

STATE OF NORTH DAKOTA
DEPARTMENT OF WATER RESOURCES
WATER APPROPRIATIONS DIVISION
1200 MEMORIAL HIGHWAY
BISMARCK, ND 58504-5262

REQUEST FOR PROPOSAL (RFP)

RFP Title: Survey of Data Collection Practices for Water Resource Monitoring
and Water Use in the Western States

RFP Number: 770.3000-23-002

Issued: November 06, 2023

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- Attachment #1- Proposal Evaluation Worksheet
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SECTION ONE – INSTRUCTIONS

1.1 PURPOSE OF RFP

The state of North Dakota, acting through its Department of Water Resources (the STATE) is soliciting proposals to conduct a survey of data collection practices for water resource monitoring and water use in the western states and provide recommendations.

1.2 PROCUREMENT OFFICER CONTACT INFORMATION

The Procurement Officer is the point of contact for this RFP. Offerors shall direct all communications regarding this RFP to the Procurement Officer. Please do not add the Procurement Officer to any marketing distribution lists.

PROCUREMENT OFFICER: Christopher D. Bader, Director of Water Appropriations

EMAIL: cbader@nd.gov

PHONE: (701)328-2754

TTY Users call: 7-1-1

A person or firm interested in submitting a proposal should ensure all communications related to the procurement are only with the designated point of contact. This section does not restrict communication with state officials or any member of the legislative assembly unless the state official or member of the legislative assembly is involved directly with the procurement for which the person is interested or has submitted a bid or proposal (N.D.C.C. § 54-44.4-01.1).

Engaging in unauthorized communication or seeking to obtain information about an open solicitation with any state employee or official other than the responsible Procurement Officer or designee is sufficient grounds for suspension or debarment. [[N.D.A.C. § 4-12-05-04\(7\)](#)]

1.3 DEFINITIONS

For the purposes of this RFP, the acronyms and defined terms are as follows:

Acronym or Term	Name or Definitions
Contractor	Entity that has an approved contract with the State of North Dakota
CT	Central Time Zone
DWR	Department of Water Resources
PRESENS	Pushing Remote SENSors
OMB	Office of Management and Budget
RFP	Request for Proposal
Solicitation Closing	Deadline for receipt of proposals listed in the RFP Schedule
SPO	Office of Management and Budget, State Procurement Office
SPO Online	State Procurement Office Online system

1.4 RFP SCHEDULE

EVENT	DATE and TIME
RFP issued	11-08-2023
Deadline for submission of Questions and Objections	11-17-2023 by 2:00 PM, C.T.
Solicitation Amendment with responses to Questions issued approximately (if required)	11-24-2023
Deadline for receipt of proposals (Solicitation Closing)	12-08-2023 by 5:00 PM, C.T.
Proposal evaluation completed by approximately	12-15-2023

EVENT	DATE and TIME
Notice of intent to award issued approximately	12-18-2023
Contract start approximately	Negotiable

1.5 ASSISTANCE TO INDIVIDUALS WITH A DISABILITY

Contact the Procurement Officer, as soon as possible, if an individual with a disability needs assistance with the RFP, including any events in the RFP schedule, so reasonable accommodations can be made.

1.6 BIDDERS LIST AND SECRETARY OF STATE REGISTRATION REQUIREMENTS

Offerors must comply with requirements related for OMB Bidders List application and Secretary of State registration [N.D.C.C. § 54-44.4-09]. Bidders Lists are used to notify vendors when solicitations are issued on SPO Online.

Proposals will be accepted from Offerors that are not on the Bidders List. The successful Offeror must complete the Bidders List application process and comply with Secretary of State registration requirements within 60 calendar days from the date a notice of intent to award is issued. If the successful Offeror does not register within this time, its proposal may be rejected.

Bidders List and Secretary of State Information

1. Secretary of State Registration and Online Bidder Registration instructions are available online at [How to Bid | Office of Management and Budget, North Dakota](#).
2. Offeror should check the [Bidders List](#) to determine if Offeror is already registered.
3. An Offeror that needs to complete the registration process shall:
 - a. Register with the Secretary of State (fees apply) and obtain a “System ID” number.
 - b. Complete the [On-line Bidder Registration](#) including selecting [commodity codes](#). Notices related to this RFP will be sent to the Bidders List for the needed commodity or service and other known potential Offerors. The commodity codes used for this solicitation are: 890, 918, 925, 926 [commodity codes](#)
4. The successful Offeror may be required to register as a new supplier to receive payment from the STATE. New vendors (suppliers and individuals) looking to receive payment from the STATE should use the online [Supplier Registration](#).

1.7 STATE PROCUREMENT WEBSITE (SPO ONLINE)

<https://intranetapps.nd.gov/csd/spo/services/login.htm>

This RFP and any related amendments and notices will be posted on the North Dakota OMB website using SPO Online. Offerors are responsible for checking this website to obtain all information and documents related to this RFP: <https://apps.nd.gov/csd/spo/services/bidder/main.htm>

Select “Recent Solicitations”. Recent Solicitations are listed by close date.

Notices related to this RFP will be sent to the Bidders List for the needed commodity or service and other known potential Offerors.

Offerors not having completed the Bidders List registration may request to receive notices related to this RFP by contacting the Procurement Officer in writing with the following information: RFP title, business name, contact person, mailing address, telephone number, and email address.

1.8 AMENDMENTS TO THE RFP

If an amendment to this RFP is issued, it will be provided to all Offerors on the Bidders List for the solicitation and to those prospective Offerors who have contacted the Procurement Officer to receive notices related to the RFP. An Offeror shall include in its proposal any required acknowledgements of amendments to the RFP.

1.9 DEADLINE FOR QUESTIONS AND OBJECTIONS

Offerors should carefully review the RFP including all Attachments. Offerors may ask questions to obtain clarification and request additional information, or object to material in the RFP. Questions and objections must be submitted to the Procurement Officer in writing by the deadline identified in the RFP Schedule. If no deadline is specified, questions or objections must be received at least seven days prior to the Solicitation Closing deadline. The Procurement Officer may elect to respond to questions received after the deadline.

Questions and objections should include a reference to the applicable RFP section or subsection. Email is the preferred method of submission with the RFP number and title cited in the email subject line.

Responses to questions will be distributed as a solicitation amendment unless the question can be answered by referring the Offeror to a specific section of the RFP.

1.10 OFFER HELD FIRM

Offerors must hold proposals firm for at least 90 days from the deadline for receipt of proposals (Solicitation Closing). The STATE may send a written request to all Offerors to hold their offer firm for a longer period of time.

1.11 OFFEROR RESPONSIBLE FOR COSTS

Offeror is responsible for all costs associated with the preparation, submittal, and evaluation of any proposal including any travel and per diem associated with demonstrations and presentations.

1.12 TAXES

The STATE is not responsible for and will not pay itemized local, state, or federal taxes. Purchases of tangible personal property made by a state government agency is exempt from sales tax. The state sales tax exemption number is E-2001, and certificates will be furnished upon requested by the purchasing agency. The contractor must provide a valid Vendor Tax Identification Number as a provision of the contract.

The purchasing agency will determine if services provided under this contract are 1099 reportable. The purchasing agency may require the contractor to submit an IRS Form W-9.

The state tax exemption number should not be used by contractors in the performance of a contract.

A contractor or service provider performing any contract, including service contracts, for the United States Government, State of North Dakota, counties, cities, school districts, park board or any other political subdivisions within North Dakota is not exempt from payment of sales or use tax on materials, tangible personal property, and supplies used or consumed in carrying out contracts. In these cases, the contractor is required to file returns and pay sales and use tax just as required for contracts with private parties. Contact the North Dakota Tax Department at 701.328.1246 or visit its website at <https://www.nd.gov/tax/tax-resources/> for more information.

A contractor performing any contract, including a service contract, within North Dakota is also subject to the corporation income tax, individual income tax, and withholding tax reporting requirements, whether the contract is performed by a corporation, partnership, or other business entity, or as an employee of the contractor. In the case of employees performing the services in the state, the contractor is required to withhold state income tax from the employees' compensation and remit to the state as required by law. Contact the North Dakota Tax Department at 701.328.1248 or visit its website for more information.

1.13 PROPOSAL RECEIPT DEADLINE – LATE PROPOSALS REJECTED

An Offeror is solely responsible for ensuring four copies of its proposal are received by the STATE prior to the Solicitation Closing deadline identified in the RFP schedule regardless of the method of submission. A solicitation amendment will be issued if this deadline is changed. An Offeror may

contact the Procurement Officer to inquire whether its proposal has been received. Proposals delivered late will be rejected pursuant to [N.D.A.C. § 4-12-08-13](#).

Please Note: Please contact Chris Bader by phone at 701-328-2754 to hand deliver the submittal. Late submittals will not be evaluated.

