the equipment as listed on the quote.
- "CPM" is the Contracted Period of Maintenance or Hours of Service.
- "Drop Ship Items" are capacitors, fans, equipment upgrades (modifications), batteries, battery monitoring systems, battery containment, battery materials, racks and cabinets.
- "Emergency Service" is all services provided on an as needed basis that is not scheduled in advance.
- "PCS" is Pre-Contract Survey Inspection.
- "Power Module" is the electronic portion of a UPS or other power quality device.
- "Scope of Work" is the services, procedures, methods, exclusions and coverage as purchased by the Customer
- "Service" is the installation, maintenance (including Preventive Maintenance as defined in Scope of Work Attachment R-2), repair, inspection, adjustment, and remote monitoring services (including the PredictPulse Service as defined in Scope of Work, Attachment R-32, R-36 or R-37) performed on the Covered Equipment by Contractor or otherwise provided by Contractor in connection with the Covered Equipment.
- "UPS" is an Uninterruptible Power Supply which is comprised of the Power Module and Batteries.

2. ELIGIBILITY: All Covered Equipment that has a lapse in Service or warranty coverage greater than ninety (90) days is subject to a PCS prior to eligibility for Service under this Agreement. Customer will be charged at Contractor's current Time and Material Service Rate Schedule (Exhibit 1-PCS and Attachment X-1). A list of the equipment requiring a PCS will be incorporated into this Agreement.

3. HOURS OF SERVICE: Contractor will provide scheduled and emergency services portal-to-portal 8:00AM to 5:00 PM Monday-Friday ("5X8 Service") excluding all observed holidays. The Customer may purchase extended hours of scheduled and Emergency Service coverage ("7x24 Service") including Emergency Service being provided on public holidays (5 U.S.C. 6103). Scheduled services are not available on observed holidays.

4. ON-SITE RESPONSE TIME: Upon Service request the Contractor will arrive at the location of the Covered Equipment the next business day. If purchased by Customer and the Covered Equipment is located within one hundred (100) miles of a Contractor service location, Contractor will arrive at location of Covered Equipment within eight (8), four (4) or two (2) CPM hours. Response time does not include battery replacement service.

5. LABOR AND MATERIAL RATES: Customer shall be billed at Contractor's current Time and Material Rate Schedule (Attachment X-1) for Service purchased outside the Scope(s) of Work. This excludes any flat-rate quoted by Contractor representative.

6. ENGINEERING CHANGES: All engineering changes deemed necessary by Contractor will be installed during scheduled Service visits during the CPM. Any engineering changes deemed optional by Contractor will be offered to Customer on an as-available, per charge basis.

7. CUSTOMER'S RESPONSIBILITY:

- A. Communication and Scheduling - Customer shall contact Contractor's Customer Reliability Center (1-800-843-9433) to schedule all Service and other requests. Preventive Maintenance or Services is deemed fulfilled if (i) the Customer fails to schedule or (ii) does not permit Service to be completed within ninety (90) days of the scheduled service date.
- B. Movement - If Covered Equipment is moved to another location within the United States, Service coverage will continue at Contractor's option if: (i) Customer notifies Contractor in writing at least thirty (30) days in advance of power-down of Covered Equipment and, (ii) Contractor supervises the power-down, disconnection, rigging, packing, movement, unpacking, reinstallation and re-start of the Covered Equipment and Customer will be charged at current Time and Material Service Rate Schedule.
- C. Escort - During the provision of Service, Customer will have a representative present at Service site at no cost to the Contractor.
- D. Access - Customer shall grant unobstructed access to the Covered Equipment to be serviced, as well as adequate working space in the immediate vicinity as may be required for the Contractor to perform Services. Prior to a site visit, the Customer and



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Contractor must agree on site access requirement costs. These costs will be invoiced by the Contractor following completion of Services.

8. TERM AND TERMINATION: The initial term of this Agreement shall be the service period defined on the applicable quote. Following the expiration of the initial term, this Agreement shall automatically renew for successive twelve (12) month periods. Contractor will provide notice of updated pricing prior to the expiration of the initial term or any subsequent renewal term. Customer or Contractor may terminate this Agreement at any time upon thirty (30) days written notice to the other, subject to Section 16.

9. BATTERIES AND DROP SHIP ITEMS: Prices stated in a quote do not include installation, freight, and handling charges unless these items are listed and priced in the quote. Prices stated in a quote are F.O.B. factory (unless otherwise stated) and title and risk of loss to each article sold by Contractor to Customer shall pass to Customer upon delivery at the F.O.B. point.

