

# INSTRUCTIONAL MATERIALS CONTRACT

## STATE OF SOUTH CAROLINA

### COUNTY OF RICHLAND

On December 9, 2015, the State Board of Education of the State of South Carolina (hereinafter referred to as the Board) gave formal notice to publishers and vendors of instructional materials (hereinafter referred to as the vendor) that it would consider samples submitted for examination in connection with the upcoming instructional materials adoption to be made by the Board; and

On December 9, 2015, the Board also advertised for bids on instructional materials to be filed with the State Superintendent of Education, as Administrative Officer of the Board, on or before **March 25, 2016**, such bids to be opened in the presence of the Board or a committee duly appointed by the Board; and

The bid submitted by the vendor to supply the instructional materials set forth elsewhere in this Contract has been accepted by the Board; therefore, this Contract is made and entered into between the Board, and Publisher/Vendor.

#### THE PARTIES MUTUALLY COVENANT AND AGREE:

##### 1. TERM

The term of this Contract shall be from **June 1, 2017** through **May 31, 2023**. If the S. C. General Assembly changes the statutory length of instructional materials contracts at any time during the term of this Contract, those changes in the law shall apply to and shall, after the first contract year, be binding to this Contract. **If at any time after the first year of this Contract, funds are not appropriated or otherwise made available, the Board may terminate this Contract.** The State Board may terminate this Contract should the subject area of the materials be opened for adoption before the end of the six-year contract.

##### 2. CONTRACT PRICE

The vendor agrees to provide instructional materials at the net wholesale price as specified in the bid (hereinafter referred to as contract price).

##### 3. CENTRAL DEPOSITORY

The vendor will establish and maintain during the term of this Contract a single depository in the State to be known as the central depository. A sufficient inventory of instructional materials adopted by the Board will constantly be kept in stock at the depository. The location and manager of the depository must be approved by the Board. The manager will give a bond to the Board in the amount of \$10,000, securing the depository's faithful performance of this Contract. The vendor further agrees that the depository manager will be the agent of the vendor to perform services required by this Contract.

##### 4. SUPPLY OF INSTRUCTIONAL MATERIALS TO CENTRAL DEPOSITORY

The vendor will furnish through the central depository to any entity or person in this State the instructional materials named at the contract price without any additional charge to the vendor for transportation. Upon failure to supply the central depository with a sufficient number of instructional materials to promptly fill all orders received from the Board, any school district, or agency approved by the Board, the vendor agrees to pay to the State Treasury for the use of the instructional materials fund, liquidated damages in the amount equal to 5% of the contract price of the late order for each initial late

order; and 10% of the contract price of each subsequent late order until stock is replenished. The damage period begins fifteen calendar days after the date the unfilled order is delivered to the central depository, and thirty calendar days for grades K-8 science kits, unless the order designates a later date for delivery, at which time the damage period begins. The parties agree that the liquidated damages set forth represent the reasonable damages resulting from late deliveries, and that the amounts shown do not constitute penalties. This provision in no way limits the State's remedies. The Board will annually receive a report from the State Department of Education (hereinafter referred to as the Department) regarding any such late deliveries and the appropriate liquidated damages. It is further understood and agreed between the parties that the Board may, at its discretion, relieve the vendor of any liability for late delivery under this Contract unless such violation results from the willful act of the vendor. The vendor agrees to replace defective or substandard materials without cost to the State **during the term of this Contract.**

## **5. QUALITY OF INSTRUCTIONAL MATERIALS**

The vendor warrants and agrees that the instructional materials furnished under this Contract shall equal or surpass in all respects the Official Minimum Manufacturing standards established by the Advisory Commission on Textbook Specifications (ACTS). Compliance with such standards does not relieve vendor of obligations arising out of any other warranties applicable to the instructional materials sold hereunder, whether such warranties are express or implied. If at any time during the continuance of this Contract the vendor fails to maintain the standard of quality and excellence described above, the vendor shall be in breach of contract and the bond herein provided for shall be declared forfeited at the option of the Board.

The vendor guarantees that the instructional materials adopted will at all times be equal in every respect to the samples submitted. All samples must be marked as official by the vendor and kept on file at the Department. Vendors of digital materials will provide SCDE with online access to the materials for the duration of the contract.

The vendor will use its best efforts to provide instructional materials that are free of errors. If, despite these efforts, typographical or factual errors occur, the vendor will report errors and cooperate with the State to correct such errors.

The vendor shall act in good faith and in a commercially reasonable manner to correct all errors found in the adopted instructional materials identified by the State or by any other party before the instructional materials are shipped to South Carolina and where reasonably possible shall assure errors are corrected in subsequent printings of the instructional materials adopted by the State. The vendor shall correct any other errors found at a later time, by reporting and providing the State with errata sheets or other corrective measures as appropriate. It is understood that errors do not include matters of interpretation or opinion and only include typographical errors and errors of fact. A statement of fact will not be deemed an error if the vendor shows that it is based upon material from a recognized or authoritative source. Information that was accurate at the time of the original publication of the instructional materials which becomes outdated as a result of a change in events or circumstances occurring after publication shall not be deemed an error.

