

**REQUEST FOR PROPOSALS FOR ELECTRONIC PAYMENT CONSULTING
SERVICES ISSUED BY THE OFFICE OF THE STATE TREASURER**

CONTRACT NUMBER: TRE20102-MSCONSULTSRVCS

I. Overview

By this request for proposals (the “RFP”), the Office of the State Treasurer (“OST”), on behalf of the Cash Management Policy Board (the “Board”), is seeking proposals from qualified consulting services firms with substantial electronic payment and public sector experience (“Consultants”) to provide advice and recommendations to the State of Delaware (the “State”). The selected Consultant will assist OST, the Board and other State agencies address the State’s practices and needs concerning electronic payment processing, gateway services and compliance with Payment Card Industry (“PCI”) standards (collectively, “Merchant Services”).

This RFP is issued pursuant to 29 *Del. C.* §§ 6981, 6982(b) and 6986.

A. Timetable

The tentative timetable for this RFP process is as follows:

EVENT	DATE
RFP published	11/20/2019
Deadline for Consultant Questions	11/29/2019
Deadline for State Responses - Q&A Closed and Published	12/06/2019
Deadline for Consultant Proposal Submission	12/20/2019 (4:00 PM EST)
Date for Invitation	12/27/2019
Finalist Presentations	Week of 01/06/2020
Finalist Selected / Begin Contract Negotiations	Week of 01/20/2020
Estimated Award Notifications (Board Approval)	Week of 2/12/2020
Complete Contract Negotiations	TBD

There will be no pre-bid meeting associated with this RFP.

This RFP is not an offer. The State reserves the right to cancel this RFP or modify the above RFP dates at any time, and for any reason.

Consultants are expected to fully inform themselves of, and by submitting a proposal shall be deemed to have read, understood and unconditionally and irrevocably accepted, all conditions, requirements, and specifications of this RFP and all attachments and exhibits, subject only to the exception process provided for herein.

B. Proposal to Remain Open

Consultants that submit a proposal in response to this RFP shall be deemed automatically to have consented and irrevocably agreed to keep any such proposal open for six (6) months after the deadline for Consultant proposal submissions, or for such additional period as the State and any Consultant may agree upon. Rates and fees quoted in a proposal shall remain fixed and binding on the Consultant.

C. Contract Term

The original term of the contract between each successful Consultant and the State shall be two years, with OST having three one-year extension options, each exercisable in OST's sole discretion, subject only to Board approval.

D. Designated Contact:

This RFP process will be managed by the Director of Policy and Office Management (the "Designated Contact"):

Name: Daniel Madrid
Title: Director of Policy and Office Management
Address: 820 Silver Lake Boulevard, Suite 100
City/State: Dover, DE
ZIP: 19904
Email: Treasury_RFP@delaware.gov
Phone: (302) 672-6709

E. Submission of Written Questions

All questions about the RFP shall be submitted to the Designated Contact listed above via e-mail on or before 4:00 p.m., prevailing Eastern time, on November 29, 2019.

Questions should be directly tied to the RFP and asked in consecutive order from beginning to end, following the organization of the RFP. Each question should begin by referencing the RFP page number, heading and subject number to which it relates.

The State will provide written responses to questions from prospective Consultants no later than December 6, 2019. Responses will be placed on <http://bids.delaware.gov>.

II. Background

A. The Cash Management Policy Board

The Board has statutory authority over the investment and deposit of State funds, including the selection of financial institutions that provide investment and banking services to the State. The Board is comprised of nine (9) members, including five (5) Delaware citizens appointed by the Governor. The remaining four (4) members are State government officials (the State Treasurer, the Secretary of Finance, the Secretary of State and the Controller General) who serve ex-officio.

The Board has two standing committees – an Investment Subcommittee and a Banking Subcommittee. The Banking Subcommittee has standing authority to address and make

recommendations to the full Board with respect to merchant processing and PCI compliance issues.

The Board meets at least four times a year. Each standing committee also meets at least four times a year.

The Board historically has approved the selection of merchant processing providers and has proposed guidelines governing the deposit of State agency credit and debit card receipts in settlement accounts.¹

B. The Office of the State Treasurer

OST serves as the administrative arm of the Board and coordinates all meetings of the Board and its committees. OST also has primary responsibility for gateway services, including the selection of the State's primary gateway vendor, and manages the State's relationships with Board-approved merchant processors and PCI vendors.

C. Merchant Services

Bank of America Merchant Services ("BAMS") is the State's incumbent merchant processor. BAMS is responsible for (i) processing, settling all credit card and debit card transactions, (ii) providing hardware and software solutions to conduct bank card transactions and (iii) the coordination of PCI compliance requirements between the State and its card brands. The contract commenced on December 27, 2017 for an initial term of three years, after the initial expiration on December 26, 2020, OST has two optional one-year extensions. OST is currently reviewing the relationship and working with State agencies to determine whether to exercise optional extensions in the BAMS contract or re-bid merchant processing services.

Govolution has been the State's principal internet gateway provider, since 2001. The contract was previously managed by the State's Department of Technology and Information ("DTI"), before being transferred to OST in 2019. In 2018, \$1.5 billion of agency credit card and ACH payments were transacted through Govolution's payment gateway.

Other miscellaneous payment gateways are utilized at certain State agencies, to accommodate the differing business needs. Most of the State's payment card hardware is provided by Govolution, though some agencies utilize BAMS hardware. The non-exclusive Govolution contract will be up for renewal in 2021. OST is assessing the State's gateway needs to determine if additional OST-sponsored payment gateways should be made available to agencies.

OST is responsible for ensuring PCI compliance across all State agencies. Technical assistance and network scanning are provided by DTI and state agency resources. For PCI purposes, the State is comprised of eighteen agencies, classified as Level 3 and 4 merchants. In 2019, OST contracted with CampusGuard, a Qualified Security Assessor ("QSA") to provide access to a Self-Assessment Questionnaire ("SAQ") portal and agency questionnaire assistance.

The Board conducted a comprehensive banking architecture study² in 2017, which included a high-level review of the state's Merchant Services architecture. As the larger banking architecture transition moves

¹ The guidelines are available here: [Cash Management Policy Board Guidelines \[link\]](#).

² The full study can be found here: [Structural Review and Recommendations Related to the State's Banking Architecture \[link\]](#).

into the implementation phase, OST is increasing its focus on reviewing and optimizing the State's Merchant Services architecture. The findings and recommendations of the 2017 review are the basis for OST's current Merchant Services strategy. OST is evaluating additional opportunities to streamline merchant services operations and integrations and is considering issuing a multiple-component Merchant Services RFP at the expiration of the current Merchant Services contracts.

III. Scope of Services

OST and the Board seek the services of a consultant to provide ongoing advice and recommendations to the State. The Consultant will serve as the Merchant Services subject matter expert during all Board and Banking Committee meetings and for all Merchant Services projects. The Consultant will assist OST, the Board and other State agencies in addressing the State's practices and needs concerning Merchant Services.

In addition to ongoing advisory support, the Board may request that the consultant perform certain discrete tasks including, but not limited to: (a) undertaking a structural review of the State's Merchant Services architecture and making recommendations for efficiencies and operational improvements, (b) providing independent advice and recommendations with regard to the procurement of Merchant Services contracts, including preparation of RFPs, proposal evaluation and contact term negotiation, (c) reviewing and providing independent advice and recommendations for Vendor management based on industry best practices, (d) providing transition support as needed to engage new Vendors and Merchant Services, and (e) providing assistance with the annual PCI security processes and necessary remediation efforts.

The Consultant will be required to attend and participate in any and all meetings of the Board and the Banking Subcommittee, at which Merchant Services issues may be discussed. The Board and its Banking Subcommittee each meet quarterly, with May and November meetings conducted in-person, and August and February meetings held telephonically. Additionally, the Consultant also will be expected to attend and participate in periodic internal OST meetings and other meetings with State agency stakeholders on Merchant Services issues, as requested by OST.