Shipment estimates are after receipt of Customer's purchase order. If approval of drawings are required, then shipment estimates are after receipt of written approval. If the Customer cannot accept delivery of batteries, Customer will arrange for storage. Contractor is not be liable or responsible for any damages or loss for delay or default in delivery due to force majeure. Customer may not cancel its purchase order because of such delays.

Customer may cancel its purchase order with prior written notice to Contractor subject to cancellation charges for capacitors, fans, equipment upgrades (modifications), batteries and Drop Ship Items as follows: (i) between 0-30 days prior to shipment, 100% of the total invoice, and (ii) greater than 30 days prior to shipment, 50% of the total invoice. Changes made to an order may be subject to increase or decrease in purchase order amount, change order charges, and changes in schedule date. Customer is responsible for return freight charges related to cancellation.

10. END OF SERVICE LIFE ("EOSL"): Contractor may designate a Power Module as "End of Service Life" which means limited parts are available and Service will be provided on a best efforts basis. This designation will be indicated on the quote for Service renewal and will serve as Contractor's notice of limited service support and its recommendation to replace or decommission the Power Module. If Contractor cannot perform or complete a covered repair, Contractor may terminate coverage subject to Section 8. Customer may request a pro-rated refund for the terminated portion of this Agreement, subject to Section 16.

11. INSURANCE: During the term of this Agreement, Contractor, at its own cost and expense, shall maintain in full force and effect the following insurance with sound and reputable insurers: (i) worker's compensation insurance in accordance with the statutory requirements of the state where the Service is to be performed; (ii) automobile liability insurance on all motor vehicles licensed for highway use, both owned and non-owned; and (iii) commercial general liability insurance for bodily injury and property damage.

12. WARRANTY: Contractor shall perform all Service in a professional and workmanlike manner. Contractor warrants repairing or replacing defective parts or materials and correcting defective workmanship reported to Contractor and/or diagnosed by Contractor's personnel during the term of this Agreement. Contractor warrants its corrective maintenance per the scope of work and replacement parts to be free from defects in material and workmanship for the term of this Agreement or for a period of ninety (90) days from the completion date of the repair or replacement of parts or materials, whichever is longer. In the event the parts or materials fail to meet published specifications due to a defect in parts or materials or workmanship covered by this Warranty, Contractor, at its discretion, will repair or replace the warranted parts or materials at no cost to Customer. This Warranty shall not apply to any Power Module and/or Battery that has been: (i) subject to damage caused by accident, fire, flood, lightning, vandalism, acts of God, Customer's neglect, misuse, misapplication, incorrect connection or external damage; (ii) subject to repair or alteration by Customer (or a third party) not authorized by Contractor in writing; or (iii) moved without thirty (30) days' notice to Contractor. Contractor reserves the right to supervise the move. THIS WARRANTY IS EXCLUSIVE EXCEPT FOR WARRANTY OF TITLE. CONTRACTOR DISCLAIMS ALL OTHER WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. CORRECTION OF NON-CONFORMITIES IN THE MANNER AND FOR THE PERIOD OF TIME PROVIDED ABOVE SHALL CONSTITUTE CONTRACTOR'S SOLE LIABILITY AND CUSTOMER'S EXCLUSIVE REMEDY FOR FAILURE OF CONTRACTOR TO MEET ITS WARRANTY OBLIGATIONS, WHETHER CLAIMS OF CUSTOMER ARE BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY) OR OTHERWISE. Parts or materials supplied, but not manufactured by Contractor, are warranted solely by the manufacturer. Contractor's obligation under this Warranty is conditioned upon receipt of all payments due from Customer.

13. ASSIGNMENT: Neither party shall assign this Agreement or any of its rights and interests without the prior written consent of the other party. Upon written notice to the other party, either party may assign this Agreement or any of its rights and interests to: (i) any parent, subsidiary, affiliated or successor corporation; or the purchaser of any of these entities; (ii) any corporation to which the party has sold all or substantially all of its assets (including the purchaser of any of the party's subsidiaries); or (iii) any corporation or legal entity with which the party may merge or consolidate.