Failure of the vendor to act in a commercially reasonable manner shall constitute breach of contract whereby the State is entitled to a full refund for the instructional materials purchased, in addition to any other remedies available at law or equity, upon the return of the instructional materials to the vendor. All shipping costs shall be paid by the vendor.

## 6. MOST FAVORED PURCHASER

If subsequent to the *date that bids had to be submitted for this particular instructional materials adoption, which is set forth on page one of this contract*, the wholesale price of any instructional materials included in this Contract is reduced, or, if more favorable terms of sale are offered to another purchaser anywhere in the United States the vendor agrees to apply the same terms to this State.

The vendor must immediately notify the Superintendent of Education of South Carolina in writing if the vendor sells or offers any special or other edition of instructional materials named in this Contract at a lower wholesale price than that offered in this State. The Board may require the vendor to issue a similar edition for South Carolina, adapted for use in this State. The South Carolina edition must be sold at the lowest wholesale price at which any similar special edition is sold anywhere in the United States. In investigating the special edition, the contents of the instructional material must be considered and not merely the title.

At the end of each calendar year when requested in writing by the State Department of Education, publishers shall submit a certified list of all contracts made with other entities during the calendar year just closed, on all instructional materials for which the publisher has a contract in South Carolina. That list must include the contract price for those materials.

## 7. RETURN OF NEW MATERIALS AFTER TERMINATION OF CONTRACT

During the contract period, all new and unused instructional materials may be returned to the Depository for credit or refund at the price it was originally invoiced. At the expiration of the contract, the State has one year to return to the Depository new and unused instructional materials for credit or refund at the price it was originally invoiced. During this one-year period, the amount to be returned cannot exceed 5% of the net amount purchased during the contract period. However, the Board is not responsible under any circumstance for instructional materials not invoiced remaining in the depository. All returned materials will be shipped as directed by the vendor, freight collect, within one year of the expiration of this contract.

## 8. DUTIES OF THE BOARD

The Board agrees to provide the South Carolina public schools the adopted instructional materials in accordance with the general powers of the Board as set forth in state law and regulation. Details of introduction, purchase, use, and **amount** of the instructional materials included in this Contract will be determined by the Board for each official course of study. The Board will not authorize the purchase of any instructional materials under this Contract if appropriations, revenues, income, or other funding is determined by the Board to be insufficient to permit the purchase of such instructional materials.

## 9. AFFIDAVIT

The affidavit submitted with the bid of the vendor is hereby made a part of this Contract. If any part of this affidavit is found to be untrue, this Contract shall immediately be subject to cancellation by the Board.

## 10. PERFORMANCE BOND

The vendor agrees that on or before \_\_\_\_\_ **(date)** \_\_\_\_\_, it will execute and deliver to the Board a good and sufficient bond payable to the Board of the State of South Carolina with a surety company authorized to do business in the State of South Carolina in the sum of \_\_\_\_\_ \$ \_\_\_\_\_ for the faithful performance of this Contract. The form and execution of the bond must be approved by the Attorney General of South Carolina pursuant to S.C. Code Ann. Section 59-31-560 (2004). **Any single**

**violation of this Contract by the vendor shall entitle the Board to recover the actual losses as a result of the forfeiture, the minimum recovery for the actual and other losses suffered shall be \$100.00.** Any recovery must go into the State Treasury for the use of the instructional materials fund of South Carolina, and all attorney's fees and costs incurred by reason thereof to be paid by the vendor. The bond shall not be exhausted by a single recovery, but may be sued on from time to time by the Board, upon thirty (30) days written notice by registered mail, and any refusal by the vendor to give an additional bond shall cause the Contract to be subject to cancellation at the option of the Board. The bond shall be transferred to another surety company upon demand of the Board upon notice, if at any time the Board deems such transfer advisable.

#### **11. ANCILLARY MATERIALS AND SERVICES LIST**

The bidder agrees to designate on the Ancillary Materials and Services List, which is attached to and incorporated as a part of this Contract, all ancillary materials and/or service such as teacher's editions, workbooks, duplicating masters, in-service training, consultants, etc., which will be made available at no cost or at a specified reduced cost on an equitable basis to any school district which adopts its instructional materials.

Only those items having intellectual content that serve as a tool for assisting in the instruction of a subject or course such as hard backed or soft backed textbooks, consumables, learning laboratories, manipulatives, electronic media, and computer courseware or software may be offered as ancillary. Publishers may not offer schools or school districts items, including equipment and supplies that do not have intellectual content. The State Department of Education reserves the right to reject any items offered as ancillary, which it deems lacking in intellectual content or not suitable for providing instruction.

No amendments to this list shall be made from the date bids are opened until one year after the beginning date of the term of this Contract unless required by the most favored purchaser provision as set forth in this Contract. Should the most favored purchaser provision of this Contract require new or additional ancillary offerings, the vendor shall file with the State Superintendent of Education a certified statement setting forth the nature and circumstances (what, when, where, why) of the offering.