1.14 PROPOSAL OPENING

A public opening will not be held.

This is a formal sealed Request for Proposal (RFP) process. Proposals will be secured and held unopened until the Solicitation Closing deadline. Per [N.D.A.C § 4-12-08-04](#), the openings may be made public at the discretion of the purchasing agency. If a public opening is held, only the names of Offerors that submitted proposals can be revealed at the opening, and each proposal will be opened in a manner to avoid disclosure of the contents to the competing Offerors.

1.15 AMENDMENT AND WITHDRAWAL OF PROPOSALS

Offeror may amend, supplement, or withdraw proposal prior to the Solicitation closing deadline. No changes will be accepted after the Solicitation closing deadline. After the Solicitation closing deadline, Offeror may make a written request to withdraw proposal and provide evidence that a substantial mistake has been made, and the STATE may permit withdrawal.

1.16 NEWS RELEASES

Offerors shall not make any news releases related to this RFP without prior approval of the STATE.

1.17 CONFLICT OF INTEREST

Under state laws and rules, a state employee or official shall not participate directly or indirectly in a procurement when the state employee or officials knows of a conflict of interest. Potential conflicts of interest include state employees or their immediate family members employed by the firm, seeking employment with the firm, or with a financial interest in the firm. Potential conflicts of interest will be addressed in accordance with [N.D.A.C. § 4-12-04-04](#). [[N.D.C.C. § 12.1-13-03](#)]

Persons employed by the State of North Dakota, or within one year thereafter, may be prohibited from acquiring a pecuniary interest in a public contract or transaction. Offerors should review [N.D.C.C. § 12.1-13-02](#) to ensure compliance and avoid such conflict(s) of interest.

1.18 ATTEMPT TO INFLUENCE PROHIBITED

Offerors must not give or offer to give anything to a state employee or official anything that might influence or appear to influence procurement decisions. Suspected attempt to influence will be handled in accordance with [N.D.A.C. § 4-12-04-05](#).

1.19 COLLUSION PROHIBITED

Offerors must prepare proposals independently, without collusion. Suspected collusion will be handled in accordance with [N.D.A.C § 4-12-04-06](#).

1.20 PROTEST AND APPEAL

An interested party may protest a solicitation pursuant to [N.D.C.C. § 54-44.4-12](#) and [N.D.A.C. § 4-12-14-01](#). When a solicitation contains a deadline for submission of questions and objections, protests of the solicitation will not be allowed if these faults have not been brought to the attention of the Procurement Officer before the specified deadline. If no deadline for questions is specified, protest based upon defects in the solicitation must be made at least seven calendar days before the deadline for receipt of proposals.

An Offeror that has submitted a response to a solicitation and is aggrieved may protest an award or notice of intent to award pursuant to [N.D.C.C. § 54-44.4-12](#) and [N.D.A.C. § 4-12-14-02](#). The protest must be submitted in writing to the Procurement Officer during the protest period, which is seven calendar days beginning the day after the notice of intent to award is issued.

The protestor may appeal the decision of the Procurement Officer to the Director of OMB or designee in writing within seven calendar days after receiving notice of the decision pursuant to [N.D.C.C. § 54-44.4-12](#) and [N.D.A.C. § 4-12-14-03](#).

SECTION TWO – BACKGROUND

2.1 BACKGROUND INFORMATION

The mission of the North Dakota Department of Water Resources is to responsibly manage North Dakota's water needs and risks for the people's benefit.

The STATE is conducting this solicitation to evaluate the survey data collection methods and practices for water resource monitoring and water use within the western states. The intent is to collect this information and share the results with the western states to provide benefit to North Dakota and the western states. In addition, recommendations for the state of North Dakota shall be included.

The North Dakota Department of Water Resources (DWR) is soliciting proposals to survey the 17 western states (see below) of the continental U.S. to provide a comprehensive summary of data collection activities and current methods and infrastructure used to collect, store, and manage data. A primary focus for this survey will be to identify real-time and near real-time data collection activities and to provide a better understanding of the data initiatives driving the need for real-time data, and the technology platforms that are currently being developed and deployed to address respective initiatives. Additionally, it will be important to understand processes that are incorporated to ensure the accuracy and integrity of the data collection efforts particularly efforts surrounding the collection of water use data and pumping activities.

The 17 western states to be targeted by this survey include Washington, Oregon, California, Nevada, Arizona, Utah, Idaho, Montana, Wyoming, Colorado, New Mexico, Texas, Oklahoma, Kansas, Nebraska, South Dakota, and North Dakota

North Dakota, like many of the western states, is engaged in a variety of data collection activities surrounding the management of the state's water resources. This includes data collection activities related to monitoring both surface and ground water resources which includes ground and surface water levels, water chemistry, precipitation, barometric pressure, air temperatures, soil moisture, and soil temperature. This also includes data collection activities for purposes of monitoring and maintaining regulatory compliance related to water withdrawals, withdrawal rates, and total water use.

Given, the increasing demand and competition for water combined with environmental stresses such as drought and changing climatic conditions, more emphasis is being placed on real-time or near real-time data collection activities to provide more timely high-resolution data for purposes of resource monitoring and regulatory compliance. North Dakota is currently engaged in large scale remote data collection activities that provide near real-time solutions for monitoring the state's water resources and the associated response of the systems to water withdrawals and environmental stresses.

With the rapid expansion of oil production related to the commercial application of hydraulic fracturing in the western part of the state over the past 15 years, the DWR was faced with challenges associated with permit violations resulting from over-appropriation and illegal pumping. Given the demand for water and the tremendous profit potential, the DWR explored real time monitoring tools for purposes of maintaining regulatory compliance. With the development of the real-time water use reporting network, consisting largely of a published web service, the DWR has required all permitted industrial water users to register and report daily pumping rates and total daily water withdrawals at each pump site. This model was structured to provide an open format that allowed permit holders to employ any vendor or manufacturer to set up the necessary telemetry at each pump site, and this system has been operational for more than 10 years (Figure 1).

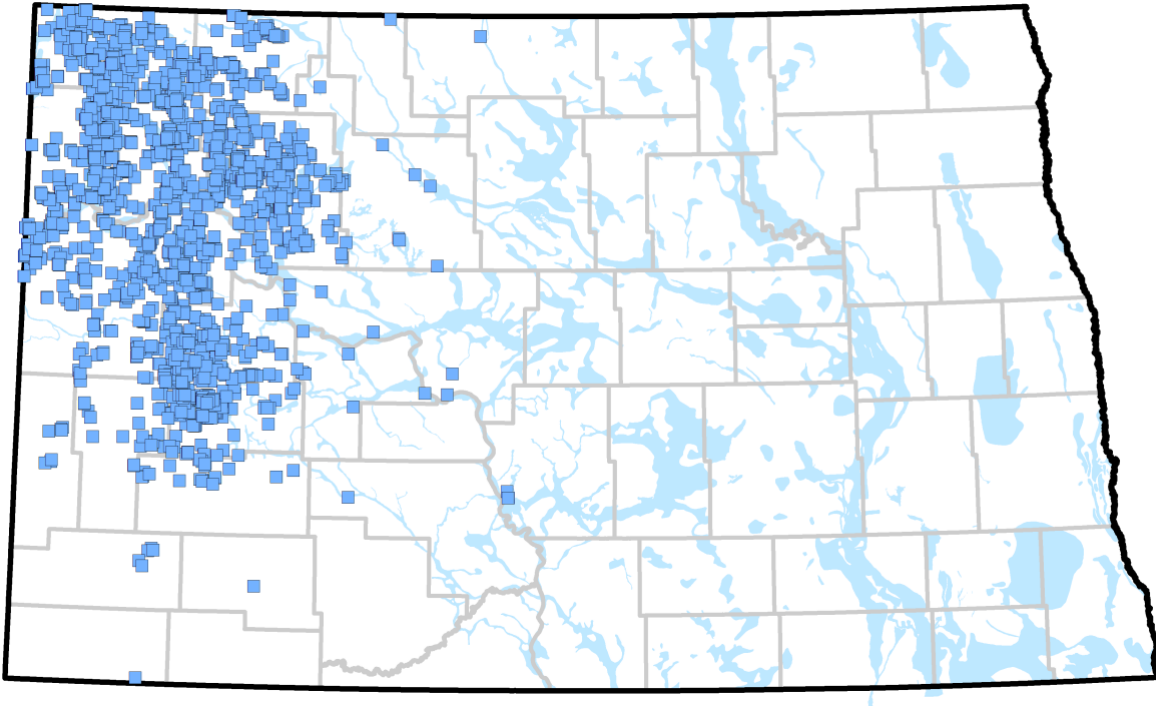


Figure 1 – Distribution of remote telemetry sites deployed for reporting industrial water withdrawals in North Dakota.

