

**\*\*Updated October 23, 2017 to add new vendor contact\*\***

**ATTACHMENT A**

**CONTRACT FOR  
KETS SERVER & STORAGE HARDWARE & SERVICES**

**BETWEEN**

**THE COMMONWEALTH OF KENTUCKY  
KENTUCKY DEPARTMENT OF EDUCATION**

**AND**

**BYTESPEED LLC**

**MA 758 1500000873**

**Vendor contact Information:**

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This Master Agreement (“Contract”, “Award”, or “Agreement”) is entered into, by and between the Commonwealth of Kentucky, Kentucky Department of Education (“the Commonwealth”, “Customer”, “KDE”) and ByteSpeed LLC (“Contractor”, “Vendor”, or “ByteSpeed”) as the Prime Contractor to establish a Contract for KETS Server & Storage Hardware & Services.

The Commonwealth and Contractor agree to the following:

**I. Scope of Contract**

The purpose of this Contract is to provide **KETS SERVER & STORAGE HARDWARE & SERVICES** for usage by Kentucky public school districts, the Kentucky School for the

Blind (KSB), the Kentucky school for the Deaf (KSD) and the Kentucky Education and Workforce Development Cabinet which includes but is not limited to the Kentucky Department of Education (KDE), the Education Professional Standards Board (EPSB), Kentucky Education Television (KET) and the Council on Postsecondary Education (CPE).

## **II. Contract Components and Order of Precedence**

The Commonwealth's acceptance of the Contractor's offer in response to the Solicitation RFP 758 150000230, indicated by the issuance of a Contract Award by the Office of Procurement Services, shall create a valid Contract between the Parties consisting of the following:

1. Any written Agreement between the Parties;
2. Any Addenda to the Solicitation RFP 758 150000230;
3. Solicitation RFP 758 150000230 and all attachments thereto, including Section 40--Terms and Conditions of a Contract with the Commonwealth of Kentucky;
4. General Conditions contained in 200 KAR 5:021 and Office of Procurement Services' FAP110-10-00;
5. Any Best and Final Offer;
6. Any clarifications concerning the Contractor's proposal in response to Solicitation RFP 758 150000230;
7. The Contractor's proposal in response to Solicitation RFP 758 150000230.

In the event of any conflict between or among the provisions contained in the Contract, the order of precedence shall be as enumerated above.

## **III. Negotiated Items**

- Executive Order 11246 – Addition of Section 40.032 - **Discrimination (Effective April 8, 2015)**
- ByteSpeed shall provide a five (5) year warranty. The first three (3) years will be the KDE required three (3) year depot warranty. Throughout the five (5) years, ByteSpeed shall cover any replacement and repairs needed as long as it is not accidental. Accidental is defined as "misuse of the product".
- ByteSpeed shall provide KDE a parts closet to include hard drives, ram, memory, etc. The replacement parts including shipping will be provided at no extra cost to KDE. All remaining items in the parts closet shall become property of KDE at the end of the five (5) year warranty period.
- ByteSpeed shall provide Unlimited Lifetime Tech Support for the life of the product. Repairs or replacement parts will not be included past the five (5) year warranty period.

## **IV. Terms and Conditions (Per Section 30 – 50 of RFP 758 150000230)**

30.1 **Commonwealth Information Technology Policies and Standards**

The Vendor and any subcontractors shall be required to adhere to applicable Commonwealth policies and standards related to technology use and security.

30.2 **Compliance with Commonwealth IT Enterprise Architecture and Standards**

The Commonwealth IT Enterprise Architecture and Standards reflect a set of principles for information, technology, applications, and organization. These standards provide guidelines, policies, directional statements and sets of standards for information technology. It defines, for the Commonwealth, functional and information needs so that technology choices can be made based on business objectives and service delivery. The Vendor shall stay knowledgeable and shall abide by these standards for all related work.

<http://technology.ky.gov/governance/Pages/architecture.aspx>

30.3 **Compliance with Commonwealth Security Standards**

The software deployment and all Vendor services shall abide by security standards as outlined in the Commonwealth's Enterprise Information Technology Policies.

Enterprise Policies

<http://technology.ky.gov/ciso/Pages/InformationSecurityPolicies,StandardsandProcedures.aspx>

**Finance and Administration Cabinet Commonwealth Office of Technology  
Enterprise IT Policies**

<http://finance.ky.gov/services/policies/Pages/default.aspx>

30.4 **Compliance with Industry Accepted Reporting Standards Based on Security Controls and Trust Principles**

The vendor must employ a comprehensive risk and threat management approach based on defined industry standards for service organizations such as the Statement on Standards for Attestation Engagements (SSAE 16). The vendor must undergo annual controls reviews based on these standards and have the ability to demonstrate compliance through the applicable reporting mechanisms associated with these reviews. This shall include providing access to any publicly available reports (i.e. SSAE 16 SOC 3) as well as on site reviews of reports available specifically for business partners (i.e. SSAE 16 SOC 2).

30.5 **System Vulnerability and Security Assessments**

The Commonwealth reserves the right to conduct external non-invasive vulnerability and security assessments of the software and infrastructure used to provide services prior to implementation and periodically thereafter. Upon completion of these assessments, the Commonwealth will communicate any findings to the vendor for action. Any cost relating to the alleviation of the findings will be the responsibility of the vendor. Mitigations will be subject to re-evaluation after completion. In cases where direct mitigation cannot be achieved, the vendor shall communicate this and work closely with the Commonwealth to identify acceptable compensating controls that will reduce risk

to an acceptable and agreed upon level. An accredited third party source may be selected by the vendor to address findings, provided they will acknowledge all cost and provide valid documentation of mitigation strategies in an agreed upon timeframe.

