

**STATE OF TEXAS
DEPARTMENT OF INFORMATION RESOURCES
CONTRACT FOR PRODUCTS AND RELATED SERVICES**

GATEWAY COMPANIES, INC.

1. Introduction

A. Parties

This Contract for products and related services is entered into between the State of Texas, acting by and through the Department of Information Resources (hereinafter "DIR") with its principal place of business at 300 West 15th Street, Suite 1300, Austin, Texas 78701, and Gateway Companies, Inc. (hereinafter "Vendor"), with its principal place of business at 610 Gateway Drive, N. Sioux City, South Dakota 57049.

B. Compliance with Procurement Laws

This Contract is the result of compliance with applicable procurement laws of the State of Texas. DIR issued a solicitation on the Texas Building and Procurement Commission's Electronic State Business Daily, Request for Offer (RFO) DIR-SDD-TMP-058, on April 18, 2005, for Information Technology Products and Related Services. Upon execution of this Contract, a notice of award for RFO DIR-SDD-TMP-058 shall be posted by DIR on the Electronic State Business Daily.

C. Order of Precedence

This Contract; Appendix A, Standard Terms and Conditions For Products and Related Services Contracts; Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan; Appendix C, Pricing and Product Index; Appendix D, Pricing and Product Index for Standard Configurations; Appendix E, Software Installation Agreement; Appendix F, Hitachi Indirect Channel Customer Agreement; Exhibit 1, Vendor's Response to RFO DIR-SDD-TMP-058, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-058, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Appendix E, then Appendix F, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

2. Term of Contract

The term of this Contract shall be one (1) year commencing on the last date of approval by DIR and Vendor. Prior to expiration of the original term, DIR and Vendor may extend the Contract, upon mutual agreement, for up to three (3) optional one-year terms.

3. Product and Service Offerings

The only products and services to be sold under this Contract are those defined by Chapter 2054, Texas Government Code, as "information resources technologies" and that have a valid business use by Texas State agencies.

A. Products

Products awarded under this Contract are based on Vendor's response to RFO DIR-SDD-TMP-058 and include:

- 1) information technology products manufactured/co-branded by Gateway Companies, Inc.;
- 2) Hitachi San Solution products specified in Appendix C, Pricing and Product Index; and
- 3) third-party information technology products identified as Gateway Accessory Store Items in Appendix C, Pricing and Product Index.

Vendor may incorporate changes to their product offering; however, any changes must be within the scope of products awarded based on Vendor's response to RFO DIR-SDD-TMP-058.

B. Product Standard Configurations

- 1) Vendor may make available standard configurations, as defined by DIR, for products offered under the Contract. Products most commonly procured by Customers shall be the basis for standard configurations. Products defined as standard configurations may also include component upgrade options that may be selected by the Customer.
- 2) Standard configurations shall be listed in Appendix D, Pricing and Product Index for Standard Configurations. Vendor and DIR shall review and update as necessary the products and specifications defined as standard configurations upon a timeframe mutually agreeable to the parties. Upon written agreement by Vendor and DIR, the updated Appendix D shall supercede the previous Appendix D.
- 3) DIR reserves the right to request the Vendor to increase or decrease the number of products offered as standard configurations if it is in the best interest of the State to do so.

C. Services

Services awarded under this Contract are based on Vendor's response to RFO DIR-SDD-TMP-058 and only available as related to the products specified above in Subsection 3.A, Products. Services include:

- 1) installation;
- 2) maintenance and warranty;
- 3) product usage training; and
- 4) technical support services.

All forms of disaster recovery, staffing augmentation, application development services, programming, and consulting services are excluded. Vendor may incorporate changes to their service offering; however, any changes must be within the scope of services awarded based on Vendor's response to RFO DIR-SDD-TMP-058.

4. Pricing

A. List Price

List Price is defined as the price for products and services published on Vendor's State and Local Government website at:

<http://www.gateway.com/work/gv/state.shtml?clv=TB>.