From a technology perspective, this model has worked in that the DWR currently receives daily meter readings from industrial pump sites that includes water withdrawals and pumping rates. However, there are significant challenges associated with this network related to the consistency and quality of the data that is received. One of the primary goals in the development of this service was to provide a self-service architecture that would not require tremendous investments by the state in terms of staff commitments and equipment at each remote pump site. This network has essentially achieved this primary goal at the expense of data quality. Typically, contractors engaged to implement the service for the permit holders are primarily concerned with data communications and often do not confirm that correct and accurate data is being transmitted. As a result, the data are unreliable and frequently cannot be used.

In 2016 the DWR began development of a proprietary data logger known as PRESENS (Pushing REMote SENSors) for purposes of providing the department with a remote data logger that would cost-effectively scale to address statewide data collection activities. PRESENS was initially designed to accommodate a wide variety of sensors, which collect data such as water levels, stage, barometric pressure, soil moisture, soil temperature, precipitation, and other data types that could be added moving forward. This would include the ability to collect pumping data from a wide variety of flowmeters currently deployed throughout North Dakota.

The PRESENS data logger is one component of a much larger data collection architecture which includes a cellular private network, command and control services, and data collection services that provide end-to-end control over the configuration, deployment, maintenance, collection, and distribution of the array of data that is collected through this architecture. Over the past five years, the DWR has deployed over 500 PRESENS data loggers (Figure 2) and has perfected the back-end command and control services and the data collection services to provide an effective platform to support deployment and management of the PRESENS data loggers as well as seamless integration of

the data collected within various back-office management systems related to each data collection theme (i.e. water levels, soils data, etc). At this point, the DWR can effectively scale this system from just over 500 sites to several thousand sites to accommodate the long-term data collection requirements for the DWR at a very low cost and with little additional overhead.

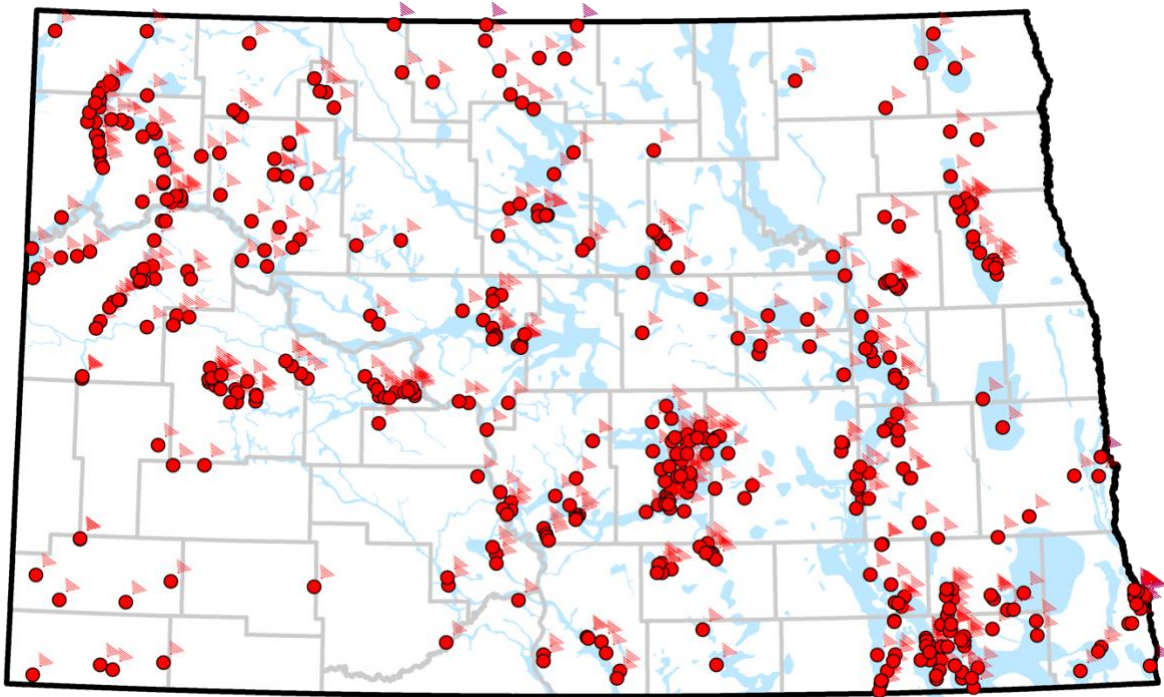


Figure 2 – Distribution of PRESENS sites deployed in North Dakota.

Moving forward, the DWR is exploring options to expand remote collection of water use and withdrawal data beyond the current scope which is limited to Industrial uses related to hydraulic fracturing. This would include all use types and expand the remote deployment to a state-wide focus. This would effectively expand the current reporting network which has historically included less than 2,000 sites to well over 10,000 sites (Figure 3). In order to accomplish this, DWR is planning to replace the current water use data reporting network with a new system which may include expanding PRESENS. This could provide DWR with a single unified data collection architecture to address all remote data collection requirements if feasible.

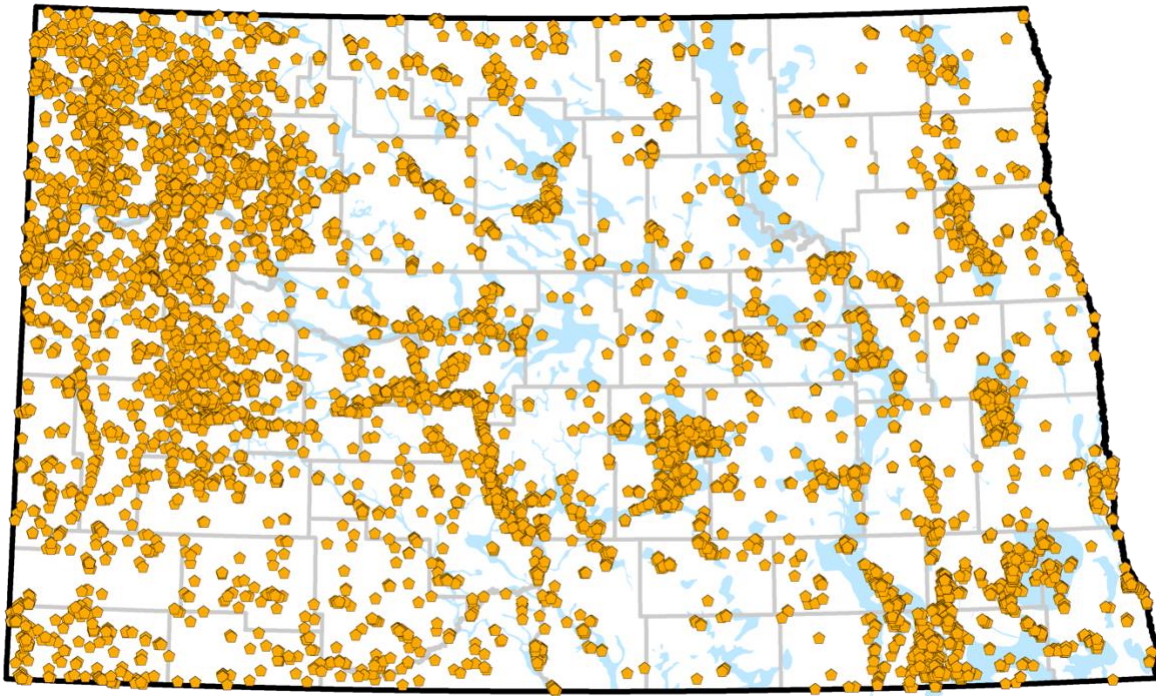


Figure 3 – Targeted water withdrawal sites for proposed expansion of water use reporting network through PRESENS.

While the PRESENS has been a tremendous success for the collection of water resource data, this success is largely dictated by the fact that the DWR controls this architecture end-to-end. This includes the procurement and deployment of the logger and the related sensors. One of the more significant challenges related to extending the PRESENS system to collect the water withdrawals and pumping data at permitted sites throughout North Dakota surrounds the integration of the wide array of flow meters that are currently deployed across the state and the issues and problems associated with collecting data from this wide array of meters. Given this challenge, replacing the data collection service for reporting industrial water use with PRESENS may not likely improve the data that is collected as the same problems may still exist, in that there could still be a great deal of uncertainty related to the quality and accuracy of the data. Installation of reliable equipment and the validation of accurate data transmission would be a priority and understanding the resources associated for successful deployment for a data collection system.

Ultimately, it would be advantageous to better understand if other states have addressed these types of challenges, and if so, what approach they have used and methodologies that have been implemented to ensure reliable and accurate data collection.

2.2 BUDGET

The funds for payment of this contract are already appropriated and identified.