**30.6 Privacy, Confidentiality and Ownership of Information**

The Commonwealth Office of Technology (COT) is the designated owner of all data and shall approve all access to that data. The Vendor shall not have ownership of Commonwealth data at any time. The Vendor shall be in compliance with privacy policies established by governmental agencies or by state or federal law. Privacy policy statements may be developed and amended from time to time by the Commonwealth and will be appropriately displayed on the Commonwealth portal (Ky.gov). The Vendor should provide sufficient security to protect the Commonwealth and COT data in network transit, storage, and cache. **All sensitive data, as defined in Enterprise Standards, must be encrypted in-transit.**

**30.7 Software Development**

Source code for software developed or modified by the Vendor specifically for the Commonwealth shall become property of the Commonwealth. This is not meant to include minor modifications to the vendor software to configure the software for Commonwealth use. This is meant to include software written to add functionality to the vendor product specifically to meet the requirements of the Commonwealth where the Commonwealth bears the entire cost of creating that functionality.

**30.8 License Agreements**

Software provided by the Vendor to the Commonwealth should contain a provision for perpetual licensing with all upgrade options. License agreements should also contain a provision for the Commonwealth to maintain a version of the software in escrow in the event the Vendor is unable to continue business for financial or other business reasons.

**30.9 Software Version Requirements**

All commercially supported and Commonwealth approved software components such as Operating system (OS), Database software, Application software, Web Server software, Middle Tier software, and other ancillary software must be kept current. In the event that a patch interferes with the solution, the vendor must present a plan for compliance to the Commonwealth outlining the constraints and an appropriate plan of action to bring the solution in to compliance to allow this patch to be applied in the shortest timeframe possible, not to exceed three months, unless otherwise negotiated with the Commonwealth.

The vendors shall keep software in compliance with industry standards to support third party dependencies such as Java, Adobe Flash, Internet Explorer, Mozilla Firefox, etc. at currently supported version, release, and patch levels. In the event that a third party dependency interferes with the solution, the vendor must present a plan for compliance to the Commonwealth outlining the constraints and an appropriate plan of action to bring the solution into compliance to allow this third party dependency to be updated in the shortest timeframe possible, not to exceed three months, unless otherwise negotiated with the Commonwealth.

**30.10 Section 508 Compliance**

All user interfaces to the solution(s) provided, shall be warranted by the vendor to comply with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) and the World Wide Web Consortium's (W3C) Web Content Accessibility Guidelines (WCAG) 1.0, conformance level Double-A or greater.

**30.11 No Surreptitious Code Warranty**

The Contractor represents and warrants that no copy of licensed Software provided to the Commonwealth contains or will contain any Self-Help Code or any Unauthorized Code as defined below. This warranty is referred to in this Contract as the "No Surreptitious Code Warranty".

As used in this Contract, "Self-Help Code" means any back door, time bomb, drop dead device, or other software routine designed to disable a computer program automatically with the passage of time or under the positive control of a person other than the licensee of the software. Self-Help Code does not include Software routines in a computer program, if any, designed to permit an owner of the computer program (or other person acting by authority of the owner) to obtain access to a licensee's computer system(s) (e.g. remote access) for purposes of maintenance or technical support.

As used in this Contract, "Unauthorized Code" means any virus, Trojan horse, spyware, worm or other Software routines or components designed to permit unauthorized access to disable, erase, or otherwise harm software, equipment, or data; or to perform any other such actions. The term Unauthorized Code does not include Self-Help Code.

In addition, Contractor will use up-to-date commercial virus detection software to detect and remove any viruses from any software prior to delivering it to the Commonwealth.

The Vendor shall defend the Commonwealth against any claim, and indemnify the Commonwealth against any loss or expense arising out of any breach of the No Surreptitious Code Warranty.

### 30.12 **Applicable Security Control Framework Compliance**

The vendor must have an awareness and understanding of the NIST Special Publication 800-53 Security Control Framework and employ safeguards that meet or exceed the moderate level controls as defined within the standard. These controls must provide sufficient safeguards to provide reasonable protections around the Commonwealth's data to ensure that the confidentiality, integrity, and availability is maintained at an appropriate level. These include but are not limited to:

- *Access Control*  
The vendor must employ policy and process that provide for stringent control to limit physical and logical access to systems that house Commonwealth data to a need to know basis and provide clear separation of duties.
- *Awareness and Training*  
The vendor must provide the appropriate role specific training for staff to ensure that there is awareness and understanding of roles and responsibilities as they relate to the protections around the Commonwealth's data.
- *Audit and Accountability*  
There must be sufficient auditing capability to ensure that actions are tracked and there is individual accountability for all actions taken by vendor staff.
- *Configuration Management*  
The vendor must work within established baselines that provide minimal functionality needed to ensure service delivery without exposing unnecessary risk. The vendor must also employ structured change control processes that provide a level of coordination with the client agreed upon in a Service Level Agreement (SLA).
- *Contingency Planning*  
The vendor must employ contingent planning policy and procedures that ensure service delivery based on agreed SLA levels while maintaining all Commonwealth data within the continental United States.
- *Identification and Authorization*  
The vendor must employ appropriate identity and access management policies and procedures to ensure that access is appropriately authorized and managed at a level to ensure that access is provisioned and de-provisioned in a timely and efficient manner.
- *Incident Response*  
The vendor must employ policy and procedures to ensure that an appropriate response to all identified security incidents are addressed in a timely manner and are reported to the appropriate parties in an agreed upon SLA timeframe. The vendor must also ensure that all staff are sufficiently trained to ensure that they can identify situations that are classified as security incidents.
- *Maintenance*

The vendor must employ policy and procedures that ensure that all maintenance activities are conducted only by authorized maintenance staff leveraging only authorized maintenance tools.

