

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

BONNIE HEATHER MILLER, ROBERT
WILLIAM ALLEN, ADELLA DOZIER
GRAY, and ARKANSAS VOTERS FIRST,

Plaintiffs,

v.

JOHN THURSTON, in his official capacity
as Secretary of State of Arkansas,

Defendant.

Case No. 5:20-cv-05070-pkh

Hon. Paul K. Holmes, III

**REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

EXHIBIT 5

Participating Addendum adding Arkansas to Utah Cloud Solutions contract
with Carahsoft Technology Corporation dated December 20, 2019

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PARTICIPATING ADDENDUM
CLOUD SOLUTIONS 2016-2026
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State of Utah Cooperative Contract #: AR2472 (the "Lead State Contract")

Contractor: **CARAHSOFT TECHNOLOGY CORPORATION**

Participating State/Entity: **STATE OF ARKANSAS** (the "State")

The following products or services are included in this contract portfolio:

- All products and accessories listed on the Contractor page of the NASPO ValuePoint website ("the Products").

Master Agreement Terms and Conditions:

1. Scope: This Participating Addendum (this "PA," or this "Addendum" or "Participating Addendum") covers **Cloud Solutions** lead by the State of Utah for use by state agencies and other entities located in the Participating State authorized by that State's statutes to utilize State contracts with the prior approval of the State's Chief Procurement Official. The Lead State Contract #: AR2472 references the NASPO ValuePoint Master Agreement Terms and Conditions and its exhibits and amendments thereto (collectively, the "Master Agreement") under Attachment A to the Lead State Contract. The State is a Participating Entity for purposes of the Lead State Contract and the Master Agreement. The parties acknowledge that Section 20 of the Master Agreement permits a Participating Entity to alter, modify, supplement or amend the Master Agreement in a Participating Addendum.
2. Participation: All eligible purchasers within the State of Arkansas, including State agencies, K-12 educational institutions, and local public procurement units (cities, counties, municipalities), are authorized to purchase Products and Services under the terms and conditions of this agreement. State agencies **shall** be those defined by Ark. Code Ann. § 19-11-203(30)(A). Political subdivisions **shall** be those defined by Ark. Code Ann. § 19-11-203(19).
3. Access to Cloud Solutions Services Requires State CIO Approval: Unless otherwise stipulated in this Participating Addendum or any SLA, specific services accessed through the Master Agreement for Cloud Solutions by state executive branch agencies are subject to the authority and prior approval of the State Chief Information Officer's Office. The State Chief Information Officer means the individual designated by the state Governor within the Executive Branch with enterprise-wide responsibilities for leadership and management of information technology resources of a state.
4. Order of Precedence:
 - (a) Except as otherwise set forth in any SLA, the order of precedence for this PA shall be as follows and in the following order:
 - i. This PA;

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- ii. A Service Level Agreement ("SLA") made pursuant to this PA, unless otherwise expressly agreed in writing in such SLA.
- iii. Lead State's Master Agreement (includes negotiated Terms & Conditions and applicable exhibits to the Master Agreement);
- iv. The Solicitation including all Addendums; and
- v. Contractor's response to the solicitation

(b) These foregoing documents shall be read to be consistent and complementary to the extent reasonably possible. Any conflict among these documents shall be resolved by giving priority to these documents in the order listed above unless an SLA expressly provides a different order of precedence, in which case that SLA's order of precedence controls (for purposes of that SLA) over that of this PA and notwithstanding anything to the contrary in the Master Agreement or this PA. The parties agree that, notwithstanding anything that may be construed to the contrary in the Lead State Contract, the Master Agreement, or any amendments thereto, or this PA: (i) any SLA made pursuant to this PA may effectively modify or amend the terms of this PA, (ii) any SLA made pursuant to this PA will govern all corresponding Orders made under the SLA, (iii) any SLA(s) made pursuant to this PA may, effectively, as expressly agreed in such SLA, not be subject to the terms of the Master Agreement, and (iv) any SLA may be used to provide all project and/or product specific terms and conditions, including those governing the delivery and use of Cloud Services, and, as needed, should include: (1) the technical service level performance promises, (i.e. metrics for performance and intervals for measure), (2) description of service quality, (3) identification of roles and responsibilities, (4) remedies, such as credits, and (5) an explanation of how remedies or credits are calculated and issued. Ordering documents (purchase orders) may also contain transaction-specific terms and each ordering document that is accepted by the Contractor shall become a part of this PA as to the products and services listed on the ordering document only. Arkansas' Participating Addendum shall not diminish, change, or impact the rights of the Lead State with regard to the Lead State's contractual relationship with the Contractor under the Terms of the Lead State's Master Agreement.