SECTION THREE – SCOPE OF WORK

3.1 ANTICIPATED PRODUCTS

The primary goal and objective of this proposal is to provide the following information:

- Provide a summary of the types of data that each state is collecting related to the management of water resources (i.e. water levels, water chemistry, stage, water use, climatic data, soils information, or any other type of data related to water resource management).
- Provide a summary of the types of remote data collection efforts that they are currently using for items included with the first bullet. This is to include the types of equipment, network (i.e. cellular, private, satellite, etc), data loggers, protocols, sensors, management solutions for configuring and deploying the data loggers, and management solutions for housing the resulting data.
- Provide a comprehensive summary of the type of data that is collected by each state that is related to water withdrawals within the state. It will be important to understand if these collection activities are targeting quantity, withdrawal rates, or both.
- Provide a comprehensive summary of the data collection methodologies related to water withdrawals, whether manual or automated tools are used, and provide a summary of technology that is utilized with any automated collection methods.
- Provide recommendations of data collection methodologies that could be used in North Dakota for accurate, reliable information.

For each objective provide information on how each state addresses data accuracy and integrity. The results of this survey and the resulting report will be shared with each state and this should be communicated as part of the survey.

3.2 SCOPE OF WORK

- Stage 1 Develop a Survey that will be used as the basis for data collection, which would be submitted to the DWR for approval.
- Stage 2 Conduct state by state surveys and collect and record related data.
- Stage 3 Collate and summarize the data and prepare a report with the results of the surveys.
- Stage 4 Provide recommendations for collection methodologies for North Dakota.
- Stage 5 Present the results to the DWR.

3.3 REQUIREMENTS

A. DELIVERABLES

The contractor will be required to provide the following to achieve the objective of this project:

- 1 – An initial survey/questionnaire that will be approved by DWR staff prior to conducting the survey.
- 2 – A report that summarizes the results that are collated from the data provided by the targeted states.
- 3 – Recommendations for the DWR to address relevant data collection activities related to water quantity to include both total water use and instantaneous pumping rates.

B. STATE-FURNISHED PROPERTY/SERVICES

The STATE will provide the following personnel to support the project: Staff will be available to assist with any questions.

C. CONTRACT TERM, SCHEDULE AND DELIVERABLES

1. Contract Term

The length of this contract will be six months from the date of award. See the attached Contract for extension provisions.

3.4 EXPERIENCE AND QUALIFICATIONS

Provide a brief history and describe the organization of the firm. Describe the number of years the Offeror has provided the type of work requested in this RFP. Describe specific experience of their firm in completing similar projects. Provide a description of the project, approximate time frame of the project, and contact information for the customer. Offerors may provide letters of reference from customers.

Experience and Qualifications of the Project Team

Provide a narrative or organizational chart that describes the organization of the proposed project team. Provide information for key project team members, including:

1. Description of anticipated work they will perform and approximate estimated hours;
2. Resume or description of the relevant education, training, experience, skills and qualifications;
3. If the Offeror has vacant positions, identify the job description and minimum qualifications for staff members to be recruited;
4. Subcontractors. If an Offeror intends to use subcontractors, the Offeror must identify in the proposal the names of the subcontractors and the portions of the work the subcontractors will perform. Provide a statement that the Offeror will ensure that the subcontractor has or will obtain any required licenses and registrations, including registration with the North Dakota Secretary of State; and
5. Joint Venture. If submitting a proposal as a joint venture, provide narrative statements that describe the roles and responsibilities of each party to the joint vendor. If available, submit a copy of the joint venture agreement that identifies the parties involved and its rights and responsibilities.

References

Provide three (3) references for similar projects the Offeror has completed. Offerors must include the name of a contact person, address, email, and telephone number. Offerors are responsible for providing accurate reference contact information and are instructed to notify the reference that the STATE may be contacting them. Reference checks may begin within one (1) business day of the Solicitation Closing deadline. Evaluation may be impacted if the STATE is unable to contact the reference or the reference does not timely provide the requested information.

SECTION FOUR – PROPOSAL INSTRUCTIONS

4.1 PROPOSAL SUBMISSION INSTRUCTIONS

Submittals from qualified consultants will be accepted until 5:00 pm CST on December 8, 2023. Four copies of the submittal should be provided. Submittal if mailed, should be addressed to:

Christopher D. Bader, Director of Water Appropriations
North Dakota Department of Water Resources
1200 Memorial Highway
Bismarck
North Dakota - 58504-5262
Telephone: (701) 328-2754
e-mail: cbader@nd.gov

PLEASE NOTE: Please contact Chris Bader by phone at 701-328-2754 to hand deliver the submittal. Late submittals will not be evaluated.

EMAIL

Sealed proposals are required; therefore, proposals cannot be submitted by email to the Procurement Officer.

SUBMIT IN PERSON, BY MAIL OR DELIVERY SERVICE

Offerors may submit proposals in person, by mail, or delivery service. Offerors may email proposals to a third party to place in a sealed envelope and deliver by the Solicitation Closing deadline.

Clearly address all envelopes or packages as follows:

RFP #: 770.300-23-002

RFP Title: Survey of Data Collection Practices for Water Resource Monitoring

and Water Use in the Western States

ATTN: **Christopher D. Bader, Director of Water Appropriations**

North Dakota Department of Water Resources

1200 Memorial Highway

Bismarck

North Dakota – 58504-5262

The STATE assumes no responsibility for delays caused by any delivery service. Postmarking by the Solicitation Closing deadline shall not substitute for actual proposal receipt by the STATE. The STATE's time of receipt will be used to determine timely receipt.

SECTION FIVE – AWARD AND PROPOSAL EVALUATION

5.1 AWARD

The STATE intends to award a contract to the responsible Offeror whose proposal is determined to be responsive to the requirements of the solicitation and is determined to be most advantageous in consideration the RFP evaluation criteria.

5.2 RESPONSIVENESS

All proposals will be evaluated to determine if they are responsive to the requirements of the solicitation. The STATE reserves the right to waive minor informalities in accordance with [N.D.A.C. chapter 4-12-10](#). Minor informalities are insignificant omissions or nonjudgmental mistakes that are matters of form rather than substance, evident from RFP document, with a negligible effect on price, quantity, quality, delivery, or contractual conditions that can be waived or corrected without prejudice to other Offerors. Responsive proposals will be evaluated by the Procurement Officer or evaluation committee using the evaluation criteria stated in the RFP.

5.3 RESPONSIBILITY – SUPPLEMENTARY INVESTIGATION

The STATE reserves the right to contact references, other customers, including state and local government agencies, regarding past experience with the Offeror. Prior experience of the state agency or institution with any prospective Offeror may also be taken into consideration during evaluation.

The STATE may, at any time, may make a supplementary investigation as to the responsibility of any Offeror in accordance with [N.D.A.C. § 4-12-11-04](#). This investigation may include, but is not limited to, financial responsibility, capacity to produce, sources of supply, performance record, or other matters related to the Offeror's probable ability to deliver if a contract is awarded to the Offeror. If it is determined that an Offeror appears not to be sufficiently responsible, the proposal will be rejected.

5.4 EVALUATION CRITERIA

Proposals will be evaluated using a 100 point scale. The evaluation committee will award points based on the scope of work strategy, experience and qualifications, and proposed cost. After the initial evaluation, the evaluation committee may determine which proposals are reasonably susceptible for award and continue the evaluation process with only those Offerors. Offerors whose proposals are not selected for further evaluation may request a debrief from the Procurement Officer after an award notice is issued. The final evaluation score will consider information received by the STATE, including but not limited to, discussions with Offerors, demonstrations, presentations, site visits, reference checks, and best and final offers.

The evaluation criteria and relative weight is as follows:

Proposal Evaluation: 100 Points

- A. Quality of the Presentation – 30 Points
- B. Scope of Work Strategy – 35 Points
- C. Experience and Qualifications – 20 Points
- D. Proposed cost - 15 Points

PROPOSED COST EVALUATION – RECIPROCAL PREFERENCE

The STATE will calculate evaluation points awarded to Cost Proposals. Any prompt payment discount terms proposed by the Offeror will not be considered in evaluating cost.

The cost amount used for evaluation may be affected by the application of North Dakota preference laws in accordance with [N.D.C.C. § 44-08-01](#). The preference given to a resident Offeror will be equal to the preference given or required by the state of the nonresident Offeror (i.e., reciprocal preference). For more information, refer to [Guidelines to North Dakota Purchasing Preference Laws](#).

The cost amount used for evaluation may also be affected by the application of other costs required to implement the proposed solution to determine the total cost of the solution (i.e. cost for ITD to host a STATE hosted solution).