- *Media Protection*

The vendor must employ policy and procedure to ensure that sufficient protections exist to protect Commonwealth data on all storage media throughout the media lifecycle and maintain documentation from media creation through destruction.

- *Physical and Environmental Controls*

The vendor must employ physical and environmental policies and procedures that ensure that the service and delivery infrastructure are located in a physically secure and environmentally protected environment to ensure the confidentiality, integrity, and availability of Commonwealth data.

- *Personnel Security*

The vendor must employ policies and procedures to ensure that all staff that have access to systems that house, transmit, or process Commonwealth data have been appropriately vetted and have been through a background check at the time of hire and periodically thereafter.

- *System and Communications Protections*

The vendor must employ physical and logical protection that protect system communications and communication media from unauthorized access and to ensure adequate physical protections from damage.

#### 40.1 **Procurement Requirements**

Procurement requirements are listed under “**Procurement Laws, Preference, Regulations and Policies**” and “**Response to Solicitation**” located on the eProcurement Web page at <http://eprocurement.ky.gov> and <http://finance.ky.gov/services/eprocurement/Pages/VendorServices.aspx> respectively. The vendor must comply with all applicable statutes, regulations and policies related to this procurement.

#### 40.2 **Contract Components and Order of Precedence**

The Commonwealth’s acceptance of the Contractor’s offer in response to the Solicitation RFP 758 1500000230, indicated by the issuance of a Contract Award by the Office of Procurement Services, shall create a valid Contract between the Parties consisting of the following:

1. Any written Agreement between the Parties;
2. Any Addenda to the Solicitation RFP 758 1500000230;
3. The Solicitation RFP 758 1500000230 and all attachments
4. Procurement Statutes, Regulations and Policies
5. Any Best and Final Offer;
6. Any clarifications concerning the Contractor’s proposal in response to the Solicitation RFP 758 1500000230;



7. The Contractor's proposal in response to the Solicitation RFP 758 1500000230.

In the event of any conflict between or among the provisions contained in the Contract, the order of precedence shall be as enumerated above.

40.3 **Final Agreement**

This Contract represents the entire agreement between the parties with respect to the subject matter hereof. Prior negotiations, representations, or agreements, either written or oral, between the parties hereto relating to the subject matter hereof shall be of no effect upon this Contract.

40.4 **Contract Provisions**

If any provision of this Contract (including items incorporated by reference) is declared or found to be illegal, unenforceable, or void, then both the Commonwealth and the Contractor shall be relieved of all obligations arising under such provision. If the remainder of this Contract is capable of performance, it shall not be affected by such declaration or finding and shall be fully performed.

40.5 **Type of Contract**

This Contract shall be on the basis of a **firm fixed unit price**.

40.6 **Contract Usage**

The contractual agreement with the Vendor will in no way obligate the Commonwealth of Kentucky to purchase any services or equipment under this Contract. The Commonwealth agrees, in entering into any contract, to purchase only such services in such quantities as necessary to meet the actual requirements as determined by the Commonwealth.

40.7 **Addition or Deletion of Items or Services**

The Office of Procurement Services reserves the right to add new and similar items, by issuing a Contract Modification, to this Contract with the consent of the Vendor. Until such time as the Vendor receives a Modification, the Vendor shall not accept Delivery Orders from any agency referencing such items or services.

40.8 **Changes and Modifications to the Contract**

Pursuant to KRS 45A.210 (1) and 200 KAR 5:311, no modification or change of any provision in the Contract shall be made, or construed to have been made, unless such modification is mutually agreed to in writing by the Contractor and the Commonwealth, and incorporated as a written amendment to the Contract and processed through the Office of Procurement Services and approved by the Finance and Administration Cabinet prior to the effective date of such modification or change pursuant to KRS 45A.210(1) and 200 KAR 5:311.

Memorandum of understanding, written clarification, and/or correspondence shall not be construed as amendments to the Contract.

If the Contractor finds at any time that existing conditions made modification of the Contract necessary, it shall promptly report such matters to the Commonwealth Buyer for consideration and decision.

**40.9 Changes in Scope**

The Commonwealth may, at any time by written order, make changes within the general scope of the Contract. No changes in scope are to be conducted except at the approval of the Commonwealth.

**40.10 Contract Conformance**

If the Commonwealth Buyer determines that deliverables due under the Contract are not in conformance with the terms and conditions of the Contract and the mutually agreed-upon project plan, the Buyer may request the Contractor to deliver assurances in the form of additional Contractor resources and to demonstrate that other major schedules will not be affected. The Commonwealth shall determine the quantity and quality of such additional resources and failure to comply may constitute default by the Contractor.

**40.11 Assignment**

The Contract shall not be assigned in whole or in part without the prior written consent of the Commonwealth Buyer.

**40.12 Payment**

The Commonwealth will make payment within thirty (30) working days of receipt of Contractor's invoice or of acceptance of goods and/or services in accordance with KRS 45.453 and KRS 45.454.

Payments are predicated upon successful completion and acceptance of the described work, services, supplies, or commodities, and delivery of the required documentation. Invoices for payment shall be submitted to the Agency Contact Person or his representative.

**40.13 Contractor Cooperation in Related Efforts**

The Commonwealth of Kentucky may undertake or award other contracts for additional or related work, services, supplies, or commodities, and the Contractor shall fully cooperate with such other contractors and Commonwealth employees. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other contractor or by Commonwealth employees.

