



## Attachment 09 PROPOSED DEVIATIONS TO SAMPLE MASTER AGREEMENT

The Lead State may, but is not obligated to, consider proposed deviations to Attachment 04, Sample Master Agreement.

Provisions of the Sample Master Agreement that are generally inapplicable to, incompatible with, or unsuitable for the subject of this RFP should be brought to the attention of the Lead State using the process described in this RFP for asking questions and will be addressed only at the sole discretion of the Lead State.

Offeror-specific deviations to the Sample Master Agreement may be proposed as part of Offeror's proposal in this attachment but are **strongly discouraged**. The quantity, breadth, and nature of deviations proposed by Offeror may be considered in the Lead State's evaluation of Offeror's proposal and of its risks, costs, and benefits to the Lead State and potential Participating Entities and Purchasing Entities. Proposing excessive or overly restrictive deviations, or proposing deviations upon which Offeror's proposal is conditioned, may result in Offeror's proposal being deemed non-responsive.

### **Offeror's Proposed Deviations.** (Check one of the below.)

- ☐ Offeror has no proposed deviations to Attachment 04, Sample Master Agreement.
- ☒ Offeror proposes the deviations set forth in the table below and **will submit with Offeror's proposal a redlined copy of Attachment 04, Sample Master Agreement** incorporating each proposed deviation. Offeror understands, acknowledges, and agrees to comply with the following:
  - The Lead State will not consider any proposed deviation that:
    - Is not submitted in this attachment;
    - Is not accompanied by an explanation as required in this attachment;
    - Is not reflected in redlined edits to the Sample Master Agreement and submitted with Offeror's proposal;
    - Merely references another document or a URL; or
    - Modifies the NASPO ValuePoint administrative fee.
  - Offerors may propose additional terms but must include them in this attachment and must clearly identify where any terms conflict with the Sample Master Agreement.
  - If Offeror is awarded a Master Agreement resulting from this RFP, a comparison of Attachment 04, Sample Master Agreement and Offeror's accepted deviations thereto may be posted on the NASPO ValuePoint website for examination by potential Participating Entities and Purchasing Entities.



- Each of the following fields **must** be completed for each proposed deviation to the Sample Master Agreement:
  - **Sample Master Agreement Section Reference:** The page, section, or paragraph in the Sample Master Agreement that is the subject of Offeror's proposed deviation.
  - **Sample Master Agreement Language:** The language in the Sample Master Agreement that the Offeror is proposing to modify.
  - **Proposed Changes and Alternate Language:** The Offeror's proposed changes to the Sample Master Agreement language including, if applicable, Offeror's proposed alternate language.
  - **Justification for Proposed Change:** Offeror's justification for the proposed change.
  - **Risk and Benefits of Acceptance:** Offeror's analysis of the risk and benefits to the Lead State, Participating Entities, or Purchasing Entities—including quantifiable costs or cost savings—if Offeror's proposed change is accepted by the Lead State.

Sample Master Agreement Section Reference	Sample Master Agreement Language	Proposed Changes and Alternate Language	Justification for Proposed Change	Risk and Benefits of Acceptance
Attachment 04 - Section 5.4.5 (Most Favored Customer)	5.4.5 Most Favored Customer. Contractor shall, within thirty (30) days of their effective date, notify the Lead State and NASPO ValuePoint of any contractual most-favored-customer provisions in third-party contracts or agreements that may affect the promotion of this Master Agreement or whose terms provide for adjustments to future rates or pricing based on rates, pricing in, or Orders from this Master Agreement. Upon request of the Lead State or NASPO ValuePoint, Contractor shall provide a copy of any such provisions.	Delete this Section in its entirety.	Pricing is based on market conditions and competitive forces. Comparisons between customers are not appropriate. This may lead to breach of confidentiality obligations.	Lead State and NASPO ValuePoint could receive Confidential Information. All deals are customer-specific and tailored to the needs of each customer.