IV. Minimum Requirements to Apply

Proposals that do not meet the following minimum requirements, or that do not comply with the specifications or material terms and conditions of this RFP, may be considered non-responsive and rejected. Consultants must clearly demonstrate in their proposals how they meet the following minimum qualifications:

1. The Consultant must have at least five (5) years of continuous experience providing Merchant Services consulting services requested pursuant to this RFP.
2. The Consultant shall staff the engagement with one or more employees possessing appropriate QSA credentials and/or other PCI certifications.
3. The Consultant should have experience providing Merchant Services consulting services to government entities.
4. The Consultant must be independent and able to make recommendations to the Board and OST free from conflicts and solely in the best interest of the State.

5. The Consultant must be willing to disclose and describe, on a confidential basis, if appropriate, all direct ownership interests in, or any reseller, consulting or other business relationships with, any Merchant Services vendor as provided herein.

OST does not wish to dissuade an otherwise qualified Consultant from submitting a proposal based on the foregoing minimum requirements if legitimate business reasons or industry practices mitigate or eliminate the need for any such requirement. **A Consultant who fails to meet a minimum requirement must explain in detail in its response the reason or reasons why OST should excuse non-compliance.** OST shall have discretion to accept or reject any such explanation and waive any minimum qualification requirement.

V. RFP Issuance and Submission of Proposals

A. RFP Issuance

1. Public Notice

Public notice has been provided in accordance with 29 *Del. C.* § 6981.

2. Obtaining Copies of the RFP

This RFP is available in electronic form only and as a courtesy, may be found at the following website:

Delaware Office of Management and Budget at <http://www.bids.delaware.gov/>.

3. Assistance to Consultants with a Disability

Consultants with a disability may receive accommodation regarding the means of communicating this RFP or participating in the procurement process. For more information, contact the Designated Contact no later than ten days prior to the deadline for receipt of proposals.

4. RFP Designated Contact

All requests, questions, or other communications about this RFP shall be made in writing to the Designated Contact. Communications must be submitted electronically to the following email address: Treasury_RFP@delaware.gov.

5. Consultants and Legal Counsel

OST may retain professional services or legal counsel to assist in the review and evaluation of this RFP and the Consultants' responses. Consultants shall not contact OST's professionals or legal counsel on any matter related to the RFP unless so instructed in writing by the Designated Contact. Consultants who make contact in violation of this provision may be disqualified from participation in the RFP process. Exceptions exist only for Consultants currently doing business with the State who require contact with such professionals or legal counsel in the ordinary course of business.

6. Contact with Other State Employees

Direct contact with State employees other than the Designated Contact regarding this RFP is expressly prohibited without prior written consent from the Designated Contact. Consultants who directly contact a State employee in violation of this provision may be disqualified from participation in the RFP process. Exceptions exist only for Consultants currently doing business with the State who require contact with State employees in the ordinary course of business.

7. Organizations Ineligible to Bid

Any individual, business, organization, corporation, consortium, partnership, joint venture, or any other entity currently debarred or suspended from conducting business in the State or any other jurisdiction for any reason may be deemed ineligible to respond to this RFP.

8. Exclusions

The State reserves the right to refuse to consider any proposal from a Consultant who itself or its officers or staff:

- a) Has been convicted for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;
- b) Has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of integrity or honesty;
- c) Has been convicted or has had a civil judgment entered for a violation of any state or federal antitrust statute;
- d) Has failed:
 - i. Without good cause to perform under a consulting contract; or
 - ii. To perform satisfactorily in accordance with terms of any consulting contract;
- e) Has violated ethical standards set out in law or regulation; and
- f) Any other cause determined by OST or the Board to be serious and compelling, and which undermines confidence in the Contractor's ability to perform independently under any resulting consulting contract.

9. No Press Releases or Public Disclosure

OST reserves the right to pre-approve any news or broadcast advertising releases concerning this RFP, the resulting contract, the work performed, or any reference to the State with regard to any project or contract performance. Any such news or advertising

releases pertaining to this RFP or resulting contract shall require the prior express written permission of OST.

10. RFP Not an Offer

This RFP does not constitute an offer by OST or the State.

B. Submission of Proposals

1. Proposal Content

Each proposal must be submitted in writing and respond to the items outlined in this RFP. OST reserves the right to reject any non-responsive or non-conforming proposals.

The State discourages overly lengthy and costly proposals and prefers that they be prepared in a straightforward and concise manner. Unnecessarily elaborate brochures or other promotional materials beyond those sufficient to present a fully responsive proposal are not desired.

Proposals must be realistic and must represent the best estimate of time, materials and other costs, including the impact of inflation and any economic or other factors that are reasonably predictable. The State shall have no responsibility or liability for a Consultant's failure to accurately estimate the costs or resources required to meet the obligations defined in the proposal.

A Consultant should describe in detail on **Attachment 3** any areas where it will be unable to provide services as requested or required herein. In addition, if a Consultant is able to provide the services exactly as requested or required but believes that there would be benefits (such as cost savings or improved service) to making adjustments to the services outlined, the Consultant should describe the adjustments and the benefits on **Attachment 3**. Acceptance or rejection of any or all exceptions is within OST's sole discretion.

Consultant must respond to all mandatory requirements presented in this RFP. The words "shall," "will," and "must" are used herein to designate mandatory requirements. Failure to respond to a mandatory requirement may, in OST's discretion, result in the disqualification of a Consultant from the RFP process.

2. Proposal Delivery

Each proposal must be submitted with ten (10) paper copies and one (1) electronic copy on USB flash drive. In addition, one electronic copy must be emailed to the Designated Contact at the address indicated above.

All proposals are to be sent to the attention of the Designated Contact so as to be **received no later than 4:00 p.m., prevailing Eastern time, on December 20, 2019** (the "Proposal Deadline"). Paper copies of a proposal may be delivered by express delivery (*e.g.*, FedEx,

UPS, etc.), United States mail, or by hand to the address for the Designated Contact listed above.

Consultants are directed to clearly print “PROPOSAL ENCLOSED” and “CONTRACT NO. TRE20102-MSCONSULTSRVCS” on the outside of the bid submission package.

Any proposal received after the Proposal Deadline shall not be considered and shall be returned unopened. Consultant bear the risk of delays in delivery.

3. Proposal Modifications

Any changes, amendments or modifications to a proposal must be made in writing, submitted in the same manner as the original response and conspicuously labeled as a change, amendment or modification to a previously submitted proposal. Changes, amendments, or modifications to proposals shall not be accepted or considered after the Proposal Deadline.

4. Proposal Costs and Expenses

The State is not responsible for and will not pay any costs incurred by any Consultant in responding to this RFP, including, but not limited to, costs associated with proposal preparation, printing, and delivery, the interview/presentation process and contract negotiations.

5. Late Proposals

Proposals will be date and time stamped upon receipt. Proposals received after the Proposal Deadline will not be opened or considered.

6. Proposal Opening

Proposals will be opened only in the presence of OST personnel. Any unopened proposals will be returned to the proposing firm. OST staff will create a public log containing the names of all Consultants that submitted proposals and the dates and times of OST’s receipt of each proposal. Unless required by applicable law, the contents of any proposal shall not be disclosed prior to contract award.

7. Non-Conforming Proposals

OST may, in its discretion, reject any non-conforming proposals. Non-conforming proposals are defined as those that do not meet the material requirements of this RFP. OST shall have the authority and discretion to determine whether an RFP requirement is material, or a mere formality or non-substantive requirement.

8. Confidentiality of Documents

Subject to applicable law or the order of a court of competent jurisdiction to the contrary, all documents submitted as part of a Consultant's proposal will be treated as confidential during the evaluation process and will not be available for review by anyone other than OST, the Board, the Evaluation Team and their counsel. There shall be no disclosure of any Consultant's information to a competing Consultant prior to award of the contract unless such disclosure is required by law or by order of a court of competent jurisdiction.

The State and its constituent organizations are required to comply with the State of Delaware Freedom of Information Act, 29 Del. C. § 10001, *et seq.* ("FOIA"). FOIA requires that the State's records are public records (unless otherwise declared by FOIA or other law to be exempt from disclosure) and are subject to inspection and copying by any person upon written request. Once a proposal is received by the State and a decision on a contract award is made, the content of selected and non-selected Consultant proposals will likely become subject to FOIA's public disclosure obligations.