40.14 **Contractor Affiliation**

"Affiliate" shall mean a branch, division or subsidiary that is effectively controlled by another party. If any affiliate of the Contractor shall take any action that, if done by the Contractor, would constitute a breach of this agreement, the same shall be deemed a breach by such party with like legal effect.

40.15 **Commonwealth Property**

The Contractor shall be responsible for the proper custody and care of any Commonwealth-owned property furnished for Contractor's use in connections with the performance of this Contract. The Contractor shall reimburse the Commonwealth for its loss or damage, normal wear and tear excepted.

40.16 **Confidentiality of Contract Terms**

The Contractor and the Commonwealth agree that all information communicated between them before the effective date of the Contract shall be received in strict confidence and shall not be necessarily disclosed by the receiving party, its agents, or employees without prior written consent of the other party. Such material will be kept confidential subject to Commonwealth and Federal public information disclosure laws.

Upon signing of the Contract by all Parties, terms of the Contract become available to the public, pursuant to the provisions of the Kentucky Revised Statutes.

The Contractor shall have an appropriate agreement with its Subcontractors extending these confidentiality requirements to all Subcontractors' employees.

40.17 **Confidential Information**

The Contractor shall comply with the provisions of the Privacy Act of 1974 and instruct its employees to use the same degree of care as it uses with its own data to keep confidential information concerning client data, the business of the Commonwealth, its financial affairs, its relations with its citizens and its employees, as well as any other information which may be specifically classified as confidential by the Commonwealth in writing to the Contractor. All Federal and State Regulations and Statutes related to confidentiality shall be applicable to the Contractor. The Contractor shall have an appropriate agreement with its employees, and any subcontractor employees, to that effect, provided however, that the foregoing will not apply to:

- A. Information which the Commonwealth has released in writing from being maintained in confidence;

- B. Information which at the time of disclosure is in the public domain by having been printed and published and available to the public in libraries or other public places where such data is usually collected; or
- C. Information, which, after disclosure, becomes part of the public domain as defined above, through no act of the Contractor.

40.18 **Advertising Award**

The Contractor shall not refer to the Award of Contract in commercial advertising in such a manner as to state or imply that the firm or its services are endorsed or preferred by the Commonwealth of Kentucky without the expressed written consent of the Agency Technical Contact person listed.

40.19 **Patent or Copyright Infringement**

The Contractor shall report to the Commonwealth promptly and in reasonable written detail, each notice of claim of patent or copyright infringement based on the performance of this Contract of which the Contractor has knowledge.

The Commonwealth agrees to notify the Contractor promptly, in writing, of any such claim, suit or proceeding, and at the Contractor's expense give the Contractor proper and full information needed to settle and/or defend any such claim, suit or proceeding.

If, in the Contractor's opinion, the equipment, materials, or information mentioned in the paragraphs above is likely to or does become the subject of a claim or infringement of a United States patent or copyright, then without diminishing the Contractor's obligation to satisfy any final award, the Contractor may, with the Commonwealth's written consent, substitute other equally suitable equipment, materials, and information, or at the Contractor's option and expense, obtain the right for the Commonwealth to continue the use of such equipment, materials, and information.

The Commonwealth agrees that the Contractor has the right to defend, or at its option, to settle and the Contractor agrees to defend at its own expense, or at its option to settle, any claim, suit or proceeding brought against the Commonwealth on the issue of infringement of any United States patent or copyright or any product, or any part thereof, supplied by the Contractor to the Commonwealth under this agreement. The Contractor agrees to pay any final judgment entered against the Commonwealth on such issue in any suit or proceeding defended by the Contractor.

If principles of governmental or public law are involved, the Commonwealth may participate in the defense of any such action, but no costs or expenses shall be incurred for the account of the Contractor without the Contractor's written consent.

The Contractor shall have no liability for any infringement based upon:

- A. the combination of such product or part with any other product or part not furnished to the Commonwealth by the Contractor
- B. the modification of such product or part unless such modification was made by the Contractor
- C. the use of such product or part in a manner for which it was not designed

**40.20 Permits, Licenses, Taxes and Commonwealth Registration**

The Contractor shall procure all necessary permits and licenses and abide by all applicable laws, regulations, and ordinances of all Federal, State, and local governments in which work under this Contract is performed.

The Contractor shall maintain certification of authority to conduct business in the Commonwealth of Kentucky during the term of this Contract. Such registration is obtained from the Secretary of State, who will also provide the certification thereof. Additional local registration or license may be required.

The Contractor shall pay any sales, use, and personal property taxes arising out of this Contract and the transaction contemplated hereby. Any other taxes levied upon this Contract, the transaction, or the equipment or services delivered pursuant hereto shall be borne by the Contractor.

**40.21 EEO Requirements**

The Equal Employment Opportunity Act of 1978 applies to All State government projects with an estimated value exceeding \$500,000. The Contractor shall comply with all terms and conditions of the Act.

<http://finance.ky.gov/services/eprocurement/Pages/VendorServices.aspx>.

**40.22 Provisions for Termination of the Contract**

This Contract shall be subject to the termination provisions set forth in 200 KAR 5:312.

**40.23 Bankruptcy**

In the event the Contractor becomes the subject debtor in a case pending under the Federal Bankruptcy Code, the Commonwealth's right to terminate this Contract may be subject to the rights of a trustee in bankruptcy to assume or assign this Contract. The trustee shall not have the right to assume or assign this Contract unless the trustee (a) promptly cures all defaults under this Contract; (b) promptly compensates the Commonwealth for the monetary

damages incurred as a result of such default, and (c) provides adequate assurance of future performance, as determined by the Commonwealth.