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Attachment 04 - Section 5.5.7	5.5.7 Contractor is solely responsible for the security and accuracy of transactions facilitated through the eMarketPlace, including the assessment, collection, and remittance of any sales tax.	Delete the following "including the assessment, collection and remittance of any sales tax" after EMarketPlace."  Added the following after eMarketPlace "to the extent possible through the management of user IDs and/or integration points under Contractor's control in a way that ensures transactions through the eMarketPlace are legitimate.	HD Supply does not own or operate the NAPSO eMarketPlace. As such, HD Supply would be unable to ensure the security of transactions on the platform.	None
Attachment 04 - Section 5.5.11.1	5.5.11.1 Contractor's NASPO eMarketPlace account with eQuoting functionality shall minimally be established within thirty (30) days following the written request.	Delete this Section in its entirety and replace with the following:  "5.5.11.1 Contractor's plan to implement NASPO eMarketPlace account with eQuoting functionality shall be established within thirty (30) business days following the written request.	HD Supply does not currently have eQuoting capabilities with an eProcurement platform/market place.	None
Attachment 04 - Section 8.3 (Inside Deliveries)	8.3 Inside Delivery. To the extent applicable, all deliveries will be "Inside Deliveries" as designated by a representative of the Purchasing Entity placing the Order. Inside Delivery refers to a delivery to a location other than a loading dock, front lobby, or reception area. Specific delivery instructions will be noted on the order form or Purchase Order. Costs to repair any damage to the building interior (e.g. scratched walls, damage to the freight elevator, etc.) caused by Contractor or Contractor's carrier will be the responsibility of the Contractor. Immediately upon becoming aware of	Delete this Section in its entirety and replace with the following:  "8.3 <b>Delivery Repair Costs.</b> <i>Costs to repair any damage to the building interior (e.g. scratched walls, damage to the freight elevator, etc.) to the extent caused by Contractor or Contractor's carrier will be the responsibility of the Contractor. Promptly upon becoming aware of such damage, Contractor shall notify the Purchasing Entity placing the Order.</i> "	HD Supply offers various forms of last mile transportation, including delivery by third parties. As such, HD Supply cannot guarantee inside delivery to every location.	None

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	such damage, Contractor shall notify the Purchasing Entity placing the Order.			
Attachment 04 - Section 8.4 (Packaging) Third (3 <sup>rd</sup> ) sentence and add new fourth (4 <sup>th</sup> ) and fifth (5 <sup>th</sup> ) sentences	8.4 All products must be delivered in the manufacturer's standard package. Costs must include all packing and/or crating charges. Cases must be of durable construction, in good condition, properly labeled and suitable in every respect for storage and handling of contents. Each shipping carton must be marked with the commodity, brand, quantity, item code number and the Purchasing Entity's Purchase Order number. Each shipping carton must be marked with the commodity, brand, quantity, item code number and the Purchasing Entity's Purchase Order number.	Delete third (3 <sup>rd</sup> ) sentence in its entirety and add new fourth (4 <sup>th</sup> ) and fifth (5 <sup>th</sup> ) sentences as follows:  <i>"Each shipment will include a packing list identifying the commodity, brand, quantity, item code number and the Purchasing Entity's Purchase Order number. In cases where shipment includes multiple boxes, the packing list will be attached to one of the boxes. Shipping labels on individual boxes will reference Purchasing Entity's order number but not necessarily item level details."</i>	Duplicate packing lists for multiple box shipments may cause confusion.	Avoids confusion and unnecessary costs.
Attachment 04 - Section 9.3 (Inspection and Acceptance)	N/A – New Section	Add new Section 9.3.3 as follows:  <i>"9.3.3 All claims for shortage of Products or for loss or damage to Products as to which Contractor has the risk of loss shall be waived unless Purchasing Entity, within three (3) business days after receipt of the short or damaged shipment, gives Contractor written notice fully described the alleged shortage or damage."</i>	HD Supply's policy is that all claims for shortage of Products or for loss or damage to Products shall be waived unless Buyer gives notice within three (3) business days after receipt.	Failure to notify Contractor may delay or limit recovery.
Attachment 04 – Sections 10.2 (Warranty) 10.3 (Breach of Warranty) 10.4 (Rights Reserved)	10.2 Warranty. The Contractor warrants for a period of <u>one</u> year from the date of Acceptance that: (a) the Product performs according to all specific claims that the	Delete these Sections in their entirety and replace with new Sections 10.2 and 10.3 as follows:  <i>"10.2 Disclaimer of Warranty. Contractor is a</i>	As a distributor, Contractor does not design or build the Goods and therefore cannot warrant	Warranty claims are made against manufacturer with the assistance of Contractor's