B. Customer Discount

- 1) The minimum Customer discount for all products and certain discounted services available under this Contract, excluding standard configurations, will be the percentage off List Price as specified in Appendix C, Pricing and Product Index.
- 2) Minimum discounts for consolidated Purchase Orders shall be added to the initial Customer discount for certain products as specified in Appendix C, Pricing and Product Index.

C. Customer Price

- 1) Excluding standard configurations and unit priced services, Customer price shall be calculated as follows:

Customer price = List Price – Customer discount.

- 2) The maximum Customer price for unit priced services shall be unit price specified in Appendix C, Pricing and Product Index.
- 3) The maximum Customer price for the standard configurations shall be as specified in Appendix D, Pricing and Product Index for Standard Configurations. During the agreed upon timeframe of the standard configuration offering, if at anytime the percentage savings becomes ten percent (10%) or less below normal Contract pricing for the same configuration/model, DIR and Vendor agree to renegotiate the standard configuration price offered. DIR agrees to provide such pricing documentation information to Vendor.
- 4) Customer price for all products and services includes the DIR Administrative Fee specified in Section 5, DIR Administrative Fee.
- 5) Customers purchasing products and services under this Contract may negotiate more advantageous pricing or participate in special promotional offers. In such event, a copy of such better offerings shall be furnished to DIR upon request.
- 6) Based on a quantity of one, if pricing for products or services available under this Contract are provided at a lower price to: (i) an eligible Customer who is not purchasing those products or services under this Contract or (ii) any other entity or consortia authorized by Texas law to sell said products and services to eligible Customers, then the available Customer price in this Contract shall be adjusted to that lower price. This Contract shall be amended within ten (10) business days to reflect the lower price.

D. DIR Administrative Fee

The administrative fee specified in Section 5 below shall not be broken out as a separate line item when pricing or invoice is provided to Customer.

E. Shipping and Handling Fees

The price to the Customer under this Contract shall include all shipping and handling fees. Shipments will be Free On Board Customer's destination. No additional fees shall be charged to the Customer for standard shipping and handling. If the Customer requests expedited delivery, Customer will be responsible for any charges for expedited delivery.

F. Tax-Exempt

As per Section 151.309, Texas Tax Code, Customers under this Contract are exempt from the assessment of State sales, use and excise taxes. Further, Customers under this Contract are exempt from Federal Excise Taxes, 26 United States Code Sections 4253(i) and (j).

G. Travel Expense Reimbursement

Pricing for services provided under this Contract are exclusive of any travel expenses that may be incurred in the performance of those services. Travel expense reimbursement may include personal vehicle mileage or commercial coach transportation, hotel accommodations, parking and meals; provided, however, the amount of reimbursement by Customers shall not exceed the amounts authorized by the current State Travel Regulations. Travel time may not be included as part of the amounts payable by Customer for any services rendered under this Contract. The DIR administrative fee specified in Section 5 below is not applicable to travel expense reimbursement. Anticipated travel expenses must be pre-approved in writing by Customer.

H. Changes to Prices

- 1) Except for product standard configurations, Vendor may change the price of any product or service at any time, based upon changes to the List Price, but discount levels shall remain consistent with the discount levels specified in Subsection 4.B above.
- 2) Price decreases for all products, including standard configurations, shall take effect automatically during the Contract term and shall be passed on to the Customer at time of quote.
- 3) Any changes to the product or services as described in Subsections 3.A and 3.C above shall incorporate, to the extent possible, similar or comparable price discount levels as specified in Appendix C, Pricing and Product Index, as agreed upon by the Vendor and DIR.