**40.24 Conformance with Commonwealth & Federal Laws/Regulations**

This Contract is subject to the laws of the Commonwealth of Kentucky and where applicable Federal law. Any litigation with respect to this Contract shall be brought in state or federal court in **Franklin County, Kentucky in accordance with KRS 45A.245.**

**40.25 Accessibility**

Vendor hereby warrants that the products or services to be provided under this Contract comply with the accessibility requirements of Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794d), and its implementing regulations set forth at Title 36, Code of Federal Regulations, part 1194. Vendor further warrants that the products or services to be provided under this Contract comply with existing federal standards established under Section 255 of the Federal Telecommunications Act of 1996 (47 U.S.C. § 255), and its implementing regulations set forth at Title 36, Code of Federal Regulations, part 1193, to the extent the Vendor's products or services may be covered by that act. Vendor agrees to promptly respond to and resolve any complaint regarding accessibility of its products or services which is brought to its attention.

**40.26 Access to Records**

The contractor, as defined in KRS 45A.030 (9) agrees that the contracting agency, the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to this contract for the purpose of financial audit or program review. Records and other prequalification information confidentially disclosed as part of the bid process shall not be deemed as directly pertinent to the contract and shall be exempt from disclosure as provided in KRS 61.878(1)(c). The contractor also recognizes that any books, documents, papers, records, or other evidence, received during a financial audit or program review shall be subject to the Kentucky Open Records Act, KRS 61.870 to 61.884.

In the event of a dispute between the contractor and the contracting agency, Attorney General, or the Auditor of Public Accounts over documents that are eligible for production and review, the Finance and Administration Cabinet shall review the dispute and issue a determination, in accordance with Secretary's Order 11-004. (See Attachment E).

**40.27 Prohibitions of Certain Conflicts of Interest**

In accordance with KRS 45A.340, the contractor represents and warrants, and the Commonwealth relies upon such representation and warranty, that it

presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services. The contractor further represents and warrants that in the performance of the contract, no person, including any subcontractor, having any such interest shall be employed.

In accordance with KRS 45A.340 and KRS 11A.040 (4), the contractor agrees that it shall not knowingly allow any official or employee of the Commonwealth who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this contract to voluntarily acquire any ownership interest, direct or indirect, in the contract prior to the completion of the contract.

**40.28 No Contingent Fees**

No person or selling agency shall be employed or retained or given anything of monetary value to solicit or secure this contract, excepting bona fide employees of the Offeror or bona fide established commercial or selling agencies maintained by the Offeror for the purpose of securing business. For breach or violation of this provision, the Commonwealth shall have the right to reject the proposal or cancel the contract without liability.

**40.29 Intentionally Left Blank**

**40.30 Contract Claims**

The Parties acknowledge that KRS 45A.225 to 45A.290 governs contract claims.

**40.31 Limitation of Liability**

The liability of the Commonwealth related to contractual damages is set forth in KRS 45A.245. The Vendor's liability for damages to the Commonwealth should be limited to the greater of \$1,000,000 or two times the contract purchase. The foregoing limitation of liability should not apply to claims covered by other specific provisions calling for liquidated damages or specifying a different limitation of liability, or to claims for injury to persons or damage to property caused by the Vendor's negligence or willful or wanton conduct. In no event should the Vendor be liable for any indirect, special, punitive or consequential damages unless otherwise specified.

**40.32 Discrimination (Effective April 8, 2015)**

Discrimination (because of race, religion, color, national origin, sex, sexual orientation, gender identity, age, or disability) is prohibited. This section applies only to contracts utilizing federal funds, in whole or in part. During the performance of this contract, the contractor agrees as follows:

1. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, national origin, sex, sexual

orientation, gender identity, or age. The contractor further agrees to comply with the provisions of the Americans with Disabilities Act (ADA), Public Law 101-336, and applicable federal regulations relating thereto prohibiting discrimination against otherwise qualified disabled individuals under any program or activity. The contractor agrees to provide, upon request, needed reasonable accommodations. The contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, religion, color, national origin, sex, sexual orientation, gender identity, age or disability. Such action shall include, but not be limited to the following; employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensations; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.

2. The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, sex, sexual orientation, gender identity, age or disability.

3. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance.

4. The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965 as amended, and of the rules, regulations and relevant orders of the Secretary of Labor.

5. The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

6. In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further government contracts or



federally-assisted construction contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in or as otherwise provided by law.

7. The contractor will include the provisions of paragraphs (1) through (7) of section 202 of Executive Order 11246 in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor, issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

50.1 **Agencies to Be Served**

This Contract shall be for use by **Kentucky public school districts, the Kentucky School for the Blind (KSB), the Kentucky school for the Deaf (KSD) and the Kentucky Education and Workforce Development Cabinet which includes but is not limited to the Kentucky Department of Education (KDE), the Education Professional Standards Board (EPSB), Kentucky Education Television (KET) and the Council on Postsecondary Education (CPE).** No shipments shall be made except upon receipt by Vendor of an official Delivery Order from a using agency.

50.2 **Extending the Contract Use to Other Agencies**

The Office of Procurement Services reserves the right, with the consent of the Vendor, to offer this Master Agreement to other state agencies requiring the product(s) or service(s).

50.3 **Term of Contract and Renewal Options**

The initial term of the Contract shall be for valid through **June 30, 2016.**

This Contract may be renewed at the completion of the initial Contract period for **two (2) additional two-year** periods upon the mutual agreement of the Parties. Such mutual agreement shall take the form of a Contract Modification as described in Section 40.8 of this Contract.

At the end of the contract the Vendor shall provide all agency data in a form that can be converted to any subsequent system of the agency's choice. The Vendor

shall cooperate to this end with the Vendor of the agency's choice, in a timely and efficient manner.