5. Primary Contacts: The primary contact individuals for this Participating Addendum are as follows (or their named successors):

Contractor

Name:	Colby Bender
Address:	11493 Sunset Hills Road, Reston, VA 20190
Telephone:	703-889-9878
Fax:	703-871-8505
Email:	NASPO@carahsoft.com

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Participating Entity

Name:	Shane Phillips
Address:	1509 W 7 th St 3 rd Floor, Little Rock, AR 72201
Telephone:	501-324-9322
Fax:	501-324-9311
Email:	Jordan.Phillips@dfa.arkansas.gov

6. PARTICIPATING ENTITY MODIFICATIONS OR ADDITIONS TO THE MASTER AGREEMENT

These modifications or additions apply only to actions and relationships within the Participating Entity.

Participating Entity must check one of the boxes below.

☐ No changes to the terms and conditions of the Master Agreement are required.

☒ Except as otherwise set forth in an SLA, the following changes are modifying or supplementing the Master Agreement terms and conditions.

- a. **Reporting.** The Contractor **must** provide annual sales/utilization reports electronically to the Office of State Procurement via email to OSP.ITContracts@dfa.arkansas.gov for the fiscal period of July 1 through June 30. The annual report **shall** be due no later than September 1st of each year. The Contract Activity Report format **must** be in Microsoft Excel format. The State **shall** have the right to request such sales/utilization reports to be produced for other timeframes as deemed necessary. The reports **must** include at a minimum:
 - i. Vendor Contract Number
 - ii. State
 - iii. Customer Type (State and Local Government, Education (K-12), and Education (Higher-Ed))
 - iv. Bill To Name
 - v. Customer PO Number
 - vi. Customer Number
 - vii. Order Date
 - viii. Product/Service Description
 - ix. Retail Price
 - x. Discount Applied
 - xi. Discounted Unit Price
 - xii. Quantity
 - xiii. Total Price
- b. **Payments.** Payments **shall** be submitted to the Contractor at the address shown on the invoice. Payments should be tendered to the contractor within thirty (30) days of the date of invoice. After the sixtieth (60) day from the date of invoice unless mutually agreed to, interest shall be paid on the unpaid balance due to the

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contractor at the rate of one half (1/2) of one (1) percent per month in accordance with Arkansas Code Annotated §19-11-224. The procuring agency shall make a good-faith effort to pay within thirty (30) days after the date of invoice.

- c. **Records.** Financial and accounting records relevant to State of Arkansas transactions under this Addendum **shall** be subject to examination by appropriate Arkansas government authorities for a period of five (5) years from the expiration date and final payment under this Addendum or extension thereof, provided, however, that such government authorities **shall** provide thirty (30) days written notice to the contractor of its intent to conduct such examination contemplated by this section.
- d. **Governing Law.** The laws of the State of Arkansas **shall** govern this agreement. Nothing under this PA or the Master Agreement shall be deemed or construed as a waiver of the State's right of sovereign immunity to the extent such right is applicable.
- e. **Travel Expenses.** Expenses for travel **shall not** be reimbursed unless specifically permitted under the duties of the contractor. All travel **must** be approved in advance by the State. Expenditures made by the contractor for travel will be reimbursed at the current rate paid by the State, available here: <http://www.dfa.arkansas.gov/travel/Pages/default.aspx>.
- f. **Cancellation.** In the event the State of Arkansas no longer needs the service or commodity specified in the contract or purchase order due to program changes, changes in law, rules, regulations, lack of funds appropriated for this purpose, or relocation of offices, the State may cancel the contract or purchase order by giving the contractor written notice of such cancellation thirty (30) days prior to the date of cancellation.
- g. **Indemnification.** The following indemnification clause replaces in its entirety the General Indemnification clause specified in the Master Agreement.
 - i. **GENERAL INDEMNIFICATION** - The Contractor shall fully defend, indemnify and hold harmless the State of Arkansas and its officers, agencies, and employees, as well as any person or entity for which they may be liable, from and against all third-party claims, damages suits, liabilities, losses, settlements, judgments or causes of action, including reasonable attorneys' fees and related costs incurred by the State, whether brought by an individual or other entity, or imposed by a court of law or administrative action of any federal, state, or local judicial body, for any death, bodily injury, or damage to real or personal property or persons, arising out of or incident to any acts, omissions, negligence or willful misconduct of the Contractor, its employees, personnel,