The State wishes to create a business-friendly environment and procurement process. As such, the State respects that Consultants desire to protect intellectual property, trade secrets and other confidential business information (collectively referred to herein as "confidential business information"). If a Consultant feels that it cannot submit a proposal without including confidential business information, it must adhere to the following procedure or such proposal may be deemed unresponsive, may not be recommended for selection, and any applicable protection for the Consultant's confidential business information may be lost.

In order to allow the State to assess its ability to protect confidential business information, Consultants will be permitted to designate appropriate portions of their proposal as confidential business information.

Consultants may submit portions of a proposal considered to be confidential business information in a separate, sealed envelope labeled "Confidential Business Information" and include the specific RFP number. The envelope must contain a letter from the submitting Consultant's legal counsel describing the information contained in the documents, representing in good faith that the information is protected from disclosure under FOIA, and briefly stating the reasons that such information is exempt under FOIA.

Upon receipt of a proposal accompanied by such a separate, sealed envelope, the State will open the envelope to determine whether the procedure described above has been followed. A Consultant's allegation as to its confidential business information shall not be binding on the State; rather, the State shall independently determine the validity of any Consultant designation as set forth in this section. Any Consultant submitting a proposal or using the procedures discussed herein expressly accepts the State's absolute right and duty to independently assess the legal and factual validity of any information designated as confidential business information. Accordingly, Consultants assume the risk that confidential business information included within a proposal may enter the public domain.

9. Sub-Contracting

Subcontracting is not permitted without OST’s prior written consent. Any Consultant that submits a proposal contemplating the use of independent contractors or a subcontractor shall identify the purpose for such use, as well as the scope of work and other terms for any such arrangement. All independent contractors and subcontractors must agree in writing to be bound by the terms of the Professional Service Agreement (the “PSA”).

10. Discrepancies and Omissions

Consultants are fully responsible for the completeness and accuracy of their proposals, and for examining this RFP and all attachments, exhibits and addenda. Failure to do so will be at the sole risk of Consultants. Should a Consultant find discrepancies, omissions, or unclear or ambiguous language in this RFP, Consultant should seek clarification from OST pursuant to the question and answer process detailed below. Protests based on any discrepancies, omissions, or unclear or ambiguous language will be disallowed if the same have not been timely raised in and preserved through the question and answer process below.

11. RFP Question and Answer Process

OST will allow written requests for clarification of the RFP. Consultants must submit written questions in the format specified below so as to be received by the Designated Contact by 4:00 p.m., prevailing Eastern time, on November 29, 2019. Questions must be submitted electronically to the following email address: Treasury_RFP@delaware.gov.

All questions will be consolidated and answered in a single response that will be posted on the State’s websites at <http://www.bids.delaware.gov/> by 4:00 p.m., prevailing Eastern time, on December 6, 2019, or such other date and time as may be prescribed by OST. Consultant names will not be attributed to questions in OST’s response.

Questions should be submitted in a standalone Microsoft Word document in the following format:

Section number
Paragraph number
Page number
Text (of passage being questioned)

Questions that deviate from this format may be rejected by OST, in its discretion.

12. State’s Right to Reject Proposals

OST and the Board reserve the right to accept or reject any or all proposals or any part of any proposal, to waive defects, technicalities or any specifications (whether they be RFP specifications or contained in a Consultant’s response), to assess the merits and qualifications of each proposal and Consultant, to solicit new or modified proposals on the same project, as OST and the Board may deem necessary or appropriate or in the best interest of the State.

13. State’s Right to Cancel Solicitation

The State reserves the right to cancel this solicitation at any time during the procurement process, for any reason, or for no reason at all. The State makes no commitments, expressed or implied, that this process will result in a contract with any Consultant.

A Consultant's participation in this RFP process may result in the State selecting the Consultant to engage in discussions and negotiations of a formal contract. The commencement of such negotiations does not signify, and may not be interpreted as, a commitment by the State to execute a contract or continue negotiations. The State may terminate negotiations at any time and for any reason, or for no reason at all.

14. State's Right to Award Multiple Source Contracting

Pursuant to 29 *Del. C.* § 6986, the State may award multiple contracts to two or more Consultants if the Board makes a determination that such action is necessary or appropriate or in the best interest of the State.

15. Notification of Withdrawal of Proposal

Consultant may modify or withdraw its proposal by written request, provided that both the proposal and subsequent request is received by the Designated Contact prior to the Proposal Deadline. A withdrawn proposal may be revised and re-submitted and will be considered timely as long as the revised proposal is received by the Proposal Deadline.

All proposals received prior to, and which have not been withdrawn by, the Proposal Deadline shall become firm offers and shall not be revocable after that time.

16. Revisions to the RFP

If it becomes necessary to revise any part of the RFP, an addendum will be posted at <http://www.bids.delaware.gov>.

17. Exceptions to the RFP

Any exceptions to the RFP or any attachments, exhibits or addenda, along with corresponding explanations and alternatives, must be noted and explained on **Attachment 3** and submitted with a proposal by the Proposal Deadline. Consultants that fail to timely and otherwise adequately preserve and assert exceptions shall be deemed to have waived all such exceptions and related arguments. The State has discretion with respect to the acceptance or rejection of exceptions.

18. Exceptions to the PSA

Attached hereto as **Appendix A** is OST standard form of PSA and related exhibits. The terms of the PSA will govern the contractual relationship between a Consultant and the State. Any exceptions to the PSA, along with corresponding explanations and alternatives, must be noted and explained on **Attachment 3**. Consultants shall provide a redlined version of the PSA ("Redline") reflecting all requested changes. Consultants that fail to

timely and otherwise adequately preserve and assert exceptions to the PSA shall be deemed to have waived all such exceptions and related arguments. The State has discretion with respect to the acceptance or rejection of PSA exceptions.

19. Award of Contract

The issuance of a contract award (“Award”) is subject to approval by OST and the Board. OST and the Board have the sole right to select the successful Consultant and approve the issuance of any Award and the terms of any PSA. OST and the Board may (a) approve the issuance of an Award to a Consultant other than the Consultant who submitted the lowest priced proposal, (b) issue multiple Awards, or (c) withdraw the RFP and issue no Award. No Award or contract resulting from this RFP process shall be effective unless and until authorized by OST and the Board.

An Award, if any, will be communicated to the successful Consultant and published only after (a) OST and the Board authorize the issuance of an Award, and (b) OST and each such Consultant execute a formal PSA on terms acceptable to OST and the Board. No Consultant will acquire any legal or equitable rights or privileges until the occurrence of both events.

The Award, the PSA and all attachments and exhibits, including all pricing information, and amounts and other details concerning any payments made to a successful Consultant shall be matters of public record subject to disclosure under FOIA.

VI. Proposal Requirements and Evaluation

A. Required Information

1. Consultants shall provide the following information with their proposals in the order listed below. Failure to respond to any request for information within this RFP may result in rejection of the proposal. The proposal will be presented in a spiral-bound book or 3-ring binder, with each completed attachment identified in its own tab.
 - a) Tab A: Transmittal Letter.
 - b) Tab B: Questionnaire(s). Provide a detailed set of responses to the questions posed in **Attachment 1**. All Consultants must respond to **Attachment 1**. Responses should be both complete and concise.
 - c) Tab C: Confidential Information Form. Consultants should identify any material information that is considered confidential using the form of **Attachment 2**. Any information not within this form is automatically subject to FOIA.
 - d) Tab D: Exception Form. Provide a detailed listing of any exceptions to the RFP, including all attachments and appendices, including the PSA and its exhibits, using the form included as **Attachment 3**. Successful Consultants who do not take exceptions as required are deemed to have consented and irrevocably agreed to the terms of the RFP.

- e) Tab E: Business References. Provide at least three business references using the form provided in **Attachment 4**.
 - f) Tab F: Disclosure of Ownership Interests and Business Relationships. Consultants responding to this RFP must identify and explain (1) all direct ownership interests in a Merchant Services vendor presently held by Consultant or its officers, directors or controlling shareholders, and (2) all reseller, consulting, joint venture, partnership or other business relationships with a Merchant Services vendor that began or existed within five (5) years from the date of publication of this RFP.
2. Prior to Award, the successful Consultant shall furnish OST with proof of (i) all necessary business licenses, including a valid State business license, (ii) certification(s) necessary to perform services identified herein, and (iii) proof of insurance required under the PSA attached hereto as **Appendix A**.