The Commonwealth reserves the right not to exercise any or all renewal options. The Commonwealth reserves the right to extend the contract for a period less than the length of the above-referenced renewal period if such an extension is determined by the Commonwealth Buyer to be in the best interest of the Commonwealth.

The Commonwealth reserves the right to renegotiate any terms and/or conditions as may be necessary to meet requirements for the extended period. In the event proposed revisions cannot be agreed upon, either party shall have the right to withdraw without prejudice from either exercising the option or continuing the contract in an extended period.

#### 50.4 **Basis of Price Revisions**

**PRICE ADJUSTMENTS:** Unless otherwise specified, the prices established by this Contract shall remain firm for the contract period subject to the following:

A: **Price Increases:** A price increase shall not occur during the first twelve (12) months of the contract. A vendor may request a price increase after twelve (12) months of the contract, which may be granted or denied by the Commonwealth. Any such price increase shall be based on industry wide price changes. The Contract holder must request in writing a price increase at least thirty (30) days prior to the effective date, and shall provide firm proof that the price increase(s) is justified. The Office of Procurement Services may request additional information or justification. If the price increase is denied, the Contract holder may withdraw from the Contract without prejudice upon written notice and approval by the Office of Procurement Services. Provided, however, that the Vendor must continue service, at the Contract prices, until a new Contract can be established (usually within sixty (60) days).

B: **Price Decreases:** The Contract price shall be reduced to reflect any industry wide price decreases. The Contract holder is required to furnish the Office of Procurement Services with notice of any price decreases as soon as such decreases are available.

C: **Extended Contract Periods:** If the Contract provides for an optional renewal period, a price adjustment may be granted at the time the

Contract is renewed, subject to price increase justification as required in Paragraph A "Price Increases" as stated above.

**50.5 Notices**

After the Award of Contract, all programmatic communications with regard to day-to-day performance under the contract are to be made to the Agency technical contact(s) identified.

**Agency Technical Contact Information**  
**Jessica Abbott**  
**Commonwealth of Kentucky**  
**Kentucky Department of Education**  
**Office of Knowledge Information Data Services**  
**500 Mero Street, 21<sup>st</sup> Floor CPT**  
**Frankfort, KY 40601**  
**Phone: (502) 564-2020 x2448**  
**Email: [Jessica.Abbott@education.ky.gov](mailto:Jessica.Abbott@education.ky.gov)**

After the Award of Contract, all communications of a contractual or legal nature are to be made to the Commonwealth Buyer.

**Commonwealth Buyer**  
**Susan S. Noland**  
**Commonwealth of Kentucky**  
**Finance and Administration Cabinet**  
**Office of Procurement Services**  
**702 Capitol Avenue, Room 096**  
**Frankfort, KY 40601**  
**Phone: (502) 564-5951**  
**Email: [Susan.Noland@ky.gov](mailto:Susan.Noland@ky.gov)**

**50.6 Subcontractors**

The Contractor is permitted to make subcontract(s) with any other party for furnishing any of the work or services herein. The Contractor shall be solely responsible for performance of the entire Contract whether or not subcontractors are used. The Commonwealth shall not be involved in the relationship between the prime contractor and the subcontractor. Any issues that arise as a result of this relationship shall be resolved by the prime contractor. All references to the Contractor shall be construed to encompass both the Contractor and any subcontractors of the Contractor.

**50.7 Scope of Work**

Provide enterprise server hardware and services that at a minimum includes the following:

**1. Vendor Single Point of Contact**

The vendor shall name a person that will be the single point of contact (SPOC) for contract issues.

The SPOC should be aggressive in sharing contract information, including but not limited to solution roadmaps, pricing and other strategic information to the KDE and KETS customers.

The contract holder should ensure that this person and all salespersons of their product will be knowledgeable in:

- All the details of the KETS contract.
- The Kentucky school, district office and KDE customer base.
- The most current KETS Master Plan on our Web site and year round current events in KETS.

Upon contract award, the Vendor's SPOC shall provide a description of a copy of procedures for requesting escalation, complaint resolution and identify the staff available for installations, billing problems, etc. The Vendor shall update this information annually at a minimum.

**2. Categories**

The following categories shall be established KETS Server and Storage Hardware & Services:

Server Hardware
Server Hardware Installation/Initial Configuration
Maintenance (Server Hardware) Support
Maintenance (Server Software) Support
Server Training (Technician/System Admin Training)
Server Hardware Accessories
Server Professional Services
Storage (Optional)
Uninterruptible Power Supply (UPS) (Optional)
KDE Managed Statewide Enterprise Server Project

**3. New/Revised Products**

Vendors are encouraged to update their product lines and solutions as quickly as possible. As new models of products and/or updates to solutions within the scope and spirit of the resulting contracts become available the vendor will notify the KIDS vendor manager. KIDS reserve the right to approve all new

and revised products and solutions, including pricing prior to the vendor being able to include it in the KETS contract. The vendor shall provide an evaluation unit of all hardware included on the contract unless waived by the KDE.

#### 4. **Pricing**

Contract Pricing: Equitable pricing shall be offered to all KETS customers. The Commonwealth of Kentucky's public school districts shall purchase from the KETS Master Agreements for the enterprise server solutions and categories that have been approved by KDE. Vendors shall be able to effectively handle this magnitude of sales, meet delivery deadlines with quality Enterprise (not Consumer) hardware and support equitably across every county in our state while meeting the performance standards for the life of the contract. The Commonwealth requests hardware that has consistency in parts and has undergone testing of internal components to the Enterprise level versus the consumer level. It is mandatory that vendors have capacity to provide contract management and support across every county in the Commonwealth. The vendor shall provide on-site support to **every school in every county** with the same timelines and costs with no exceptions for location.