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subcontractors, agents, or volunteers, at any tier, in the performance of its obligations under the Master Agreement and this Participating Addendum.. Language in these terms and conditions **shall not** be construed or deemed as the State's waiver of its right of sovereign immunity. The vendor agrees that any claims against the State, whether sounding in tort or in contract, **shall** be brought before the Arkansas Claims Commission as provided by Arkansas law, and **shall** be governed accordingly. This section is not subject to any limitations of liability in the Master Agreement or in any other document executed in conjunction with the Master Agreement.

- ii. **INTELLECTUAL PROPERTY INDEMNIFICATION** - The Contractor shall fully defend, indemnify and hold harmless the State of Arkansas and its officers, agencies, and employees, as well as any person or entity for which they may be liable, from and against all third-party claims, damages suits, liabilities, losses, settlements, judgments or causes of action, including reasonable attorneys' fees and related costs incurred by the State, whether brought by an individual or other entity, or imposed by a court of law or administrative action of any federal, state, or local judicial body, for claims that the Product or other products and services provided under this Addendum and the Master Agreement infringe upon Intellectual Property rights of another person or entity. This section is not subject to any limitations of liability in the Master Agreement or in any other document executed in conjunction with the Master Agreement.
- iii. The State of Arkansas shall furnish, at the Contractor's reasonable request and expense, information and assistance necessary for any defense under (g)(i) and (g)(ii) above. If the Contractor fails to vigorously pursue the defense or settlement of the claim, the State of Arkansas may assume the defense or settlement thereof and the Contractor shall be liable for all costs and expenses, including reasonable attorneys' fees and related costs, as well as any settlements or judgments, incurred by the State of Arkansas related to the claim.
- h. Limitation of liability. Except as otherwise set forth in section (g) (Indemnification) above, the limit of liability shall be as follows:
 - i. Contractor's liability for any claim, loss or liability arising out of, or connected with the Products and services provided under this Addendum and Master Agreement, and whether based upon default or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the purchase order forming the basis of the claim or (ii) five million dollars (\$5,000,000), whichever is greater.

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- ii. The State of Arkansas may retain such monies from any amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted against the State of Arkansas unless Contractor at the time of the presentation of claim shall demonstrate to the State of Arkansas' satisfaction that sufficient monies are set aside by the Contractor in the form of a bond or through insurance coverage to cover associated damages and other costs.
- iii. Notwithstanding the above, neither the Contractor nor the State of Arkansas shall be liable for any consequential, indirect or special damages of any kind which may result directly or indirectly from such performance, including, without limitation, damages resulting from loss of use or loss of profit by the State of Arkansas, the Contractor, or by others.
- i. **Confidential Information.** Under Arkansas law, the release of public records is governed by The Arkansas Freedom of Information Act found at Section 25-19-101 et. seq. of the Arkansas Statutes.
- j. **Contingent Fee.** The Contractor guarantees that Contractor has not retained a person to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the Contractor for the purpose of securing business.
- k. **Disclosure.** Under Arkansas law, the Office of State Procurement (OSP) is required to have a copy of EO 98-04 Disclosure Form on file for the Contractor. Contractor must submit the disclosure form prior to entering into this Addendum. Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that order, shall be a material breach of the terms of this Addendum. Any contractor, whether an individual or entity, who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the State.
- l. **Vendor Registration.** In order to receive payment, Contract Vendor must register online at <https://www.ark.org/vendor/index.html>
- m. **Technology Access.** When procuring a technology product or when soliciting the development of such a product, the State of Arkansas is required to comply with the provisions of Arkansas Code Annotated § 25-26-201 et seq., as amended by Act 308 of 2013, which expresses the policy of the State to provide individuals who are blind or visually impaired with access to information technology purchased in whole or in part with state funds. Contractor expressly acknowledges and agrees that state funds may not be expended in connection with the purchase of information technology unless that technology meets the