5. DIR Administrative Fee

- A. The administrative fee to be paid by the Vendor to DIR based on the dollar value of all sales to Customers pursuant to this Contract is 3/4 of 1% (0.0075). Payment will be calculated for all sales, net of returns and credits. For example, the administrative fee for sales totaling \$100,000 shall be \$750.
- B. The total administrative fee due to DIR shall not be less than \$200,000 for any given annual contract period starting February 1 and ending January 31. Should this Contract expire or terminate prior to January 31 of any given annual contract period, the total administrative fees due for the contract period shall be prorated at no less than \$16,666 per month.
- C. All prices quoted to Customers shall include the administrative fee. DIR reserves the right to change this fee upwards or downwards during the term of this Contract, upon written notice to Vendor. Any change in the administrative fee shall be incorporated in the price to the Customer.

6. Notification

All notices under this Contract shall be sent to a party at the respective address indicated below.

If sent to the State:
Sherri Parks, Service Delivery Division
Department of Information Resources
300 W. 15th St., Suite 1300
Austin, Texas 78701
Phone: (512) 475-4700
Facsimile: (512) 475-4759
Email: sherri.parks@dir.state.tx.us

If sent to the Vendor:
Kris Mogensen
Gateway Companies, Inc.
610 Gateway Drive
N. Sioux City, South Dakota 57049
Phone: (800) 846-2042 ext. 28971
Facsimile: (605) 232-2533
Email: kris.mogensen@gateway.com

7. Shrink Wrap License and Service Agreements

A. Shrink Wrap License Agreement

Third-party software products having a shrink-wrap software license agreement may be sold under the Contract. All such third-party software is subject to the shrink-wrap software license agreement provided with the software by the software publisher. Customers are bound by and will abide by all such software licensing agreements.

B. Installation Services Statement of Work and Software Installation Agreement

1) Installation Services Statement of Work

Customers purchasing installation services under this Contract shall work with Vendor to develop a Statement of Work that shall be attached to the Purchase Order. The Statement of Work will contain a detailed description of services to be provided, criteria for acceptance, pricing, schedule, payment milestones, and responsibilities of Vendor, Customer, and any third party involved in the performance of the services.

2) Software Installation Agreement

Installation services provided under this Contract that require Vendor to install Customer-provided software shall be in accordance with the Software Installation Agreement as set forth in Appendix E of this Contract. No changes to the Software Installation Agreement terms and conditions may be made unless previously agreed to by Vendor and DIR.

C. Hitachi Indirect Channel Customer Agreement

Customers acquiring Hitachi San Solution products and services under this Contract shall hold, use and operate such products and services in accordance with the Hitachi Indirect Channel Customer Agreement as set forth in Appendix F of this Contract. No changes to the Hitachi Indirect Channel Customer Agreement terms and conditions may be made unless previously agreed to by Vendor and DIR.

8. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts.

A. The definition of “Customer” in Section 3, Definitions, is restated in its entirety as follows:

A. Customer - any Texas state agency, unit of local government, institution of higher education as defined in Section 2054.003, Texas Government Code, and those state agencies purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, and any local government as authorized through the Interlocal Cooperation Act, Chapter 791, Texas Government Code.

- B. The definition of “Order Fulfiller” in Section 3, Definitions, is restated in its entirety as follows:

D. Order Fulfiller – the party, either Vendor or Reseller, who is fulfilling a Purchase Order pursuant to the Contract. Reseller is a distributor, dealer, or value-added reseller designated by the Vendor who participates under the Contract as a primary distribution source for the Vendor.

- C. Subsection 6.A, Service, Sales and Support of the Contract, is hereby restated in its entirety as follows:

Vendor shall provide service, sales and support resources to serve all Customers throughout the State. It is the responsibility of the Vendor to sell, market, and promote products and services available under the Contract. Vendor shall use commercially reasonable efforts to ensure that potential Customers are made aware of the existence of the Contract. All sales to Customers for products and services available under the Contract shall be processed through the Contract.

- D. Subsection 6.C, Product Warranty and Return Policies, is hereby restated in its entirety as follows:

Order Fulfiller will adhere to the Vendor’s then-currently published policies concerning product warranties and returns. Product warranty and return policies for Customers will not be more restrictive or more costly than warranty and return policies for other similarly situated Customers for like products. Product warranty and return policies shall be included in product shipments to Customers.