After applying any reciprocal preference, the lowest Cost Proposal will receive the maximum number of points allocated to cost. Cost proposals will be evaluated using the following formula.

$$\frac{\text{Price of Lowest Cost Proposal}}{\text{Price of Proposal Being Rated}} \times \text{Total Points for Cost Available} = \text{Awarded Points}$$

5.5 CLARIFICATIONS OF PROPOSALS – DISCUSSIONS

To determine if a proposal is reasonably susceptible for award, communications by the Procurement Officer or evaluation committee are permitted with an Offeror to clarify uncertainties or eliminate confusion concerning the contents of a proposal and determine responsiveness to the RFP requirements. Discussions will be limited to the specific section of the RFP or proposal indicated by the STATE. Discussions are generally conducted by telephone or internet-based conference.

In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing Offerors. Clarifications may not result in material or substantive change to the proposals. Evaluation scores may be adjusted based in consideration of information obtained through discussions.

5.6 RIGHT OF REJECTION

The STATE reserves the right to reject any proposals, in whole or in part. Proposals received from suspended or debarred bidders will be rejected. Proposals determined to be nonresponsive to the requirements of the RFP will be rejected. The STATE reserves the right to reject the proposal of an Offeror determined to be not responsible. The STATE reserves the right to refrain from making an award if determined to be in its best interest.

5.7 BEST AND FINAL OFFERS

The STATE is not obligated to request best and final offers; therefore, Offerors should submit their best terms (technical and cost) in response to this RFP.

If the STATE determines there is a need for any additional information, substantial clarification or changes to the RFP or proposals, the STATE may request for best and final offers from Offerors that have submitted proposals determined to be reasonably susceptible for award. The best and final offer request will describe the additional information, clarification, or change being requested.

A date and time will be established for receipt of revised proposals. If an Offeror does not submit a best and final offer, the STATE shall consider its original proposal as its best and final offer. Best and final offers will be evaluated using the evaluation criteria stated in the RFP. The STATE may request more than one Best and Final Offer.

5.8 NEGOTIATIONS

Contract negotiations will be conducted in accordance with [N.D.A.C. § 4-12-12](#). The STATE may enter negotiations with one or more Offeror whose proposals received the highest scores and are reasonably susceptible for award. During negotiations, the STATE and Offeror may agree to alter or otherwise change the terms and conditions and price of the proposed contract. Negotiation, if held, will be within the scope of the RFP and limited to those items that would not have an effect on the ranking of proposals.

Each Offeror will be responsible for all costs it incurs as a result of negotiations, including any travel and per diem expenses. Contract negotiations will be conducted primarily by email, conference calls, or internet-based conference. Any on-site negotiation, if needed, will be held in [Insert City](#), North Dakota.

The STATE may terminate negotiations, reject a proposal as nonresponsive, and continue or commence negotiations with other Offerors reasonably susceptible for award, if the Offeror:

- fails to provide necessary information for negotiation in a timely manner,
- fails to negotiate in good faith,
- is unable to successfully negotiate contract terms that are acceptable to the STATE, or
- indicates that it cannot perform the contract within the budgeted funds.

5.9 NOTICE OF INTENT TO AWARD

After proposals have been evaluated and the successful Offeror selected, notice of intent to award will be promptly issued to all Offerors that submitted proposals. Upon issuance of this notice, the procurement file becomes an open record. The successful Offeror named in the Notice of Intent to Award is advised not to begin work, purchase materials, or enter into subcontracts until the successful Offeror and the STATE sign the contract.

5.10 CONTRACT APPROVAL

This RFP does not, by itself, obligate the STATE. The STATE's obligation shall commence when the STATE signs the contract. Upon written notice to the contractor, the STATE may set a different starting date for the contract. The STATE shall not be responsible for any work done by the contractor, even work done in good faith, if it occurs prior to the contract start date set by the STATE.

5.11 EVALUATION DEBRIEFING

After the notice of intent to award is issued, Offerors may contact the Procurement Officer to schedule an evaluation debrief. The debrief will provide information about the evaluation process and proposal scores.

SECTION SIX – CONTRACT INFORMATION

6.1 NORTH DAKOTA CONTRACTUAL REQUIREMENTS – BACKGROUND

As a public institution and government entity of the State of North Dakota (the STATE), there are a number of statutes, rules, and policies (Requirements) that may restrict or prevent the STATE from entering into certain types of contracts or certain contractual terms and conditions, some of these Requirements are non-negotiable.

While these Requirements occasionally make the process of negotiating a contract with the STATE more challenging than negotiating with a private industry business, these are not unique to any one agency of the State of North Dakota. These Requirements apply to all public institutions and government entities of the State of North Dakota. Although some are unique to North Dakota, the majority of these Requirements are common to public institutions and government entities throughout the United States.

6.2 STATE CONTRACT TERMS AND CONDITIONS – OFFEROR’S PROPOSED CHANGES

The STATE intends to execute a contract substantially similar to the Contract – Attachment [Insert number](#). The Offeror will be required to sign the Contract attached to this RFP and must comply with the terms and conditions. The STATE may deem any failure to object to a contract provision as the Offeror’s acceptance of that provision.

North Dakota procurement statutes, rules, and policies allow some negotiation of the terms and conditions. No changes to the terms and conditions will be permitted without prior written approval from the STATE.

Pursuant to [N.D.A.C. § 4-12-11-06](#), proposals subject to conditions imposed by the Offeror may be rejected as nonresponsive, as determined by the STATE. Proposed terms and conditions that conflict with those contained in the attached contract or that diminish the STATE’s rights under the contract shall be considered null and void. The terms and conditions in the attached contract shall prevail in the event a conflict arises between a term or condition in the proposal and a term or condition in the attached contract.

Part or all of this RFP and Offeror’s proposal may be incorporated into the attached contract. The STATE may deem any failure to object to a contract provision as the Offeror’s acceptance of that provision.

6.3 CONTRACT PROVISIONS

A. Contract Type.

The contract type will be as follows:

Firm Fixed Price. The contractor will be required to hold the price firm for the contract period, except as otherwise provided in the contract.

B. Payment Procedures

Compensation and payment terms will be set forth in the contract based upon the successful Offeror’s proposal. The STATE will not make any advanced payments before performance by the contractor under this contract.

- The STATE will make payments based on a negotiated payment schedule. Each billing must consist of an invoice and progress report. No payment will be made until the progress report and the project director has approved invoice.

C. Inspection & Modification

The contractor is responsible for the completion of all work set out in the contract. All work is subject to inspection, evaluation, and approval by the STATE. The STATE may employ all reasonable means to ensure that the work is progressing and being performed in compliance with the contract.

Should the STATE determine that corrections or modifications are necessary to accomplish its intent, the STATE may direct the contractor to make changes. The contractor will not unreasonably withhold changes.

Substantial failure of the contractor to perform the contract may cause the STATE to terminate the contract. In this event, the STATE may require the contractor to reimburse monies paid (based on the identified portion of unacceptable work received) and may seek associated damages.

D. Contract Changes – Unanticipated Amendments

During the course of the contract entered as a result of this solicitation, the contractor may be required to perform additional work due to a legitimate unforeseen circumstance. That work will be within the general scope of the initial contract. When additional work is required, the STATE shall provide contractor a written description of the additional work and request contractor to submit proposal for accomplishing the scope of work. CONTRACTOR will not commence additional work until all parties agree in writing.

E. Purchasing Card

STATE may make payments under this contract using a state purchasing card. See the contract related to payments using the STATE purchasing card.

6.4 CONTRACTUAL TERMS AND CONDITIONS – NO MATERIAL CHANGES

A. Indemnification and Insurance

[N.D.C.C. § 32-12.2-17](#) requires that the OMB establish guidelines for indemnification and insurance provisions in state contracts. The indemnification and insurance requirements contained in the attached contract are pursuant to those guidelines. The STATE shall not be deemed to have accepted any alteration of these provisions without prior written approval to Offeror from the STATE acting in consultation with the North Dakota Risk Management Division.

B. Indemnification

Indemnification is a contractual clause by which one party to a contract asks the other party to defend it against any claims of third parties who might be injured as a result of something that occurs while the parties are performing their duties and obligations under the contract. Without specific authority to do so, the STATE agencies cannot enter into agreements indemnifying contractors, or any other entity, against third party claims.

Any clause that has the intent of seeking indemnification from the STATE, whether the clause contains the words “indemnity” or “indemnify,” are not clauses to which the STATE may agree.

The STATE will also not agree to clauses to indemnify a contractor “to the extent permitted by law.” This is because the STATE knows that the extent to which the law permits it to indemnify contractors is no extent whatsoever, and as a result would be disingenuous for the STATE to imply in a contract that there might be some set of circumstances under which the STATE would defend the contractor against a third party claim(s). Simply put, the STATE is not going to agree to something it knows it cannot do. In this circumstance an “extent” clause is merely an invitation to litigate the matter in the event a third party claim(s) arises, and the STATE does not enter into agreements that invite litigation. Do not ask the STATE to indemnify you against third party claims because it is a contractual obligation to which the STATE cannot agree.