B. Proposal Evaluation

1. Initial Screening

The Designated Contact and/or designated OST staff shall perform an initial screening of all proposals submitted by qualified Consultants and evaluate them for timeliness and compliance with the minimum qualifications and other requirements set forth herein. OST shall have discretion with respect to any such determination. Proposals that pass the initial screening shall be forwarded to the Evaluation Team (as defined below) for scoring and evaluation as provided herein.

2. The Evaluation Team

An evaluation team (“Evaluation Team”) that may be composed of representatives from OST, the Board and other State entities will evaluate qualified Consultant proposals meeting all RFP requirements based on the quantitative and qualitative criteria set forth below. Neither the lowest price nor highest scoring proposal will necessarily be selected. OST may in its discretion remove or add members of the Evaluation Team.

3. Evaluation Criteria

Consultants must review the evaluation criteria below and provide responses that address the criteria. The Evaluation Team will not be able to make assumptions about the Consultants’ capabilities; therefore, responses should be detailed and concise within the proposal.

The State has outlined the services it will require in the Scope of Services above. In formulating responses, Consultants are encouraged to suggest additional or modified services in their proposals if such additional or modified services will provide a benefit to the State.

Proposals that meet submission requirements of the RFP will be evaluated and scored based on the criteria and points system set forth in the table below.

Evaluation Criteria	Point Value
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Consultant's organizational fit (firm history, reputation, values, and personnel)	20
Breadth and depth of Consultant's experience in providing Merchant Services consulting services	20
Scale and scope of Consultant's ability to help OST and the Board assess and improve the State's agreements, infrastructure and practices related to Merchant Services	20
Experience in assisting states or other governmental agencies decrease expenses and achieve operational efficiencies related to Merchant Services	20
Pricing proposal (structure and cost)	20
TOTAL POINTS	100

4. Proposal Clarification

The Evaluation Team may communicate with a Consultant in order to clarify uncertainties or gain better understanding of a proposal. The Evaluation Team may require or permit Consultants to modify or supplement their proposals as a result of such communication. Consultants must provide all requested information in a timely manner, which shall mean on or before any deadline established by the Evaluation Team.

5. Communication with References and Past or Present Clients

The Evaluation Team may communicate with all references provided by a Consultant on **Attachment 4** and may use information gained thereby in the evaluation process. In addition, the Evaluation Team may communicate with any known past or present client of a Consultant outside of the reference list, and any information gained may be used in the evaluation process. Consultants that submit a proposal in response to this RFP shall be deemed to have (a) waived any confidentially or other restrictions that may limit in any way a reference or client's ability to convey information relevant to the evaluation process and (b) to all such communications with references or clients.

6. Oral Presentations

The Evaluation Team, after consultation with OST and/or the Board, may invite selected Consultants to make in-person oral presentations to the Evaluation Team. Presentations are tentatively scheduled for the week of January 6, 2020. *Any costs associated with oral*

presentations will be borne by the Consultant. The State requests that all individuals who are expected to be assigned to this engagement be in attendance.

VII. Contract Process

A. Formal Contract

The Consultant that is selected as the finalist and invited via written notification from OST (the “Invitations”) to enter into negotiations concerning Merchant Services consulting services will be expected to enter into a formal contract with OST in the form of the PSA attached here to as **Appendix A** (the “Contract”). Consultant’s attempt to negotiate pricing or other material Contract terms that were not disclosed and detailed in the Consultant’s response may result in the termination of negotiations with, and/or the disqualification of, such Consultant.

B. Modification of PSA

OST, in its discretion, may consider and accept proposed modifications or additions to the PSA, whether or not raised in an exception, subject to necessary Board approval.

C. Time Frame

A Consultant who receives an Invitation must execute a Contract within twenty (20) business days from the date of the Invitation, unless such period is extended by OST, in its discretion. If no Contract has been executed by the applicable deadline, OST may in its discretion cancel the Invitation and enter negotiations with another Consultant.

D. Inception of Services

Absent OST’s prior written request or approval, no Consultant is to begin providing services prior to the issuance of an Award.

E. Cancellation of Award

If a Consultant that receives an Award fails to commence providing consulting services when due under the Contract, OST, without liability, may cancel and annul the Award and terminate any Contract. In such event, an Award under this RFP may be made to another Consultant.

F. Collusion or Fraud

Consultants may not restrain competition by agreement to offer a fixed price, or otherwise. By responding to this RFP, each Consultant shall be deemed to have represented and warranted that: (i) its proposal is not made in connection with any competing Consultant submitting a separate response to this RFP; (ii) its approval is in all respects fair and without collusion or fraud; (iii) the Consultant did not participate in the RFP development process and had no knowledge of the specific contents of the RFP prior to its issuance; and (iv) no employee or official of the State, the Board or OST participated directly or indirectly in the Consultant’s proposal preparation.

If at any time, whether prior to or after the issuance of an Award, OST determines that any of the foregoing representations was untrue when made or subsequently became untrue, OST may, without liability, cancel and annul the Award and terminate any Contract. In such event, an Award under this RFP may be made to another Consultant.

G. Lobbying and Gratuities and Contingency Fees

As required by 29 *Del. C.* § 6903(b), the successful Consultant is deemed to have sworn under oath that the Consultant has not employed or retained any company or person to solicit or secure a Contract by improperly influencing OST or the Board in this procurement process. In addition, the Consultant represents and warrants that it has not directly or indirectly paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working primarily for Consultant, any fee, commission, percentage, gift or any other consideration contingent upon or resulting from an Award or Contract.

For breach or violation of the foregoing oath, representation or warranty, OST, in its discretion and without liability, shall have the right to cancel and annul any Award and terminate any Contract, or deduct from the Contract price or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

H. Solicitation of State Employees

During the RFP process and for the term of the Contract, Consultant shall not, directly or indirectly, solicit any employee of OST to leave OST's employ in order to accept employment with the Consultant, its affiliates, or any person acting in concert with Consultant, without prior written approval of OST.

VIII. Attachments and Appendices

The following items are provided for use in your response. Attachments are required forms to be submitted with your proposal as described in this RFP. Appendices are provided as additional detail or information to assist in your proposal response.

1. Attachments

<u>Attachment 1</u>	Consultant Questionnaire
<u>Attachment 2</u>	Confidential Information Form
<u>Attachment 3</u>	Exception Form
<u>Attachment 4</u>	Business References
<u>Attachment 5</u>	Non-Collusion Statement

2. Appendices

<u>Appendix A</u>	Form of Professional Services Agreement
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Attachment 1: Consultant Questionnaire

CONTRACT NUMBER: **TRE20102-MSCONSULTSRVCS**

Organizational Background, Available Services and Competencies

1. Provide the following background of your organization—
 - a. Legal name of entity
 - b. Legal structure of entity (corp., LLC, LP, etc.)
 - c. Company's address
 - d. Year Founded
 - e. Number of employees
 - f. Parent company (or equivalent) or controlling stakeholder
 - g. State of incorporation or formation
2. Provide a brief history of your organization, including your firm's primary business focus, how long you have been providing Merchant Services consulting services and your experience providing such services to governmental and municipal entities
3. Provide professional biographies of key employees and consultants that would be assigned to this engagement, as well as any relevant training and certifications they possess
4. Does the firm engage in other business or consulting activities, besides Merchant Services consulting? If so, list the business services or consulting activities your firm provides
5. Report the annual volume of Merchant Services consulting engagements, for both private and public sector clients for the last six years
6. Report your firm's experience (i) performing structural reviews, (ii) reviewing policies and procedures, (iii) reporting on opportunities for operational efficiencies, and (iv) assessing and making recommendations with regard to payment processing, data security, gateway, and PCI compliance services for public sector clients
7. Please describe your organization's experience with our current Merchant Services providers
8. Report how your firm distinguishes itself from other Merchant Services consultants
9. Describe your consulting philosophy and research capabilities. Identify to what extent you incorporate quantitative data and qualitative information in your analysis. Describe the evaluation criteria and provide sample reports
10. Report how and when your firm would take action in the case of finding a significant vulnerability or need for remediation
11. Report the extent to which your organization can provide leverage or negotiation support during contract negotiations with our current provider(s) or alternate provider of choice
12. Report any additional value you can provide to an RFP review committee during the procurement process

Pricing Proposal

1. Please provide a proposed fee structure for the services described in **Appendix B** for the initial contract period and any extension periods. The proposed fee structure may be a fixed price or based on hourly rates, or a blend of the two approaches.