- E. Subsection 6.E, Internet Access to Contract and Pricing Information, is amended to add the following:

7) Website Pricing

Vendor agrees to maintain the pricing on its Contract eSource website in accordance with the following provisions:

- a) Pricing listed on the Contract eSource website for all products and services will conform to the guaranteed pricing and/or discount levels identified in Contract Section 4.
- b) Vendor may change the price of any product or service in accordance with Contract Subsection 4.H, Changes to Prices.
- c) Vendor may make changes to the product and services offering listed the Contract eSource website in accordance with Contract Subsections 3.A, Products, and 3.C, Services.
- d) Vendor shall delete obsolete and discontinued products or services from the Contract eSource website on a timely basis.
- e) Major product model changes shall be incorporated into the Contract eSource website as soon as possible after product announcement.
- f) Vendor shall publish any product standard configurations, as defined by DIR and Vendor, on the Contract eSource website. Any standard configurations available under the Contract shall be prominently displayed on the Contract eSource website so that access to such information is readily available to all Customers. DIR reserves the right to require the Vendor to revise the location of the published standard

configurations on the Contract eSource website if, in the opinion of DIR, the location fails to prominently display the standard configurations.

F. Subsection 7.A, Purchase Orders, is restated in its entirety as follows:

All Customer Purchase Orders will be placed directly with the Order Fulfiller and must include Contract Number DIR-SDD-220 and reference number 03CCS21633. Accurate Purchase Orders shall be effective and binding upon acceptance by the Order Fulfiller.

G. Paragraph 1 of Subsection 7.B, Invoices, is restated in its entirety as follows:

Invoices shall be submitted by the Order Fulfiller directly to the Customer and shall be issued in compliance with Chapter 2251, Texas Government Code. All payments for products and/or services purchased under the Contract and any provision of acceptance of such products and/or services shall be made by the Customer to the Order Fulfiller. The Customer shall determine whether all products and services procured meet the Vendor's published specifications. Unless otherwise agreed upon between the Customer and Order Fulfiller, the Customer shall accept or reject the products and/or services within fifteen (15) days from the date of receipt of a correct invoice.

H. Subsection 8.B.2, Detailed Monthly Report, is restated in its entirety as follows:

Vendor shall electronically provide DIR with a detailed monthly report in a mutually agreed to format showing the dollar volume of any and all sales under the Contract for the previous month period. Reports shall be submitted to the DIR Go DIRect Coordinator. Reports are due on the fifteenth (15th) calendar day after the close of the previous month period. It is the responsibility of Vendor to collect and compile all sales under the Contract from participating Order Fulfillers and submit one (1) monthly report. The monthly report shall include, per transaction: the detailed sales for the period, the Order Fulfiller's company name, if applicable, Customer name, invoice date, invoice number, description, part number, manufacturer, quantity, unit price, extended price, Customer Purchase Order number, contact name, if available, Customer's complete billing address, purchases of standard configurations identified, and other information as required by DIR. The other information as required by DIR shall be mutually agreed upon by the Vendor and DIR. Each report must contain all information listed above per transaction or the report will be rejected and returned to the Vendor for correction in accordance with this section.

I. Subsection 9.A, Indemnification, is restated in its entirety as follows:

1) Acts or Omissions

Vendor shall defend, indemnify and hold harmless the State of Texas and Customers, their officers, agents, and employees from and against all claims, actions, suits, demands, proceeding, costs, damages and liabilities, including attorneys fees, arising out of, or resulting from any negligent acts or omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. Vendor agrees to coordinate defense with the Texas Office of Attorney General, as requested by DIR. To the extent permitted by State law, the State of Texas, its officers, agents, and employees agree to be responsible for their own acts, errors or omissions pertaining to this Indemnification provision.