Promotional Pricing: The Kentucky Department of Education may identify set dates where promotional pricing is encouraged by contract holders to KETS customers. During the promotional period(s) deeper discounts which are available regardless of quantities purchased may be set by the contract holder. This promotional pricing must be submitted and approved by the KETS vendor manager and be available to all KETS customers. At the close of a promotion period the discounts would return to the discount off msrp approved prior to the promotional period. Any promotional discount must be equitable and offered to all KETS customers during that period.

Negotiation of Price: During the life of the contract, KETS customers are encouraged to negotiate a better price for items or a better discount for product categories available for purchase from the KETS Master Agreement. However, once a lower price or better discount has been negotiated with one district, it becomes the new statewide price/discount for that solution/product category for the duration of the KETS contract. Typically, vendors have special offers to quickly get rid of inventory that didn't sell as well as anticipated or is outdated. If a vendor offers a special price for any time period (e.g. Offer ends August 12), that price for that model for all districts does not end on August 12. Instead, it has now become the new price for the duration that the model is on contract. The exception to this is the promotional pricing period set by the Kentucky Department of Education. Example: If a large district like Jefferson County negotiates a lower price for a specific model

from a vendor, it now becomes the new price for every district statewide for that model from that vendor.

5. **Contract Quotes and Invoicing**

Vendor quotes and invoices shall be submitted to the customer. Vendor shall submit invoices only for items ordered, delivered and accepted by the customer. Each quote and invoice shall include at a minimum:

- State/KETS contract number
- Customer purchase order number
- Customer name and address
- Date of Order
- Date of Installation (if applicable)
- Detailed equipment charges
- Hourly rate, if applicable
- Grand total for the quote or invoice

6. **Leasing**

Leasing agreements shall meet all legal requirements for the Commonwealth of Kentucky and the Kentucky Department of Education. The Vendor shall quote hardware warranty coverage for the duration of the lease period. The Commonwealth Lease Agreement is included as Attachment J. No changes or substitutions to the Commonwealth Lease Agreement may be made without the approval of the Kentucky Department of Education and the Finance Cabinet Office of Procurement Services. Lessee shall not be penalized for failure to return copies of device technical documentation such as CDs if reasonable efforts have been made to store, track and return them at the end of a lease. Information provided by the Vendor of leased items on any Lease quote or schedule of equipment shall include the following: description (including model name and number where applicable), price, quantity, total quantity price, and the KETS contract number. When there is a residual lease value the Vendor shall clearly identify the residual value per unit and the total quantity residual value. The residual value must be clearly identified in the lease quote and lease agreement. Lease payments will be addressed to the contract holder.

7. **Web site**

The contract holder shall maintain their own Web site where solutions and prices offered on the KETS contract may be easily/quickly viewed. This information must be easily accessible and easily recognized as "KETS Master Agreement" pricing. The vendor Web site shall also clearly identify the contract number and vendor contact information. The vendor shall work with the KIDS Vendor Manager to satisfy the Web site requirements within (90) ninety days of a contract award.

## 8. **Warranty**

Vendor shall be required to include three (3) years of maintenance/warranty in the initial purchase cost. After the initial three (3) year period, if hardware maintenance is desired, it will be the responsibility of the customer to procure from either this contract or other approved sources.

Warranty shall meet the following criteria:

- The KETS customer's primary period of service falls between the hours of 8:00am and 5:00pm customer's local time, Monday through Friday, excluding state observed holidays;
- The vendor shall be available to provide warranty service during the KETS's customer's primary period of service;
- Extended warranty coverage up to (24 x 7) shall be available if needed;
- Vendor shall have a toll-free number for all calls (no busy signals, answered by the third ring, hold time no longer than two (2) minutes, and a call tracking system);
- The vendor shall call/email the customer back within one (1) hour of placing call to provide applicable information including ticket number;
- The three (3) year of warranty coverage included in the initial server hardware purchase shall include:
  - Vendor response within four business hours to begin the diagnostics/fault determination. Vendor shall perform all fault determination.
  - Next business day onsite response. Onsite is defined that the vendor goes to the location of the equipment purchased, in a school district office, state agency, etc. The vendor shall come on-site to install any replacement parts or perform repair work so that the server is operational within 24 business hours (3 business days) of the initial call.
- All technicians shall be properly certified and or licensed to service server hardware;
- The vendor may perform diagnostics and repair remotely if applicable versus onsite response with the customer's prior approval.
- Vendor is not responsible for disaster recovery;
- Replacement parts shall be new or reconditioned, and of equal or better quality than original parts;
- There shall be no charge for any shipping and handling of parts or labor charges for troubles or issues with the equipment;
- The vendor shall ensure the cost is the same throughout the state for installation;
- The vendor shall be provided access to the customer's building where the server equipment is located as required to fulfill customer service

requests.

#### Warranty Penalties

There shall be a complaint desk at KDE site so our customers can quickly document vendors that are failing to meet the service requirements of the contract. Quarterly reports will be prepared and submitted by the vendor to the KETS Vendor Manager which will assist us in identifying vendors whom have not successfully met service response times. The vendor shall meet service specifications for a minimum of 97% of total annual service calls. The vendor is allowed this three percent (3%) failure rate based on total service calls they receive annually due to vehicle break down, parts that get lost, addresses being difficult to find, etc.