While the STATE may limit the liability of a contractor in claims between the STATE and the contractor, the STATE does not have authority to limit a contractor's liability for claims brought by a third party. In the event a contract contains a limitation of liability clause, the contract's Indemnification clause and obligation of the contractor cannot be subject to that limitation of liability clause. See 6.4(D) for *Limitation of Liability*.

C. Insurance

Upon receipt of the Notice of Intent to Award, the successful Offeror must obtain the required insurance coverage and provide the Procurement Officer with proof of coverage prior to contract approval. The coverage must be satisfactory to the STATE, in consultation with the North Dakota Risk Management Division. The successful Offeror's failure to provide evidence of insurance coverage is a material breach and grounds for withdrawal of the award or termination of the contract.

D. Limitation of Liability

The STATE may negotiate Limitation of Liability pursuant to N.D.C.C. § 32-12.2-15 "Contracts limiting liability to the STATE".

Notwithstanding any provision in N.D.C.C. ch. 32-12.2 to the contrary, an agency may agree to limit the liability of a contractor to the STATE if:

1. the agency determines such services or products cannot be effectively obtained without such limitation; and
2. the limitation does not pose any significant risk of loss to the STATE; and
3. the limitation is in the best interests of the STATE.

The agency, in consultation with the OMB and the attorney general's office, shall prepare a written documentation before agreeing to any liability limitation.

An agency's authority to agree to a limitation of liability is limited to contracts for the purchase or lease of, or services related to, software, communication, electronic equipment, and economic forecasting.

1. An agency may limit its ability to recover indirect consequential damages.
2. If the extent of potential direct loss is unknown, an agency may agree to limit direct damages to a reasonably estimated amount commensurate with the foreseeable risk of loss to the STATE. The amount must be equal to twice the total value of the contract, unless all parties to the contract agree to an alternative amount. Any agreed upon amount that is less than twice the value of the contract must be approved by the director of the OMB. The liquidated damages and retainage provisions for delay, missed deadlines, and other breaches are not subject to a general limitation on direct or indirect damages authorized under N.D.C.C. § 32-12.2-15.
3. A contract under N.D.C.C. § 32-12.2-15 may not limit any loss to the STATE resulting from fraud or other intentional or willful misconduct, breach of confidentiality obligations, or loss resulting from tangible property damage or personal injury.

E. Waivers of Jurisdiction and Venue; Alternative Dispute Resolution

The North Dakota Attorney General is the STATE's attorney for all purposes, including management of litigation and claims against the state. The STATE may not usurp the Attorney General's authority by agreeing in advance to control the way litigation may be managed in the event of a dispute. The STATE cannot, without specific authority, agree to the jurisdiction or the

laws of another state or federal courts, nor can it contractually agree to participate in any form of alternative dispute resolution.

Although the STATE cannot contractually agree to such terms, this does not mean that in the event of a dispute, the STATE would not agree to participate in alternative dispute resolution. It simply means that this is a decision that must be made by the Attorney General and is a decision that is made at the time a dispute arises.

F. Confidentiality

All state agencies of North Dakota are subject to North Dakota public records laws. The STATE cannot agree to contractual terms that attempt to prevent it from having to disclose records that are declared public records under applicable statutes. Although some confidentiality and exemptions are allowed under the public records laws, the STATE may not agree to more restrictive obligations concerning its records. Under North Dakota public records laws, contracts are records that are open to the public and may be reviewed at the request of the public.

G. Unliquidated Expenses (i.e., attorney's fees, add-ons, cost increases)

Because the STATE may only obligate those funds that have been appropriated to it by the Legislative Assembly and may only obligate those funds for the purposes for which the funds were appropriated, the STATE may not agree to clauses which may obligate it to pay for claims that might exceed its current funding appropriation. Certainly, this is one of numerous reasons why the STATE cannot indemnify a contractor against third party claims, but it may also be said for clauses that purport to obligate the STATE to pay a contractor's attorneys' fees, unknown cost increases during the life of the contract, add-ons that were not contemplated or priced in the contract.

6.5 SCOPE OF WORK

The Scope of Work agreed upon by the parties will be incorporated into the attached contract.

6.6 CONTRACT TERM

The contract term will be set forth in the contract, including any options for extension, renewal, and renegotiation.

6.7 RIGHT TO INSPECT PLACE OF BUSINESS

At reasonable times, the STATE may inspect those areas of the contractor's place of business that are related to the performance of a contract. If the STATE makes an inspection, the contractor must provide reasonable assistance.

6.8 LIQUIDATED DAMAGES

The contract may include a clause setting forth an actual dollar amount designated as liquidated damages in order to make the STATE whole if it suffers damages due to a contractor's fault. The specific dollar amount for liquidated damages may be part of the negotiation process. The amount will be reasonable and not disproportionate to the damages to the STATE that are anticipated at the point of the contract and will not serve in any way as a penalty.

**ATTACHMENT #1
PROPOSAL EVALUATION WORKSHEET**

Proposals that are determined to be responsive to the requirements of the RFP will be evaluated by the Evaluation Committee using the evaluation criteria stated in the RFP. For assistance with RFP evaluations, contact the State Procurement Office at infospo@nd.gov or 701-328-2740.

- If a group evaluation is conducted, the Evaluation Committee will produce one worksheet that summarizes the comments and scores. If individual scores are being compiled, each member of the Evaluation Committee will prepare an evaluation worksheet with their comments and scores.
- Evaluation Committee members must read the Request for Proposal and have a clear understanding of the requirements and evaluation criteria before attempting to evaluate proposals.
- Evaluators should read all proposals twice. First, read all proposals for a general understanding without scoring. Next, read proposals with the intent to complete the evaluation worksheet which includes taking notes and documenting any questions/clarification needed.
- Each evaluation criterion is assigned a specific number of points. The questions under each evaluation criterion help Evaluators measure the quality of the Offeror’s response. Do not assign points to individual questions, instead, award a total score for each evaluation criterion.
- Evaluators will assign an initial score for each evaluation criterion and provide comments which explain their scores.
- Evaluation documents become an open record upon award.

RATING SCALE FOR PROPOSAL SCORING

The rating scale provided is intended help Evaluators perform evaluations. Evaluators are exercising independent judgement so variation in scoring is normal. However, the Procurement Officer may question scoring that appears to be unsupported. Evaluators may assign any value for a given evaluation area from 0 to the maximum number of points allowed per evaluation criterion. A zero value typically constitutes no response or an inability of the Offeror to meet the criteria. In contrast, the maximum value should constitute a high standard of meeting the criteria. For example: “Experience and Qualifications” is an evaluation area weighted at 25% of the total possible points on a 100 Point Scale, so any value between 0 and 25 points can be awarded. An example of the rating scale is below:

Experience and Qualifications Rating Scale (25 Point Maximum)	
Point Value	Explanation
<i>0-5</i>	Poor. Not addressed or response of no value
<i>6-10</i>	Fair. Limited applicability
<i>11-15</i>	Good. Some applicability
<i>16-20</i>	Very Good. Substantial applicability
<i>21-25</i>	Excellent. Total applicability

ADJUSTMENT OF INITIAL EVALUATION SCORES

After the initial scoring, the Evaluation Committee should meet to discuss proposals and identify areas where clarification or more information is needed. Evaluation scores may be adjusted as a result of discussions with offerors, clarifications, demonstrations, presentations, reference check results, Best and Final Offers, and further due diligence within the evaluation process.

PROPOSAL EVALUATION WORKSHEET

Offeror Name _____

RFP Title/Number Survey of Data Collection Practices for Water Resource Monitoring and Water Use in the Western States - 770.3000-23-xxx

Evaluator Name _____

Evaluator Certification. I have reviewed the Request for Proposal Evaluators Guide, and I certify that neither I nor my immediate family members have a conflict of interest with regard to this offeror, in accordance with [N.D.A.C. § 4-12-04-04.](#)

Evaluator Signature _____ Date _____

THE TOTAL NUMBER OF POINTS USED TO SCORE THIS PROPOSAL IS 100

Quality of the Presentation (30 Point Maximum)	
Point Value	Explanation
0 – 3	None. Poorly laid out and not applicable
3 – 6	Fair. Reasonable Presentation
6 – 10	Good. Good Presentation
10 – 15	Very Good. Well Laid Out with good Graphic information
15 – 20	Excellent. Exceptional presentation, with good graphic information tied to the context of each specific component of the report.

This study will produce a report that is intended to convey the results of collated information. If they are to provide a credible and useful report, they should be able to demonstrate a command for presentation with the proposal that is submitted.