2) Infringements

a) Vendor shall defend, indemnify and hold harmless the State of Texas and Customers, their officers, agents and employees, from any and all third party claims involving infringement of United States patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the use of any product manufactured by Vendor or service supplied under the Contract. Vendor agrees to defend against any and all third party claims at Vendor's expense, whether or not such claims become the subject of litigation provided the Customer: (i) notifies Vendor promptly in writing of such claim, (ii) grants Vendor control over the defense and settlement thereof, and (iii) reasonably cooperates in response to Vendor's requests for assistance. DIR will provide reasonable assistance in the defense of such claims if so requested by the Vendor. Vendor agrees to coordinate defense with the Texas Office of Attorney General, as may be requested by DIR.

b) Vendor shall have no liability if the alleged infringement is caused in whole or part by: (i) use of the product or service in combination with product or services not provided under the Contract, (ii) use of the product or service for a purpose or in a manner for which the product or service was not designed, (iii) any modification made to the product without Vendor's written approval, (iv) any modifications made to the product by the Vendor pursuant to Customer's specific instructions, (v) any intellectual property right owned by or licensed to Customer, or (vi) any use of the product or service by Customer that is not in conformity with the terms of any applicable license agreement.

c) If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense: (i) procure for the Customer the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing.

3) Limitation of Liability

In no event shall either party be liable to the other for incidental, indirect, punitive, consequential, special or exemplary damages, arising out of or in connection with the Contract even if apprised of them in advance.

J. Subsection 9.B, Vendor Certifications is restated in its entirety as follows:

Vendor certifies that to the best of its knowledge, it and its designated Order Fulfillers: (i) have not given, offered to give, and do not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the Contract, (ii) are not currently delinquent in the payment of any franchise tax owed the State of Texas and are not ineligible to receive payment under §231.006 of the Texas Family Code and acknowledge the Contract may be terminated and payment withheld if this certification is inaccurate, (iii) neither they, nor anyone acting for them, have violated the antitrust laws of the United States or the State of Texas, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage, (iv) have not received payment from DIR or any of its employees for participating in the preparation of the Contract, (v) are not ineligible to receive the Contract under §2155.004, Texas Government Code, (vi) to the best of their knowledge and belief, there are no suits or proceedings pending or threatened against or affecting them, which if determined adversely to them will have a material adverse effect on the ability to fulfill their obligations under the Contract, (vii) are not suspended or debarred from doing business with the federal

government as listed in the *Excluded Parties List System (EPLS)* maintained by the General Services Administration, and (viii) as of the effective date of the Contract, are not listed in the prohibited vendors list authorized by Executive Order #13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*", published by the United States Department of the Treasury, Office of Foreign Assets Control. In addition, Vendor acknowledges the applicability of §2155.444 and §2155.4441, Texas Government Code, in fulfilling the terms of the Contract.

K. Subsection 10.B.2, Absolute Right, is restated in its entirety as follows:

DIR shall have the absolute right to terminate the Contract without recourse in the event that: i) Vendor becomes listed on the prohibited vendors list authorized by Executive Order #13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*", published by the United States Department of the Treasury, Office of Foreign Assets Control, or ii) Vendor becomes suspended or debarred from doing business with the federal government as listed in the *Excluded Parties List System (EPLS)* maintained by the General Services Administration. Vendor shall be provided written notice in accordance with Section 11.A, Notices, of intent to terminate. Should an Order Fulfiller designated by Vendor in accordance with Subsection 6.B, Use of Order Fulfillers, become listed on one of the aforementioned lists, Vendor shall immediately notify DIR and rescind the Order Fulfiller's participation under the Contract. Vendor shall submit a revised Subcontracting Plan in accordance with Subsection 6.B.2, Changes in Order Fulfiller List.

This Contract is executed to be effective as of the date of last signature.

Gateway Companies, Inc.

**The State of Texas, acting by and through the
Department of Information Resources**

Authorized By: *signature on file*

Authorized By: *signature on file*

Name: Duane Wichman

Name: Brian S. Rawson

**Title: Manager, Contract Management
Organization**

Title: Director of Service Delivery

Date: 2/8/06

Date: 2/6/06

Legal: CJHK 2/1/06