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<p>10.5 (Warranty Period Start Date)</p>	<p>Contractor made in its response to the solicitation, (b) the Product is suitable for the ordinary purposes for which such Product is used, (c) the Product is suitable for any special purposes identified in the solicitation or for which the Purchasing Entity has relied on the Contractor's skill or judgment, (d) the Product is designed and manufactured in a commercially reasonable manner, and (e ) the Product is free of defects.</p> <p>10.3 Breach of Warranty. Upon breach of the warranty set forth above, the Contractor will repair or replace (at no charge to the Purchasing Entity) the Product whose nonconformance is discovered and made known to the Contractor. If the repaired and/or replaced Product proves to be inadequate, or fails of its essential purpose, the Contractor will refund the full amount of any payments that have been made.</p> <p>10.4 Rights Reserved. The rights and remedies of the parties under this warranty are in addition to any other rights and remedies of the parties provided by law or equity, including, without limitation, actual damages, and, as applicable and awarded under the law, to a prevailing party, reasonable attorneys' fees and costs.</p>	<p><i>reseller of Goods only, and as such does not provide any warranty for the Goods it supplies hereunder. Notwithstanding this As-Is limitation, Contractor shall pass through to Lead State, Participating Agency, or Purchasing Entity any transferable manufacturer's standard warranties with respect to Goods purchased hereunder. EXCEPT AS SET FORTH HEREIN AND APPLICABLE, NO WARRANTY OR AFFIRMATION OF FACT OR DESCRIPTION, EXPRESS OR IMPLIED, IS MADE OR AUTHORIZED BY CONTRACTOR. LEAD STATE, PARTICIPATING AGENCY, OR PURCHASING ENTITY AND PERSONS CLAIMING THROUGH LEAD STATE, PARTICIPATING AGENCY, OR PURCHASING ENTITY (COLLECTIVELY, "CLAIMANT") SHALL SEEK RECOURSE EXCLUSIVELY FROM THE RELEVANT MANUFACTURER(S) IN CONNECTION WITH ANY DEFECTS IN OR FAILURES OF GOODS, AND THIS SHALL BE THE EXCLUSIVE RECOURSE OF CLAIMANT FOR DEFECTIVE GOODS, WHETHER THE CLAIM SHALL SOUND IN CONTRACT, TORT, STRICT LIABILITY, PURSUANT TO STATUTE, OR FOR NEGLIGENCE. LEAD STATE,</i></p>	<p>against defects but instead will pass through transferable manufacturer's warranties and provide assistance through Contractor's Warranty Solutions team.</p>	<p>Warranty Solutions team. Contractor's Warranty Solutions team provides a single contact for all warranty claims and valuable trouble-shooting assistance.</p>
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	<p>10.5 Warranty Period Start Date. The warranty period will begin upon Acceptance, as set forth in Section 9.</p>	<p><i>PARTICIPATING AGENCY, SHALL PASS THESE TERMS AND SUBSEQUENT BUYERS AND USERS OF GOODS. CONTRACTOR EXCLUDES AND DISCLAIMS ALL OTHER EXPRESS AND IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS. CONTRACTOR ASSUMES NO RESPONSIBILITY WHATSOEVER FOR INSTALLATION OF GOODS, USE, MISUSE, ALTERATION OR MODIFICATION OF GOODS, OR CONTRACTOR'S INTERPRETATION OF PLANS OR SPECIFICATIONS PROVIDED BY LEAD STATE, PARTICIPATING AGENCY, OR PURCHASING ENTITY. CONTRACTOR DOES NOT CERTIFY OR GUARANTEE THAT ANY GOODS COMPLY WITH ANY STATUTES, LAWS, CODES, ORDINANCES OR REGULATIONS."</i></p> <p><b>"10.3 Warranty Solutions.</b> Contractor agrees to provide assistance to Lead State and any Participating Agency or Purchasing Entity with any manufacturer's warranty process through contractor's Warranty</p>		
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		<i>Solutions service. Warranty Solutions may be reached via email at <a href="mailto:fmwarrantysolutions@hdsupply.com">fmwarrantysolutions@hdsupply.com</a> or via phone at 1.800.782.4154."</i>		
Attachment 04 - Section 12.1 (General Indemnification)	12.1 The Contractor shall defend, indemnify and hold harmless NASPO, NASPO ValuePoint, the Lead State, Participating Entities, and Purchasing Entities, along with their officers and employees, from and against third-party claims, damages or causes of action including reasonable attorneys' fees and related costs for any death, injury, or damage to tangible property arising from any act, error, or omission of the Contractor, its employees or subcontractors or volunteers, at any tier, relating to performance under this Master Agreement.	Delete this Section in its entirety and replace with the following:  <b>"12.1 General Indemnification.</b> <i>The Contractor shall defend, indemnify and hold harmless NASPO, NASPO ValuePoint, the Lead State, Participating Entities, and Purchasing Entities, along with their officers and employees, from and against third-party claims, damages or causes of action including reasonable attorneys' fees and related costs for any death, injury, or damage to tangible property to the extent arising from any negligent or willful act, error, or omission of the Contractor, its employees or subcontractors or volunteers, at any tier, relating to performance under this Master Agreement."</i>	Contractor should only be responsible for acts under its control and should not be obligated to indemnify for damages caused by indemnified parties.	Indemnified parties would not be indemnified for damages that they caused.
Attachment 04 - Section 12 (Indemnification)	N/A – New Section	Add new Section 12.3 LIMITATIONS OF LIABILITY as follows:  <b>"12.3 LIMITATIONS OF LIABILITY. EXCEPT FOR CONTRACTO'S INDEMNITY OBLIGATIONS HEREUNDER, TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, IN NO EVENT, WHETHER IN CONTRACT, WARRANTY, TORT (INCLUDING, BUT NOT LIMITED TO,</b>	Sophisticated parties customarily limit liability to direct damages not exceeding an agreed-upon amount to protect both parties against unexpected and excessive losses.	Limitation is mutual and does not apply to indemnification claims. Parties may be restricted from claiming indirect and similar type damages.