EVALUATOR NOTES

INITIAL EVALUATION SCORE FOR PRESENTATION QUALITY: _____

SCOPE OF WORK STRATEGY RATING SCALE (35 Point Maximum)	
Point Value	Explanation
0 – 5	None. Not addressed or response of no value
5 – 10	Fair. Limited applicability
10 – 15	Good. Some applicability
15 – 20	Very Good. Substantial applicability
20 – 25	Excellent. Total applicability

How well has the Offeror followed the proposal preparation instructions? Does the proposal contain all the requested information?

EVALUATOR NOTES

Has the Offeror identified any additional directives that apply to the contract?

EVALUATOR NOTES

How well has the Offeror described their strategy for accomplishing the scope of work requirements? What are the strengths of the proposed strategy?

EVALUATOR NOTES

Are there aspects of the proposed Scope of Work strategy of concern or that requires clarification or further information?

EVALUATOR NOTES

How well does the proposed timeline demonstrate the offeror's ability to meet the contract schedule and deliverables?

EVALUATOR NOTES

How well does the proposal address where the work will be performed and any travel?

EVALUATOR NOTES

How well has offeror described any expectations for State resources?

EVALUATOR NOTES

How well has the offeror addressed risk management? Did they identify any potential risks, issues or problems?

EVALUATOR NOTES

Has the offeror described their project management to accomplish the work on time, within budget, and meet quantity and quality standards?

EVALUATOR NOTES

INITIAL EVALUATION SCORE FOR SCOPE OF WORK STRATEGY: _____

Additional/overall comments related to the offeror's proposed strategy for accomplishing the work.

EVALUATOR NOTES

EXPERIENCE AND QUALIFICATIONS RATING SCALE (20 Point Maximum)	
Point Value	Explanation
0 – 4	None. Not addressed or response of no value
4 – 8	Fair. Limited applicability
8 – 12	Good. Some applicability
12 – 16	Very Good. Substantial applicability
16 – 20	Excellent. Total applicability

MINIMUM EXPERIENCE OR QUALIFICATIONS

If the RFP required a minimum amount of experience or qualifications, has the offeror provided information to demonstrate meeting the requirements? Does the offeror exceed the minimum experience or qualifications?

EVALUATOR NOTES

EXPERIENCE AND QUALIFICATIONS OF THE FIRM

Has the offeror provided historical information to demonstrate the firm is well established in this field?

EVALUATOR NOTES

How extensive is the firm’s experience in this type of work? How well does the information about similar projects demonstrate the firm’s experience work related to this RFP?

EVALUATOR NOTES

If the offeror provided letters of reference or the Evaluation Committee contacted the customer contacts, what information did the offeror’s customers provide related to the offeror’s past performance?

EVALUATOR NOTES

Has the offeror demonstrated a proposed strategic planning process or model that will meet the goal(s) of this project?

EVALUATORS NOTES

Has the offereor recognized in their proposal unique qualities of the Department of Water Resources that should be considered to make the strategic planning process a success?

EVALUATORS NOTES

EXPERIENCE AND QUALIFICATIONS OF THE PROJECT TEAM

Has the offeror provided information about the organization of the project team and proposed work project team members will perform, and estimated hours? Does the proposed project team and work breakdown seem appropriate to accomplish the requirements of the RFP?

EVALUATOR NOTES

Are resumes complete and do they demonstrate education and experience that would be desirable for individuals engaged in the work the RFP requires?

EVALUATOR NOTES

How extensive is the experience of the project team members on similar projects?

EVALUATOR NOTES

If a subcontractor will perform work on the project or joint venture is proposed, has the offeror provided the requested information? How extensive is the experience and qualifications of the subcontractor or other party of the joint venture?

EVALUATOR NOTES

REFERENCE CHECK RESULTS

If references were required, did the references provide information to verify the satisfactory performance of the vendor?

EVALUATOR NOTES

Did references identify any areas of concern?

EVALUATOR NOTES

Did references identify any particular strengths of the vendor?

EVALUATOR NOTES

INITIAL EVALUATION SCORE FOR EXPERIENCE AND QUALIFICATIONS: _____

Additional/overall comments related to the offeror's experience and qualifications.

EVALUATOR NOTES

PROPOSED COST

The proposals are normally scored by the Procurement Officer or selected evaluators, and cost proposals are given to the Evaluation Committee after technical proposals have been evaluated. Remember to check if reciprocal preference applies to out of state offerors. Prompt payment discounts are not considered in evaluating cost.

The cost amount used for evaluation may also be affected by the application of other costs required to implement the proposed solution to determine the total cost of the solution (i.e. cost for ITD to host a STATE hosted solution).

After applying any reciprocal preference, the lowest Cost Proposal will receive the maximum number of points allocated to cost. Cost proposals will be evaluated using the following formula.

$$\frac{\text{Price of Lowest Cost Proposal}}{\text{Price of Proposal Being Rated}} \times \text{Total Points for Cost Available (15 Points)} = \text{Awarded Points}$$

**ATTACHMENT #2
SAMPLE SERVICE CONTRACT**

Date

SWC Project # _____

Manager: C. Bader

Contract for Engineering Services

1. **PARTIES.** The parties to this contract are the State of North Dakota (State), by and through the Department of Water Resources (Department), and _____ (Engineer).
2. **BACKGROUND.** The Department's mission is to responsibly manage North Dakota's water needs and risks for the people's benefit. The Department is soliciting proposals to survey the 17 western states of the continental U.S. to provide a comprehensive summary of data collection activities and current methods and infrastructure used to collect, store, and manage data. A primary focus for this survey will be to identify real-time and near real-time data collection activities and to provide a better understanding of the data initiatives driving the need for real-time data, and the technology platforms that are currently being developed and deployed to address respective initiatives. Additionally, it will be important to understand processes that are incorporated to ensure the accuracy and integrity of the data collection efforts particularly efforts surrounding the collection of water use data and pumping activities.
3. **SCOPE OF WORK.** The primary goal and objective of this proposal is to provide the following information:
 - Stage 1 Develop a Survey that will be used as the basis for data collection, which would be submitted to the DWR for approval.
 - Stage 2 Conduct state by state surveys and collect and record related data.
 - Stage 3 Collate and summarize the data and prepare a report with the results of the surveys.
 - Stage 4 Provide recommendations for collection methodologies for North Dakota.
 - Stage 5 Present the results to the DWR.
4. **TERM OF CONTRACT.** This contract begins upon signature of both parties and ends on ____.
5. **COMPENSATION.** Department will pay for the services provided by Engineer under this contract a lump sum amount of \$____, to be paid in one payment, within 30 days after Department approves Engineer's invoice. The invoice must be provided to Department no later than _____. Department will not make any advance payments before performance by Engineer under this contract.
6. **TERMINATION.**
 - a. Department may terminate this contract effective upon delivery of written or electronic notice to Engineer, or a later date as may be stated in the notice, under any of the following conditions:
 - 1) If Department determines an emergency exists.

- 2) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to provide the funds agreed upon for the services or supplies in the indicated quantities or term. The parties may modify the contract to accommodate a reduction in funds.
 - 3) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
 - 4) If any license, permit, or certificate required by law, rule, or this contract is denied, revoked, suspended, or not renewed.
 - 5) If Department determines that continuing the contract is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.
- b. Any termination of this contract is without prejudice to any obligations or liabilities of either party already accrued before termination.
 - c. Department by written notice of default (including breach of contract) to Engineer may terminate the whole or any part of this contract:
 - 1) If Engineer fails to provide services required by this contract within the time specified or any extension agreed to by Department; or
 - 2) If Engineer fails to perform any of the other provisions of this contract or so fails to pursue the work as to endanger performance of this contract, and after receipt of written notice from Department, fails to correct failures within 10 days or a longer period as Department authorizes.
 - d. The rights and remedies of any party provided in this contract are not exclusive.
 - e. The obligations recited in this section will survive the expiration or termination of this contract.
7. **FORCE MAJEURE.** Neither party will be held responsible for delay or default caused by fire, riot, terrorism, acts of God, or war if the event is beyond the party's reasonable control and the affected party gives notice to the other party immediately upon becoming aware that the occurrence of the event will cause a delay or default.
8. **WORK PRODUCT, EQUIPMENT, AND MATERIALS.** All work product, equipment, or materials created or purchased by Department under this contract belongs to Department and must be delivered to Department at Department's request upon termination of this contract.
9. **WORKS FOR HIRE.** Engineer agrees that all work under this contract is "work for hire" within the meaning of the copyright laws of the United States and, upon payment of undisputed amounts in accordance with this Agreement, assigns to Department all rights and interests Engineer may have in the work it prepares under this contract, including any right to derivative use of the work. Upon payment of undisputed amounts in accordance with this Agreement, all software and related material

developed by Engineer in performance of this contract for Department will become the sole property of Department, and Engineer assigns and transfers all its right, title, and interest therein to Department. Engineer must execute all necessary documents to enable Department to protect Department's intellectual property rights under this section.