Attachment 3: Exception Form

CONTRACT NUMBER: **TRE20102-MSCONSULTSRVCS**

Proposals must include all exceptions to the specifications, terms or conditions contained in this solicitation, including all attachments and appendices. If Consultant is submitting the proposal without exceptions, please state so below.

By checking this box, Consultant acknowledges that it takes no exception to the specifications, terms or conditions found in this solicitation, including the terms of the PSA.

Paragraph # and page #	Exceptions to specifications, terms or conditions	Proposed alternative

Note: Use additional pages as necessary.

Attachment 4: Business References

CONTRACT NUMBER: TRE20102-MSCONSULTSRVCS

List a minimum of four business references. At least two (2) of the references should be from government entities. Business references should include the following information:

- Business name and mailing address
- Contact name, phone number and email address
- Number of years doing business with
- Type of work performed

Please do not list any State entity, officer or employee as a business reference.

If you have held a State contract within the last 5 years, provide a separate list of the contract(s), describe the scope of work performed and include the name, title, phone number and email address for your primary contact for each engagement.

APPENDIX A: PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement (the “Agreement”) is entered into by and between the Office of State Treasurer (“OST”) for the State of Delaware (the “State”), on behalf of itself and the Cash Management Policy Board (the “Board”), and [_____] (“Vendor”).

WHEREAS, in October 2019, OST, on behalf of itself and the Board, issued a formal Request for Proposals (the “RFP”) pursuant to the State Procurement Code seeking proposals from qualified consulting firms to provide independent Merchant Services³ advisory and consulting services to OST and the Board;

WHEREAS, OST and the Board desire to obtain from Vendor independent advisory and consulting services as set out in the Statement of Work on **Exhibit 1** to this Agreement;

WHEREAS, Vendor desires to provide such services to OST and the Board on the terms set forth in the Agreement;

WHEREAS, OST, on behalf of itself and the Board, and Vendor represent and warrant that each party has full right, power and authority to enter into and perform under this Agreement;

FOR AND IN CONSIDERATION OF the premises and mutual agreements herein, OST and Vendor agree as follows:

1. Services and Term.

- 1.1. Vendor shall provide to OST, the Board and its committees those services as set forth herein and as specified on the Statement of Work attached hereto as **Exhibit 1** (collectively, the “Services”).
- 1.2. The initial term of this Agreement shall begin on the date this Agreement is fully executed, or as may be otherwise agreed upon by the parties, and shall extend for two years from that date. OST has three one-year extension options. OST, in its discretion, may exercise each option at any time prior to the expiration of the initial or extended term, as the case may be, subject only to Board approval of any such extension.
- 1.3. Vendor shall meet and confer with OST, the Board and/or any committee of the Board at such times and places as OST, the Board or a committee may reasonably request. Vendor, if requested by OST, shall participate in meetings with other State agencies concerning Merchant Services-related issues. Vendor shall keep OST staff informed of progress and provide updates on the status of the Services. This interface shall include regular telephone communication, exchange of written data and analysis and other interaction as requested by OST.

2. Payment for Services and Expenses.

- 2.1. OST will pay Vendor for the performance of Services in accordance with **Exhibit 2**.

³ Capitalized terms used but not defined in this Agreement shall have the meanings ascribed to such terms in the RFP.

- 2.2. OST's obligation to pay Vendor for the performance of Services will not exceed the annual fixed price and/or rates and limits set forth on **Exhibit 2**. Vendor is solely responsible for ensuring that all Services are completed for the agreed upon price and/or rates and within any applicable cap. Annual fees and/or rates shall be fixed for the initial term of the Agreement and, at OST's option, shall remain fixed for any extension period.
- 2.3. Unless otherwise agreed, all payments will be sent to Vendor's identified address on record with OST.
- 2.4. Vendor shall submit invoices to OST in arrears on a monthly basis. Services provided for a fixed annual price shall be prorated and billed monthly. OST agrees to pay undisputed amounts within 30 days of receipt. In the event that OST disputes all or any portion of an invoice, OST agrees to provide Vendor with a detailed statement of OST's position on the invoice, or disputed portion of the invoice, within 30 days of receipt.
- 2.5. All expenses incurred in the performance of the Services are Vendor's responsibility. Vendor shall not be reimbursed for any expenses incurred by Vendor in the performance of the Services, including, but not limited to, travel and lodging expenses, communications charges, and computer time and supplies.
- 2.6. OST shall not be liable for the payment of federal, state and local sales, use and excise taxes, including any interest and penalties from any related deficiency, which may become due and payable by Vendor as a consequence of this Agreement.
- 2.7. OST shall have the right to setoff or subtract from any payment to be made to Vendor all damages, costs and expenses caused by Vendor's breach of the Agreement, or Vendor's negligence, gross negligence or other tortious or illegal conduct in connection with the provision of Services hereunder, to the extent such damages, costs and expenses have not otherwise been reimbursed by Vendor.
- 2.8. Invoices shall be submitted electronically to OST's Director of Planning and Performance, Daniel Madrid at Daniel.Madrid@delaware.gov with a copy to OST Deputy Treasurer, Liza Druck Davis at Liza.Davis@delaware.gov

3. [Reserved.]

4. Responsibilities of Vendor.

- 4.1. Vendor shall be responsible for the professional quality, technical accuracy, timely completion, and coordination of all Services. In performing the Services, Vendor shall follow practices consistent with generally accepted professional and technical standards and comply with all applicable federal, state and local laws, ordinances, codes and regulations.
- 4.2. Vendor shall be responsible for ensuring that all Services and deliverables furnished pursuant to this Agreement comply with the standards promulgated by the State's Department of Technology and Information ("DTI") published at <http://dti.delaware.gov/> and as modified from time to time by DTI during the term of this Agreement. If any Service or deliverable furnished pursuant to this Agreement does not conform to DTI standards, Vendor shall, at its

expense and option either (a) replace it with a conforming equivalent or (b) modify it to conform to DTI standards. Vendor shall be liable and indemnify the State and its officers, employees and attorneys for all liability, suits, actions or claims, together with all reasonable costs and expenses (including attorneys' fees), incurred by the State or its agents or employees resulting from or attributable to Vendor's failure to comply with DTI standards and requirements.

- 4.3. [Reserved.]
- 4.4. It shall be Vendor's duty to assure that Vendor does not compromise the security, confidentiality, or integrity of information owned or maintained by the State. In providing Services, Vendor will meet or exceed the standards set forth in the Top 20 Critical Security controls located at: <http://www.sans.org/critical-security-controls/>.
- 4.5. Vendor shall be responsible for all security breaches caused by its employees and contract employees, its subcontractors, and the employees and contract employees of its subcontractors. Vendor shall indemnify and hold harmless the State and its officers, employees and attorneys from any and all liability, suits, actions or claims, together with all reasonable costs and expenses (including attorneys' fees) arising out of such breaches. In addition to all rights and remedies available to it in law or in equity, the State may offset against and subtract from any payment to be made to Vendor any damages, costs and expenses caused by any such breach.
- 4.6. Multifunction peripherals must be hardened when used or connected to the State's network.
- 4.7. Electronic information storage devices (hard drives, tapes, diskettes, compact disks, USB, multifunction peripherals, *etc.*) shall be disposed of in a manner corresponding to the classification of the stored information, up to and including physical destruction.
- 4.8. [Reserved.]
- 4.9. [Reserved.]
- 4.10. It shall be the duty of Vendor to assure that all Services and deliverables are technically sound and in conformance with all applicable federal, state and local statutes, codes, ordinances, resolutions and other regulations applicable to the Services. Vendor will not provide access to software, or produce work product, that violates or infringes on any copyright, trademark, patent or other intellectual property rights. Vendor shall, without additional compensation, correct or revise any errors or omissions in the software or work product and shall indemnify the State and its officers, employees and attorneys for all liability, suits, actions or claims, together with all reasonable costs and expenses (including attorneys' fees), incurred by the State or its officers, employees or attorneys resulting from or attributable to Vendor's failure to comply with this Section.
- 4.11. OST's review, approval, acceptance, or payment for any Services shall not be construed to operate as an admission or acknowledgement of any fact or circumstance, or a waiver of any rights under this Agreement or otherwise, and Vendor shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages caused by Vendor's breach or negligent performance or failure to perform under this Agreement.