Vendors who exceed the three percent (3%) failure rate during the 1<sup>st</sup> quarter shall be required to meet with the KIDS Vendor Manager to establish a corrective plan for warranty service. Vendors who exceed the three percent (3%) failure rate for two (2) consecutive quarters shall be required to meet with the KIDS Vendor Manager to establish a corrective plan for warranty service and the KIDS may recommend a two (2) week suspension of the vendor contract to the OPS. Vendors who exceed the three percent (3%) failure rate for three (3) consecutive quarters shall be required to meet with the KIDS Vendor Manager to establish a corrective plan for warranty service and the KIDS may recommend a three (3) week suspension of the vendor contract to the OPS. Vendors who exceed the three percent (3%) failure rate for four (4) consecutive quarters shall be required to meet with the KIDS Vendor Manager to establish a corrective plan for warranty service and the KIDS may recommend termination of the vendor contract to the OPS.

The contract holder shall be held solely accountable for all services conducted under the terms and conditions specified in this warranty. Service calls taken by any technical support center(s) shall be quickly turned over to second and third levels of support for quick resolution rather than attempts to resolve issues at that point. All support personnel shall be certified by the manufacturer of equipment (for example, if this vendor supplies Vendor X equipment, support staff shall hold a manufacturer's certification and be certified by Vendor X to perform service on Vendor X equipment).

#### 9. **Vendor's Contract Reporting**

The vendor shall submit the following reports quarterly to the Kentucky Department of Education KETS Vendor Manager:

- A. Sales Report - The vendor shall maintain accurate records indicating sales from the KETS contract. Reports will contain the following fields: contract number, invoice date, customer name, product number, description (must



include model name and number), unit price, list price, quantity purchased, total price, discount off MSRP.

- B. Warranty/Maintenance Report - The vendor shall maintain accurate records indicating service performance of hardware purchased from the KETS contract. Reports will contain the following fields: Customer name, service call date, Hardware & Service Description including models and versions respectively, Warranty or SLA Coverage, and Service Completion Date.

The vendor shall prepare and submit electronically this information no later than ten (10) business days after the end of each quarter to the KETS Vendor Manager. It will be responsibility of the vendor to submit the quarterly sales reports. The KETS vendor manager or the KDE shall not be responsible for reminders to submit reports. The KDE Office of KIDS shall report any failure to submit and/or late submissions of sales reports on the annual contract review.

### **C. Delivery, Delivery Penalties, Delivery Penalty Waiver**

#### **A. Delivery**

All deliveries of equipment shall be provided within thirty (30) calendar days of the vendor's receipt of the purchase order from the customer, unless otherwise requested by the purchasing agency in writing. Delivery is defined as the receipt of goods and completion of installation, if required.

Customers purchasing from this Contract shall have thirty (30) calendar days from the date the customer receives a complete order to notify the vendor of any issues with the order (i.e. missing or damaged parts). The vendor may consider the order accepted by the customer after the close of the thirty (30) calendar day window.

#### **B. Delivery Penalties**

The Vendor agrees that when delivery is not made within the contracted due date, one percent (1%) per day shall be deducted from the Vendor's invoice for each day the Vendor fails to meet the contracted delivery date.

The Vendor agrees that when delivery and/or installation is not made within the contracted timeframes, one percent (1%) per day from the total invoice amount may be deducted from the vendor's invoice for each day the Vendor fails to meet the contracted timeframe. Penalties will continue to be charged to the vendor until the delivery and installation if applicable is complete.

C. Delivery Penalty Waiver

The vendor shall not be penalized if within the thirty (30) day delivery period, they have supplied KIDS and the customer with a written notice indicating the particular model ordered is not available in inventory anymore and a newer different model will be shipped in its place. In this case, the vendor must have submitted the new model to KIDS for evaluation testing unless the evaluation of that model is waived by KIDS. The new model shall not be shipped to the customer until which time the model has been added to the KETS contract. The vendor shall not use this penalty waiver to notify customers falsely with intentions to stall and send the same unit originally ordered. This conduct may result in termination of contract. Once the vendor receives notification their new model is now available for sales; the thirty (30) day clock starts again.

**D. National School Lunch Program Compliance**

This Contract shall meet the requirements of the National School Lunch Program (NSLP) per Attachment I.

## V. Pricing

### Product Category Discounts

<b>Server</b>	<b>Discount off MSRP</b>
Server Hardware	15%
Server Hardware Installation/Initial Configuration	100%
Maintenance (Server Hardware) Support	100%
Maintenance (Server Software) Support	100%
Server Training (Technician/System Admin Training)	100%
Server Hardware Accessories	15%
Server Professional Services	100%
Integrated Storage (Optional)	15%
Uninterruptible Power Supply (UPS) (Optional)	15%
KDE Managed Statewide Enterprise Server Project	15%

**Original Signatures on File**

**VI. Approvals**

This Contract is subject to the terms and conditions as stated. By executing this Contract, the parties verify that they are authorized to bind this Agreement and that they accept the terms of this Agreement.

This Contract may be executed electronically in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same Contract.

This Contract is invalid until properly approved and executed by the Finance and Administration Cabinet.

**1st Party: ByteSpeed, LLC. as Contracting Agent (“Contractor” or “Vendor”, or “ByteSpeed”)**

\_\_\_\_\_  
Printed name Title

\_\_\_\_\_  
Signature Date

**2nd Party: Commonwealth of Kentucky, Kentucky Department of Education (“the Commonwealth”, or “Customer” or “KDE”)**

\_\_\_\_\_  
Printed name Title

\_\_\_\_\_  
Signature Date

**Approved by the Finance and Administration Cabinet  
Office of Procurement Services**

Donald R. Speer \_\_\_\_\_ Executive Director \_\_\_\_\_  
Printed name Title

\_\_\_\_\_

Signature

Date