- 10. SEVERABILITY.** If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms is unaffected and if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.
- 11. ATTORNEY FEES AND COSTS.** If a lawsuit is instituted by Department to obtain performance due under this contract and Department is the prevailing party, Engineer must, except when prohibited by N.D.C.C. § 28-26-04, pay Department's reasonable attorney fees and costs recoverable by law in connection with the lawsuit.
- 12. ASSIGNMENT, DELEGATION, AND SUBCONTRACTS.** Engineer may not assign, transfer, or delegate any right or duty without Department's express written consent. With Department's consent, Engineer may enter into subcontracts provided that any subcontract acknowledges the binding nature of this contract and incorporates this contract, including any attachments. Engineer is solely responsible for the performance of any subcontractor. Engineer has no authority to contract for or incur obligations on behalf of Department. The obligations recited in this section must survive the expiration or termination of this contract.
- 13. NOTICE.** All notices or other communications required under this contract must be given by mail or email and are complete on the date mailed when addressed to the parties at the following addresses:

Department of Water Resources
Christopher Bader
1200 Memorial Highway
Bismarck, ND 58504-5262
cbader@nd.gov

Notice provided under this provision does not meet the notice requirements for monetary claims against Department under N.D.C.C. § 32-12.2-04.

- 14. APPLICABLE LAW AND VENUE.** This contract is governed by and construed under the laws of the State of North Dakota. Any action to enforce this contract must be adjudicated exclusively in the District Court of Burleigh County, North Dakota.
- 15. SPOILIATION – PRESERVATION OF EVIDENCE.** Engineer agrees to promptly notify Department of all potential claims that arise or result from this contract. Engineer must also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to Department the opportunity to review and inspect the evidence, including the scene of an accident.
- 16. INDEMNIFICATION.**
 - a. Except as limited in paragraph 16(b) or for claims arising out of Department's sole negligence, Engineer agrees to defend, indemnify, and hold harmless the State and Department from all liabilities, claims, actions, suits, cases, assertions of right, reasonable settlements, judgments, reasonable alternative dispute resolutions, and costs, expenses, and reasonable attorneys' fees that arise out of and are limited to acts, errors, or omissions

of Engineer or the employees, agents, subconsultants, officers, or members of Engineer in the performance of this contract or matters incidental thereto. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. Engineer also agrees to reimburse Department for all costs, expenses, and reasonable attorneys' fees incurred if Department prevails in an action against Engineer in establishing and litigating the indemnification coverage provided herein. The obligations recited in this section must survive the expiration or termination of this contract.

- b. Whether resolved through a court judgment, alternative dispute resolution, or a negotiated settlement, Engineer's obligation to indemnify Department must be derived by multiplying all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and costs, expenses, and reasonable attorneys' fees incurred by or assessed against Department by the percentage of fault attributable to Engineer.

18. INSURANCE. Engineer must secure and keep in force during the term of this contract, and Engineer must require all subcontractors before commencement of a contract between Engineer and the subcontractor, to secure and keep in force during the term of the contract the following insurance coverages from insurance companies authorized to do business in North Dakota:

- c. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- d. Professional errors and omissions with minimum limits of \$2,000,000 per claim and in the aggregate. Engineer must continuously maintain such coverage during the contract period and for three years thereafter. If there is a cancellation of coverage, Engineer must purchase an extended reporting period to meet the time periods required in this section or procure coverage with a retroactive date that is prior to the date this Agreement was executed.
- e. Automobile liability, including Owned (if any), Hired, and Non-owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence.
- f. Workers' compensation coverage meeting all statutory requirements. The policy must provide coverage for all states of operation that apply to the performance of this contract.
- g. If the subcontractor is domiciled outside the State of North Dakota, employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers' compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

- h. Any deductible or self-insured retention amount or other similar obligation under the policies is the sole responsibility of Engineer. The amount of any deductible or self-retention is subject to approval by Department.
- i. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less

than an "A-" rating must be approved by State. The policies must be in form and terms approved by State.

- j. Department will be defended, indemnified, and held harmless by Engineer as set forth in paragraph 16.
- k. Department must be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. Department must have all the benefits, rights, and coverages of an additional insured under these policies that must not be limited to the minimum limits of insurance required by this contract or by the contractual indemnity obligations of Engineer.
- l. The insurance required in this contract, through a policy or endorsement, must include:
 - 1) A "Waiver of Subrogation" waiving any right of recovery the insurance company may have against Department;
 - 2) A provision that Engineer's insurance coverage is primary (i.e., pay first) as respects any insurance, self-insurance, or self-retention maintained by Department and that any insurance, self-insurance, or self-retention maintained by Department must be in excess of Engineer's insurance and must not contribute with it;
 - 3) Cross liability/severability of interest for all policies and endorsements;
 - 4) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
 - 5) The insolvency or bankruptcy of the insured Engineer must not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Engineer from meeting the retention limit under the policy.
- m. Engineer must furnish a certificate of insurance to Department before commencement of this contract. All endorsements must be provided as soon as practicable.
- n. Failure to provide insurance as required throughout the term of this contract is a material breach of contract entitling Department to terminate this contract immediately.
- o. Engineer must provide at least 30 days' notice of any cancellation or material change to the policies or endorsements. During the term of this contract, Engineer must provide renewal certificates 10 days before coverage expiration.

19. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL. Department does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. Department does not waive any right to a jury trial. The obligations recited in this section must survive the expiration or termination of this contract.

20. CONFIDENTIALITY. Engineer agrees not to use or disclose any information it receives from Department under this contract that Department has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this contract or as

authorized in advance by Department. Department agrees not to disclose any information it receives from Engineer that Engineer has previously identified as confidential and that Department determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of Department and Engineer to maintain confidentiality of information under this section continues beyond the term of this contract. The obligations recited in this section must survive the expiration or termination of this contract.

- 21. COMPLIANCE WITH PUBLIC RECORDS LAWS.** Engineer understands that, except for disclosures prohibited in this contract, Department must disclose to the public upon request any records it receives from Engineer. Engineer further understands that any records obtained or generated by Engineer under this contract, except for records that are confidential under this contract may, under certain circumstances, be open to the public upon request under the North Dakota public records law. Engineer agrees to contact Department immediately upon receiving a request for information under the public records law and to comply with Department's instructions on how to respond to the request.
- 22. INDEPENDENT ENTITY.** Engineer is an independent entity under this contract and is not a Department employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law, and the North Dakota Workforce Safety and Insurance Act. Engineer retains sole and absolute discretion in the manner and means of carrying out Engineer's activities and responsibilities under this contract, except to the extent specified in this contract.
- 23. NONDISCRIMINATION AND COMPLIANCE WITH LAWS.** Engineer agrees to comply with all laws, rules, and policies, including those relating to nondiscrimination, accessibility, and civil rights. Engineer agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation, and workers' compensation premiums. Engineer must have and keep current at all times during the term of this contract all licenses and permits required by law. The obligations recited in this section must survive the expiration or termination of this contract.
- 24. STATE AUDIT.** All records, regardless of physical form, and the accounting practices and procedures of Engineer relevant to this contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or federal auditors. Engineer must maintain all of these records for at least three years following completion of this contract and be able to provide them at any reasonable time. Department, State Auditor, or Auditor's designee must provide reasonable notice.
- 25. TAXPAYER ID.** Engineer's federal employer ID number is: _____.
- 26. PAYMENT OF TAXES BY DEPARTMENT.** Department is not responsible for and will not pay local, state, or federal taxes. Department's sales tax exemption number is E-2001, and certificates will be furnished upon request.
- 27. COMPLIANCE WITH FEDERAL PROVISIONS.** The following federal provisions bind the parties:
- a. Title VI of the *Civil Rights Act of 1964* (42 U.S.C. § 2000d *et seq.*). Title VI prohibits discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance.
 - b. If the cost of performing this contract exceeds \$10,000, the party must comply with Executive Order 11246, Equal Employment Opportunity.

c. Compliance with the *Drug-Free Workplace Act of 1988* (41 U.S.C. § 701 *et seq.*).

28. EFFECTIVENESS OF CONTRACT. This contract is not effective until fully executed by both parties.

29. MERGER AND MODIFICATION. This contract constitutes the entire contract between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented, or amended in any manner, except by written contract signed by both parties.

**NORTH DAKOTA DEPARTMENT
OF WATER RESOURCES**

ENGINEER

ANDREA TRAVNICEK, PH.D.
Secretary

Date: _____

Date: _____