14. INDEMNITY: Contractor shall defend, indemnify and hold harmless Customer, its officers, employees and agents (Indemnified Parties), from and against any and all claims, causes of action or suits brought against the Indemnified Parties to the extent they result directly from (1) bodily injury to or death of any person or damage to or destruction of any property caused by the negligent acts or willful misconduct of Contractor, its agents or employees, and (2) any violation of federal or state law,



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regulation, order, rule or of any other governmental authority having jurisdiction by Contractor, its employees or agents, while Contractor is performing work on site. The indemnified Party shall cooperate in a reasonable manner to provide information and access to personnel related to the defense of any indemnified claim.

15. LIABILITY: The remedies of the Customer set forth in this Agreement are exclusive and are its sole remedies for any failure of Contractor to comply with its obligations hereunder. IN NO EVENT SHALL CONTRACTOR OR CUSTOMER, OR THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS BE LIABLE TO THE OTHER FOR ANY AND ALL CLAIMS ARISING OUT OF (A) DAMAGE TO PROPERTY OR EQUIPMENT, OTHER THAN DIRECT DAMAGES TO EQUIPMENT SOLD OR SERVICED HEREUNDER, OR (B) ANY INCIDENTAL, INDIRECT, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, SUCH AS, BUT NOT LIMITED TO, DELAY DAMAGES, LOST PROFITS OR REVENUE, LOSS OF DATA, LOSS OF USE OR LOST OPPORTUNITY THAT RESULT FROM OR IN CONNECTION WITH ANY CLAIM(S) OR CAUSE(S) OF ACTION, WHETHER BROUGHT IN CONTRACT OR IN TORT, EVEN IF CONTRACTOR OR CUSTOMER KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES. WITH THE EXCEPTION OF THIRD PARTY CLAIMS FOR BODILY INJURY, PROPERTY DAMAGE DEATH, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, THE TOTAL CUMULATIVE LIABILITY OF CONTRACTOR ARISING FROM OR RELATED TO THIS AGREEMENT WHETHER THE CLAIMS ARE BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY) OR OTHERWISE, SHALL NOT EXCEED TEN (10) TIMES THE OVERALL VALUE OF THE PURCHASE ORDER AND/OR UNDERLYING CONTRACT..

16. PAYMENT: All payments are due net thirty (30) days in full from the date of invoice, unless otherwise mutually agreed upon in writing. Customer shall be invoiced for, and shall pay for, all Service not expressly provided for by the terms, such as site calls involving no-fault found inspections where no corrective maintenance was required. Contractor reserves the right to refuse to provide any further Service until all due payments have been received. In the event of an early termination: i) Customer is liable for any Service performed prior to the effective date of termination; and (ii) Contractor, at its discretion, will provide a credit against any advance payments received as follows: a) for fixed-rate Agreements, a pro-rated amount based on the terminated portion of the fixed-price fee due Contractor; or b) for any new work outside of the Services provided in this Agreement, an amount based on the difference between the amount paid by Customer prior to the effective date of early termination and the actual cost of Service completed (including emergency repair calls) by Contractor prior to the effective date of early termination, or c) for pre-paid multi-year contracts if Customer terminates the Agreement partway through the Agreement term, Customer will be entitled to a refund of the unused portion of the contract MINUS the applied discount for the pre-payment.

17. TAX: Contractor's price is exclusive of any applicable tax. All orders will be subject to applicable sales tax unless a current tax exemption certificate is on file with Contractor covering the state where Covered Equipment under this Agreement is located.

18. PARTS: Unless otherwise agreed to by the parties in writing, all parts removed for replacement shall be Contractor's property. Parts used from Customer-owned spare parts kit shall be replaced by Contractor at no cost. Replacement parts shall be new or of the same quality as new.

19. FORCE MAJEURE: Seller shall not be liable for failure to perform or delay in performance due to fire, flood, strike or other labor difficulty, act of God, act of any governmental authority or of the Buyer, riot, embargo, fuel or energy shortage, car shortage, wrecks or delays in transportation, or due to any other cause beyond Seller's reasonable control. In the event of delay in performance due to any such cause, the date of delivery or time for completion will be extended by a period of time reasonably necessary to overcome the effect of such delay.

20. CHOICE OF LAW: This Agreement shall be construed in accordance with and governed by the laws of the State of Ohio, or in the jurisdiction where the Service has been performed.

21. MODIFICATION OR WAIVER: The terms and conditions of this Agreement cannot be modified or waived except by a writing signed by the parties and waiver by Contractor or Customer of any provision in any one instance shall not constitute a waiver as to any other instance. If a provision of this Agreement is invalidated for any reason, this Agreement remains binding except for such invalid provision.

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