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		<p>NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, ARISING DIRECTLY OR INDIRECTLY OUT OF THE PERFORMANCE OR BREACH OF THESE TERMS, SHALL SELLER BE LIABLE FOR (a) ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL, CONSEQUENTIAL OR SIMILAR DAMAGES SUCH AS LOSS OF USE, LOST PROFITS, ATTORNEYS' FEES OR DELAY DAMAGES, EVEN IF SUCH DAMAGES WERE FORESEEABLE OR CAUSED BY SELLER'S BREACH OF THIS AGREEMENT, (b) ANY CLAIM THAT PROPERLY IS A CLAIM AGAINST A MANUFACTURER, OR (c ) ANY AMOUNT EXCEEDING THE AMOUNT PAID TO SELLER FOR GOODS FURNISHED TO BUYER THAT ARE THE SUBJECT OF SUCH CLAIM(S). ALL CLAIMS MUST BE BROUGHT WITHIN ONE (1) YEAR OF ACCRUAL OF A CAUSE OF ACTION."</p>		
Attachment 04 – Section 13.4 (Notice of Cancellation), Second (2 <sup>nd</sup> ) sentence	13.4 Contractor shall provide notice to a Participating Entity state guideline who is a state within five (5) business days after Contractor is first aware of expiration, cancellation or nonrenewal of such policy or is first aware that cancellation is threatened or expiration, nonrenewal or expiration otherwise may occur.	<p>Delete this sentence in its entirety and replace with the following:</p> <p><i>"Contractor shall provide prior written notice of cancellation, according to state guidelines, to a Participating Entity."</i></p>	Contractor's policy endorsements are not specific regarding cancellation and therefore vary by state.	Some states will have longer notice period.



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Attachment 04 - Section 13.5 (Notice of Endorsement)	13.5 Prior to commencement of performance, Contractor shall provide to the Lead State a written endorsement to the Contractor's general liability insurance policy or other documentary evidence, acceptable to the Lead State that (1) provides that written notice of cancellation will be delivered in accordance with the policy provisions, and (2) provides that the Contractor's liability insurance policy will be primary, with any liability insurance of any Participating State as secondary and noncontributory.	Delete " <i>or other documentary evidence acceptable to Lead State</i> " between "policy" and "that".	HD Supply deleted this language to avoid delaying the project in the event HD Supply provides the required documents, but Lead State's approval is not received in a timely manner.	Avoids project start delay.
Attachment 04 – Section 13.6 (Participating Entities)	13.6 Contractor shall provide to Participating States and Participating Entities the same insurance obligations and documentation as those specified in Section 13, except the endorsement is provided to the applicable Participating State or Participating Entity.	Add the words " <i>scheduled or blanket</i> " between "the" and "endorsement."	Contractor does not need to add specific parties to our endorsements. This information indicates the type of endorsement that will be provided.	None
Attachment 04 - Exhibit 1 (Description of Goods and/or Services, Prices, and Discount Percentages), Third (3 <sup>rd</sup> ) paragraph, Second (2 <sup>nd</sup> ) sentence	Until such time as the Contractor receives a modification, the Contractor shall not accept delivery orders from any Participating Entity referencing such items or services.	Delete second (2 <sup>nd</sup> ) sentence in its entirety.	Participating Entities should not be restricted in their purchases; they should be able to purchase the products they need. Products not awarded will not be sold under this contract.	No restrictions on what Participating Entities can purchase.

[Add additional rows as needed.]