#### **12. FAILURE TO PROVIDE ANCILLARY SERVICES OR OFFERING SERVICES NOT ON LIST**

If the vendor offers any material or service **not** designated on the ancillary list as an inducement to adopt its program, or if the vendor fails to make available to all school districts which adopt its instructional materials the ancillary materials and/or services which the vendor normally provides at no cost or at a reduced cost to school districts adopting its instructional materials, the Board has the right to deny the vendor further participation in the South Carolina Instructional Materials Adoption Process, which action does not waive any other contractual or common law rights of the Board.

#### **13. CHANGE IN STATE LAW**

Nothing in this Contract shall be construed to limit, restrict, or impair the right of the General Assembly of the State of South Carolina to change any statute under which this Contract is made or awarded. This Contract shall be subordinate to the right of the General Assembly to amend, modify or repeal any statute relating to instructional materials. The terms of the Contract that conflict with future laws shall be deemed abrogated and of no effect. The parties may agree to rescind this Contract by written notice of the intention to do so at any time within ninety days after the effective date of any such changed statute if the statute is mutually disadvantageous to the parties.

#### **14. JURISDICTION**

Any action at law, or in equity, or other judicial proceeding for the construction or enforcement of any provision of this Contract must be brought in the Court of Common Pleas of South Carolina having jurisdiction of the matter. It is mutually understood and agreed that this Contract shall be governed by the laws of the State of South Carolina, both as to interpretation and performance.

Nothing in this Contract shall be construed to limit the State's remedies in the event of a breach by the vendor.

#### **15. AGENT FOR SERVICE OF PROCESS**

The name and address of the person or entity listed with the Secretary of State as the registered agent of the vendor for the receipt of service of legal process on behalf of the vendor is \_\_\_\_\_ **(Publisher/Vendor)** \_\_\_\_\_. The vendor shall, at all times during the term of this contract, maintain a registered agent for the service of process with the South Carolina Secretary of State (File your Agent for Service of Process with the South Carolina Secretary of State's Office, 803-734-2158, <http://www.scsos.com>).

#### **16. INFORMATION AND DATA REQUESTS**

The Board may request data and information from vendors during the contract period. This information will include but is not limited to publisher contract data with other states for Most Favored Purchaser verification and bid information. Upon the written request of the State Department of Education, the vendor will provide information and/or data that have been requested by the Board electronically.

#### **17. NATIONAL INSTRUCTIONAL MATERIALS ACCESSIBILITY STANDARD (NIMAS)**

The National Instructional Materials Accessibility Standard (NIMAS) is a standard that will be used by publishers and states to prepare electronic files of print instructional materials in a timely manner. These files will be used to create accessible formats for students who are blind or other students with print disabilities. Complete information about NIMAS and IMAC is available at <http://nimac.us>. The following requirement is added to this contract in order for the state to be in compliance with the NIMAS (IDEA-2004):

By agreeing to deliver the textbooks and related core materials marked with "NIMAS" on this contract, the publisher agrees to prepare and submit, on or before **June 1, 2017**, a NIMAS file set to the NIMAC (NIMAS Development and Technical Assistance Centers) that complies with the terms and procedures set forth by the NIMAC. Should the vendor be a distributor of the materials and not a publisher, the distributor agrees to immediately notify the publisher of its obligation to submit NIMAS file sets of the purchased textbooks and related core materials to the NIMAC, the files will be used for the production of alternate formats as under the law for students with print disabilities.

Under these guidelines, "textbook" means the principal tool of instruction used in the classroom. It is a printed book or books that contain most, if not all, of the academic content a student needs to learn to meet the state or Local Education Agency's curriculum requirements for that subject area. "Related core materials" are printed materials, other than textbooks, designed for use by students in the classroom in conjunction with a textbook and which, together with the textbook, are necessary to meet the curriculum requirements for the intended course. The materials should be directly related to the textbook and wherever possible they should be published by the publisher of the textbook. Related core materials do not include materials that are not written and published primarily for use by students in

the classroom (e.g., trade books not bundled with the textbook, newspapers and reference works) not ancillary or supplemental materials that are not necessary to meet the curriculum requirements for the intended course. For purposes of these definitions, the term "curriculum requirements for the intended course" refers to relevant curriculum standards and requirements as established by a state educational agency or local education agency.

**18. SIGNATURES OF PARTIES**

The Board of Education of the State of South Carolina, represented by the Chair of the Board and the State Superintendent of Education as the Administrative Officer of the Board, and the vendor by its undersigned authorized agent, have affixed their respective signatures on the dates set forth below.

**STATE BOARD OF EDUCATION OF THE STATE OF SOUTH CAROLINA:**

By \_\_\_\_\_ and \_\_\_\_\_  
Chairperson State Superintendent of Education/Administrative Officer

Date \_\_\_\_\_

**PUBLISHER/VENDOR:**

\_\_\_\_\_ of \_\_\_\_\_  
Publisher/Vendor Address

By \_\_\_\_\_  
Authorized Agent

Date \_\_\_\_\_

**ATTORNEY GENERAL:**

I approve form and execution of the within Contract:

\_\_\_\_\_  
2016 Attorney General

Date \_\_\_\_\_