- 4.12. Vendor shall appoint a senior employee who will manage the performance of Services and act as the single point of contact to OST.
- 4.13. Upon receipt of written notice from OST that an employee of Vendor is unsuitable for good cause, Vendor shall remove such employee from the performance of Services and substitute in his/her place an employee suitable to OST.
- 4.14. Unless legally prohibited, Vendor shall promptly notify OST in writing of any investigation, examination or other proceeding involving Vendor, or any key personnel or designated staff of Vendor, including a contract employee or a subcontractor, or any key personnel or designated staff of a subcontractor, commenced by any regulatory or law enforcement agency and involving allegations of fraud or illegal conduct, or a data breach.
- 4.15. Vendor agrees that its senior employee and other key personnel or designated staff will cooperate with OST in the performance of Services and will be available for consultation with OST upon reasonable request.
- 4.16. [Reserved.]
- 4.17. [Reserved.]
- 4.18. Vendor has or will retain such employees as it may need to perform the Services.
- 4.19. Vendor will not use OST's, the Board's or the State's name, either express or implied, in any of its advertising or sales materials without OST's prior written consent.
- 4.20. Vendor represents that it is properly licensed, registered and authorized to transact business and perform Services in the State.
- 4.21. Vendor will provide to OST audited or unaudited financial statements, as requested by OST.
- 4.22. Vendor shall be independent and shall provide advice and recommendations to OST and the Board free of any conflicts of interest and solely in the best interest of the State.

5. OST Responsibilities/Representations.

- 5.1. OST agrees that its officers and employees will cooperate with Vendor in the performance of Services and will be available for consultation with Vendor upon reasonable request.
- 5.2. OST shall pay for the Services as provided on **Exhibit 2**, subject to review for compliance with and the terms of this Agreement.

6. Ownership of Work Product and Data and Documents.

- 6.1. All materials, information, documents, reports and other work product, whether finished, unfinished, or draft, developed, prepared or completed by Vendor relating to the Agreement shall become the property of the State and shall be delivered upon request by OST. The State

shall have the right to reproduce and disclose all work product related to this Agreement. The State's rights under this Section shall survive termination of the Agreement.

- 6.2. The State shall have and retain title and interest to all data and documents related to this Agreement, including Vendor work product and data and documents electronically stored by Vendor. Upon termination of the Agreement, and for a period of six (6) months thereafter, OST shall have the right to request and shall, at OST's option and at Vendor's expense, be provided with copies of all data and documents electronically stored by Vendor related to the Agreement. Promptly after such six (6) month period, all State data and documents shall be destroyed or retained in accordance with Section 7.8.

7. Confidential Information of the State.

- 7.1. "Confidential Material," as used herein, means all documents and data that contain confidential commercial, financial, consumer, or other confidential information of the State, whether or not such agreements or other documents are marked "confidential" or otherwise designated as confidential by OST.
- 7.2. Confidential Material shall be used by Vendor solely for purposes of executing its duties and obligations under the Agreement. Vendor may disclose Confidential Material only to those Vendor employees who have a need to access Confidential Material in the scope of their employment for Vendor, and who have been informed, understand and acknowledge in writing that Confidential Material is highly sensitive and confidential and must be held in strictest confidence.
- 7.3. Confidential Material shall not be copied or reproduced without the express written permission of OST, except for such copies as may reasonably be required for Vendor to execute its duties and obligations under the Agreement. Except as contemplated by the Agreement, Vendor shall not store or aggregate in a data base or other electronic storage means any Confidential Material; provided, however, that Vendor is permitted to store Confidential Material in physical or electronic files in accordance with this Section 7 while executing its duties under the Agreement and for a reasonable period of time thereafter, after which the Confidential Materials, including all physical and electronic copies, shall be destroyed or retained in accordance with Section 7.8.
- 7.4. Except as expressly permitted in this Section 7, Confidential Material shall not be disclosed to any individuals or third parties without the prior written consent of OST, unless such disclosure is required by law. Vendor shall immediately notify OST in writing of Vendor's receipt of a court order, subpoena or discovery requests seeking or ordering the production, disclosure or inspection of any Confidential Material. Vendor shall, at the request of OST, object to any such order, subpoena or discovery and shall take all other measures that may reasonably be necessary to protect against the unwarranted production, disclosure or inspection of Confidential Material. In the event disclosure of Confidential Material is compelled or otherwise required by law, Vendor shall mark all documents submitted in connection with any such disclosure so as to indicate the confidential nature of the material and OST's interest therein.
- 7.5. This Section 7 shall not restrict the disclosure or use of Confidential Material that:

- a. is in the public domain at the time of disclosure or thereafter enters the public domain through no breach of the Agreement;
 - b. is in the possession of Vendor without restrictions when received;
 - c. has been lawfully obtained or is lawfully obtainable without restrictions from a source other than OST, the Board or the State through no breach of the Agreement;
 - d. has been developed independently by Vendor and without reliance upon Confidential Material.
- 7.6. Vendor shall take reasonable steps to restrict access to and otherwise safeguard the confidentiality and integrity of Confidential Material at all times, including, without limitation, the implementation of electronic security procedures and other measures designed to ensure that all Confidential Material is properly stored, and password protected at all times.
- 7.7. Vendor shall immediately disclose to OST the discovery of any security breach or suspicious intrusion involving Confidential Material and shall identify the type and amount of Confidential Material that was compromised or disclosed.
- 7.8. Within six (6) months from the termination of the Agreement, all Confidential Material, regardless of form, shall be permanently deleted or destroyed in accordance with all applicable law, orders, rules and regulations and industry best practices. Any electronic data or documents deleted under this Section 7.8 shall be permanently deleted and shall not be recoverable, according to the National Institute of Standards and Technology's approved methods. If requested, Vendor shall provide a destruction certificate to OST listing the type and contents of electronic records or physical documents destroyed or permanently deleted under this Section 7.8. Notwithstanding the foregoing, Vendor may, subject to Vendor's confidentiality obligations under this Agreement, retain copies of State data and documents to the extent required by applicable state or federal law, regulations, rules, or orders or Vendor's document retention policy.
- 7.9. The State shall have no obligation to disclose Confidential Material. OST may, in its discretion, provide or refuse to provide Confidential Material requested by Vendor.
- 7.10. Vendor understands and agrees that the State may suffer irreparable harm in the event that Vendor fails to comply with its obligations hereunder and that monetary damages may not be adequate to compensate the State for such breach. Vendor agrees that the State, in addition to other remedies available to it at law or in equity for actual damages, shall be entitled to seek injunctive relief to enforce the terms of this Section 7.
- 7.11. Vendor's confidentiality obligations shall survive termination of the Agreement.

8. Warranty.

- 8.1. Vendor agrees to correct or re-perform any Services not in compliance with this Agreement in a timely manner.

8.2. Third-party products within the scope of this Agreement, if any, are warranted solely under the terms and conditions of the licenses or other agreements by which such products are governed. With respect to all third-party products and services purchased by Vendor in connection with the provision of the Services, if any, Vendor shall pass through or assign to the State all rights Vendor obtains from the manufacturers and/or vendors of such products and services (including warranty and indemnification rights), to the extent that such rights are assignable.

9. Indemnification; Limitation of Liability.

- 9.1. Vendor shall indemnify and hold harmless OST, the Board, the State and their respective officers, members, employees and attorneys (“Indemnified Parties”) from any and all liability, suits, actions, claims or damages, together with all reasonable costs and expenses (including attorneys’ fees), arising out of Vendor’s breach of the Agreement, or the negligent, reckless, intentional or other tortious, fraudulent, illegal, or unlawful conduct of Vendor or any subcontractor, or their respective officers, employees, contract employees or agents, arising out of or related to this Agreement (“Claims”).
- 9.2. If OST notifies Vendor in writing of a Claim against an Indemnified Party, including, without limitation, any Claim based on Vendor’s disclosure of or failure to safeguard any personal financial or other Confidential Material, Vendor will defend such Claim at Vendor’s expense if so requested by OST, in OST’s sole discretion. Vendor will pay any costs or damages that may be finally awarded against an Indemnified Party.
- 9.3. Except for fees that may be due and owing as set forth in Section 2 above and **Exhibit 2** hereto, and notwithstanding anything to the contrary in this Agreement, neither OST, the Board or the State, nor any officers, members, employees or attorneys of the foregoing, shall have any liability to Vendor or any other party for fees (including attorneys’ fees), expenses, suits, actions, claims or damages, whether direct or indirect, compensatory or punitive, actual or consequential, in or for actions, claims, causes of action or rights, including alleged indemnification rights, arising out of or related in any way to this Agreement.
- 9.4. Notwithstanding anything to the contrary herein, no provision of this Agreement shall constitute or be construed as an indemnification obligation in favor of Vendor, or a waiver or limitation of any right of OST, the Board or the State that may exist under applicable law.
- 9.5. Notwithstanding anything to the contrary herein, to the extent available under applicable law, OST, the Board and the State, and their respective officers, members, employees and attorneys, expressly reserve all rights, claims, arguments, defenses and immunities, including, without limitation, claims or defenses based on sovereign immunity, qualified immunity and other statutory or common law rights, claims, defenses or immunities; provided, however, that Vendor shall have the right to seek to enforce this Agreement in the courts of this State.

10. Insurance.

- 10.1. Vendor shall maintain the following insurance during the term of this Agreement:
- a. Worker’s compensation and employer’s liability insurance in accordance with applicable law;

- b. Comprehensive general liability - \$1,000,000 per occurrence/\$3,000,000 per aggregate;
 - c. Professional liability - \$5,000,000 per occurrence/\$5,000,000 per aggregate;
 - d. Automotive liability insurance covering all automotive units used in the work with limits of not less than \$100,000 for each person and \$300,000 for each accident as to bodily injury and \$25,000 as to property damage to others; and
 - e. Cyber Liability – Vendor must maintain cyber security liability insurance coverage with limits of \$[in an amount TBD] aggregate for loss resulting from a data breach. The policy shall be issued by an insurance company with an A.M. Best Rating of A-VII and shall remain in place for the term of the Agreement. At a minimum, the policy must include third-party coverage for credit monitoring, notification costs to data breach victims, and regulatory penalties and fines (to the extent insurable). Vendor shall be responsible for any deductible or self-insured retention contained in the insurance policy.
 - f. Excess/Umbrella policy - Excess/Umbrella \$[in an amount TBD] total (sits above underlying worker’s compensation and employer’s liability, general liability, and automotive liability).
- 10.2. Should any of the above-described policies be cancelled before the expiration date thereof, notice will be delivered to OST.
- 10.3. Before any work is performed pursuant to this Agreement, certificate of insurance and/or copies of the insurance policies specified in Section 10.1 shall be provided to OST. The certificate holder is as follows:

**Office of the State Treasurer
820 Silver Lake Blvd., Suite 100
Dover, DE 19904**

- 10.4. In no event shall OST, the Board or the State, or their respective officers, members, employees or attorneys, be named as an additional insured on any policy required under this Agreement.

11. Independent Contractor.

- 11.1. It is understood that in the performance of the Services, Vendor is an independent contractor, not an agent or employee of OST, the Board or the State, and shall furnish such Services in its own manner and method, except as required by this Agreement.
- 11.2. Vendor has and shall retain the right to exercise full control over the employment, direction, compensation and discharge of all persons employed by Vendor in the performance of the Services; provided, however, that Vendor will, subject to scheduling and staffing considerations, attempt to honor OST’s request for specific individuals.
- 11.3. Vendor shall be solely responsible for, and shall indemnify, defend and hold OST, the Board and the State, and their respective officers, members, employees and attorneys, harmless from

all matters relating to the payment of Vendor's employees, contract employees, subcontractor or subcontractor's employees, including compliance with Social Security withholding and all other wages, salaries, benefits and taxes of any nature whatsoever.

- 11.4. Vendor acknowledges that Vendor and any agents or employees employed or contracted by Vendor shall not, under any circumstances, be considered employees of OST, the Board or the State, and that they shall not be entitled to any of the compensation, benefits or rights afforded employees of the State, including, but not limited to, sick leave, vacation leave, holiday pay, pension benefits, and health, life, dental, long-term disability and workers' compensation insurance benefits.
- 11.5. Vendor shall be responsible for providing liability insurance for its personnel and agents.
- 11.6. As an independent contractor, Vendor has no authority to bind or commit OST, the Board or the State. Nothing herein shall be deemed or construed to create a joint venture, partnership, or fiduciary or agency relationship between the parties for any purpose.

12. Suspension.

- 12.1. OST may for any reason suspend performance by Vendor under this Agreement for such period of time as OST, in its discretion, may prescribe by providing written notice to Vendor. Upon receipt of such notice, Vendor shall not perform further work under this Agreement until Vendor's receipt of written notice from OST to resume performance.
- 12.2. OST shall pay Vendor compensation earned through the effective date of suspension, less all previous payments and subject to any rights of offset or recoupment that OST or the State may have against Vendor.

13. Termination.

- 13.1. This Agreement may be terminated by either party for default, which shall mean the failure of the other party to fulfill a material obligation under this Agreement, through no fault of the terminating party, but only after the other party is given:
 - a. Not less than 14 calendar days' written notice of intent to terminate; and
 - b. An opportunity for consultation with the terminating party prior to termination.
- 13.2. This Agreement may be terminated in whole or in part by OST for its convenience, but only after Vendor is given 30 calendar days' written notice of intent to terminate.
- 13.3. If termination is effected, OST will pay Vendor that portion of compensation earned for Services provided as of the effective date of termination, but:
 - a. No amount shall be allowed for anticipated profit on unperformed Services or other work;
 - b. Any payment due to Vendor at the time of termination may be adjusted or reduced to the extent of the State's offset or recoupment rights; and

- c. In the event Vendor ceases conducting business, OST shall have the right to make an unsolicited offer of employment to any officers or employees of Vendor.
- 13.4. In connection with any notice issued under this Section 13, OST may immediately retain another vendor to perform the Services. Vendor shall at all times cooperate in the transition and shall perform such Services and additional services as OST shall determine are necessary or appropriate to enable the transition of work to a successor vendor or vendors. Vendor's obligation to provide transition services shall survive termination and shall continue until such date as is communicated in writing to Vendor that such Services or additional services are no longer needed.
- 13.5. If after termination for breach it is determined that Vendor has not so failed, the termination shall be deemed to have been effected for convenience.
- 13.6. The termination of this Agreement shall not terminate indemnification or confidentiality rights or obligations, or any other rights or obligations that are intended to or customarily extend beyond termination.
- 13.7. The rights and remedies of OST provided in this Section are in addition to any other rights and remedies provided by law or under this Agreement.
- 13.8. Gratuities.
- a. OST may, by written notice to Vendor, terminate this Agreement without liability if it is found that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by Vendor or any agent or representative of Vendor to any officer or employee of OST, the Board or the State with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending or making of any determinations with respect to the performance of this Agreement.
 - b. In the event this Agreement is terminated as provided in Section 13.8.a, the State shall be entitled to pursue the same remedies against Vendor it could pursue in the event of a breach of this Agreement by Vendor.
 - c. The rights and remedies of OST, the Board and the State provided in Section 13.8 shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.
- 13.9. Validity and enforcement of this Agreement is subject to appropriations by the General Assembly of the specific funds necessary for contract performance. If such funds are not so appropriated, (a) OST may immediately terminate this Agreement without liability, and (b) the Agreement shall be terminated without liability as to any obligation of OST requiring the expenditure of money for which no specific appropriation is available.

14. Assignment; Subcontracts.

- 14.1. Any attempt by Vendor to assign or otherwise transfer any interest in this Agreement without the prior written consent of OST shall be void.

- 14.2. Vendor's employees shall perform all Services, unless OST consents in writing to Vendor's request to use temporary staff, independent contractors or a subcontractor. Neither approval by OST of any such request, nor OST's acceptance of any software, deliverable or payment of any invoice, shall relieve Vendor of responsibility for the professional and technical accuracy and adequacy of the Services. All temporary staff, independent contractors and subcontractors shall adhere to and be bound by the terms of this Agreement, including all exhibits.
- 14.3. Vendor shall be and remain liable for all damages to OST, the Board and the State caused by the negligent performance or non-performance of work under this Agreement by any use temporary staff, independent contractors or a subcontractor.
- 14.4. The compensation otherwise due to Vendor pursuant to **Exhibit 2** shall not be affected by OST's approval of Vendor's request to use temporary staff, independent contractors or a subcontractor.

15. Complete Agreement.

- 15.1. This Agreement and its exhibits, which are incorporated herein by reference, shall constitute the entire Agreement between OST and Vendor with respect to the subject matter of this Agreement and shall not be modified or changed without the express written consent of the parties. The provisions of this Agreement supersede all prior oral and written quotations, communications, agreements and understandings of the parties with respect to the subject matter of this Agreement. Notwithstanding the foregoing, or any other provision of this Agreement, all oaths, representations and warranties made by Vendor through participation in the RFP process, including, without limitation, all written representations made by Vendor in Vendor's proposal concerning Vendor's experience and capabilities, shall survive execution and become part of the Agreement.
- 15.2. If the scope of any provision of this Agreement is too broad in any respect to permit enforcement to its full extent, then such provision shall be enforced to the maximum extent permitted by law, and the parties hereto consent and agree that such scope may be judicially modified accordingly and that the whole of such provisions of the Agreement shall not thereby fail, but the scope of such provision shall be curtailed only to the extent necessary to conform to the law.
- 15.3. If any term or provision of this Agreement is found by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable, the same shall not affect the other terms or provisions hereof or the whole of this Agreement, but such term or provision shall be deemed modified to the extent necessary in the court's opinion to render such term or provision enforceable, and the rights and obligations of the parties shall be construed and enforced accordingly, preserving to the fullest permissible extent the intent and agreements of the parties herein set forth.
- 15.4. Each exhibit to this Agreement, except as its terms otherwise expressly provide, shall be a complete statement of its subject matter and shall supplement, modify and supersede the terms and conditions of this Agreement. No other agreements, representations, warranties or other matters, whether oral or written, shall be deemed to bind the parties hereto with respect to the subject matter of this Agreement.

16. Miscellaneous Provisions.

- 16.1. Except for fees that may be due and owing as set forth in Section 2 above and **Exhibit 2** hereto, Vendor shall solely bear the costs incurred in the performance of this Agreement.
- 16.2. Neither this Agreement nor any exhibit may be modified or amended except by the mutual written agreement of the parties. No waiver of any provision of this Agreement shall be effective unless it is in writing and signed by the party against whom enforcement is sought.
- 16.3. The delay or failure by either party to exercise or enforce any of its rights under this Agreement shall not constitute or be deemed a waiver of that party's right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right.
- 16.4. Vendor covenants that it presently has no interest, and that it will not acquire any interest, direct or indirect, that conflicts or would conflict in any manner or degree with the performance of Services required under this Agreement. Vendor further covenants that Vendor has disclosed and adequately described all direct ownerships interests in, or any reseller, consulting or other business relationships with, a Merchant Services vendor as of the date of this Agreement. Vendor will immediately notify OST of any material changes to such disclosures and descriptions and any other ownership interests in or relationships with a Merchant Services vendor that arise during the term of the Agreement, including any extension period.
- 16.5. Vendor acknowledges that OST, the Board and the State have obligations to ensure that public funds and resources are not used to subsidize private discrimination. Vendor recognizes that its refusal to hire or do business with an individual or company due to reasons of race, color, gender, ethnicity, disability, national origin, age, or any other protected status, may result in OST declaring Vendor in breach of the Agreement, terminating the Agreement without liability and/or taking such additional action as may be warranted under the circumstances.
- 16.6. Vendor warrants that no person or entity has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, or a percentage, brokerage or contingent fee. For breach or violation of this warranty, OST shall have the right to terminate this Agreement without liability.
- 16.7. This Agreement was drafted with the joint participation of both parties and shall be construed neither against nor in favor of either party.
- 16.8. At the option of OST, the parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between officials or executives who have authority to settle the controversy. All offers, promises, conduct and statements, in each case relating to dispute resolution, whether oral or written, made in the course of the negotiation by any of the parties, their agents, employees, experts and attorneys are confidential, privileged and inadmissible in any proceeding involving the parties; provided, however, that evidence that is otherwise admissible or discoverable may not be rendered inadmissible merely because it was the subject of discussion in the course of negotiation.

- 16.9. Any disputes, claims or controversies arising out of or relating to this Agreement that are not resolved through resolution pursuant to Section 16.8, may be submitted to mediation if OST so elects. Any such proceedings held pursuant to this provision shall be governed by the State's laws, and venue shall be in this State. The parties shall maintain the confidential nature of the proceedings and shall keep the terms of any resulting settlement or award confidential to the extent permissible under applicable law. Each party shall bear its own costs of mediation, including attorneys' fees and half of the mediator's fees and expenses.
- 16.10. The rights and remedies of OST and the State provided for in this Agreement are in addition to any other rights and remedies provided by law or at equity.
- 16.11. Neither party to this Agreement shall be liable for damages resulting from delayed or defective performance of its obligations under this Agreement when such delays or defective performance arise out of causes beyond the reasonable control and without the negligence or willful misconduct of the party.
- 16.12. This Agreement, including all exhibits, and its contents, including pricing information, is a public document subject to mandatory disclosure under the State's Freedom of Information Act, 29 *Del. C.* § 10001-10007. In the event that OST is required by law (any statute, governmental rule or regulation, or judicial or governmental order, judgment or decree) to disclose to the public any information or document reasonably designated as "confidential" by Vendor, OST will, to the extent reasonably practicable, give Vendor prior written notice of such disclosure or potential disclosure.
- 16.13. The provisions of this Agreement are for the sole benefit of the parties hereto. This Agreement confers no rights, benefits or claims upon any person or entity not a party hereto, including any permitted independent contractor or subcontractor approved by OST.
- 16.14. The terms of the RFP and any addenda or answers to RFP questions (the "RFP Documents") are incorporated herein by reference and govern the Services and Vendor except to the extent the terms of the RFP Documents conflict with the terms of this Agreement. When construing or interpreting the Agreement (a) the terms of the exhibits shall control and take precedence over the main text of the Agreement; and (b) the terms of the Agreement, including all exhibits, shall control and take precedence over the RFP Documents.

17. Assignment of Antitrust Claims.

As consideration for the award and execution of this Agreement by OST, Vendor hereby grants, conveys, sells, assigns and transfers to the State all of Vendor's right, title and interest in and to all known or unknown causes of action it presently has or may now or hereafter acquire under the antitrust laws of the United States or this State relating to the Services and other work product purchased or acquired by OST, the Board or the State pursuant to this Agreement.

18. Governing Law.

This Agreement shall be governed by and construed in accordance with Delaware law, without regard to conflict of laws rules or principles. Vendor consents to jurisdiction and venue in this State.

19. Notices.

Any and all notices required by the provisions of this Agreement shall be in writing and shall be mailed, certified or registered mail, return receipt requested. All notices shall be sent electronically to the following addresses:

If to OST:
Attn:

If to Vendor:
Attn:

IN WITNESS THEREOF, the parties hereto have caused this Agreement to be duly executed as of the date indicated below.

**STATE OF DELAWARE, by and through
the OFFICE OF THE STATE
TREASURER, on behalf of the CASH
MANAGEMENT POLICY BOARD**

Signature

Name

Title

Date

[VENDOR]

Signature

Name

Title

Date

The following two exhibits are attached and shall be considered part of this Agreement:

- **Exhibit 1 – Statement of Work**
- **Exhibit 2 – Fee Structure**

Exhibit 1: Statement of Work⁴

[To be negotiated.]

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⁴ Terms used but not defined in the exhibits to this Agreement shall have the meanings ascribed to such terms in the Agreement.

Exhibit 2: Fee Structure

[To be negotiated.]

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