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statutory Requirements found in 36 C.F.R. § 1194.21, as it existed on January 1, 2013 (software applications and operating ICSs) and 36 C.F.R. § 1194.22, as it existed on January 1, 2013 (web-based intranet and internet information and applications), in accordance with the State of Arkansas technology policy standards relating to accessibility by persons with visual impairments.

ACCORDINGLY, THE CONTRACTOR EXPRESSLY REPRESENTS AND WARRANTS to the State of Arkansas through the procurement process by submission of a Voluntary Product Accessibility Template (VPAT) for 36 C.F.R. § 1194.21, as it existed on January 1, 2013 (software applications and operating ICSs) and 36 C.F.R. § 1194.22, that the technology provided to the State for purchase is capable, either by virtue of features included within the technology, or because it is readily adaptable by use with other technology, of:

Providing, to the extent required by Arkansas Code Annotated § 25-26-201 et seq., as amended by Act 308 of 2013, equivalent access for effective use by both visual and non-visual means

Presenting information, including prompts used for interactive communications, in formats intended for non-visual use

After being made accessible, integrating into networks for obtaining, retrieving, and disseminating information used by individuals who are not blind or visually impaired

Providing effective, interactive control and use of the technology, including without limitation the operating system, software applications, and format of the data presented is readily achievable by nonvisual means;

Being compatible with information technology used by other individuals with whom the blind or visually impaired individuals interact

Integrating into networks used to share communications among employees, program participants, and the public

Providing the capability of equivalent access by nonvisual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired

State agencies cannot claim a product as a whole is not reasonably available because no product in the marketplace meets all the standards. Agencies must evaluate products to determine which product best meets the standards. If an agency purchases a product that does not best meet the standards, the agency

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must provide written documentation supporting the selection of a different product, including any required reasonable accommodations.

For purposes of this section, the phrase "equivalent access" means a substantially similar ability to communicate with, or make use of, the technology, either directly, by features incorporated within the technology, or by other reasonable means such as assistive devices or services which would constitute reasonable accommodations under the Americans with Disabilities Act or similar state and federal laws. Examples of methods by which equivalent access may be provided include, but are not limited to, keyboard alternatives to mouse commands or other means of navigating graphical displays, and customizable display appearance. As provided in Arkansas Code Annotated § 25-26-201 et seq., as amended by Act 308 of 2013, if equivalent access is not reasonably available, then individuals who are blind or visually impaired shall be provided a reasonable accommodation as defined in 42 U.S.C. § 12111(9), as it existed on January 1, 2013.

If the information manipulated or presented by the product is inherently visual in nature, so that its meaning cannot be conveyed non-visually, these specifications do not prohibit the purchase or use of an information technology product that does not meet these standards.

- n. **Shared Technical Architecture.** The respondent's solution must comply with the state's shared Technical Architecture Program which is a set of policies and standards that can be viewed at: <http://www.dis.arkansas.gov/policiesStandards/Pages/default.aspx>. Only those standards which are fully promulgated or have been approved by the Governor's Office apply to this solution.
- o. **For Services Only:**
 - i. **Equal Opportunity Policy.** In compliance with Arkansas Code Annotated § 19-11-104, if a state agency is purchasing services, the Office of State Procurement (OSP) is required to have a copy of the Contractor's *Equal Opportunity (EO) Policy* prior to entering into this Addendum. *EO Policies* may be submitted in electronic format to the following email address: eeopolicy.osp@dfa.arkansas.gov or Contractor may submit a hard copy with this Addendum. The submission of an *EO Policy* to OSP is a one-time requirement. Contractor is responsible for providing updates or changes to its policy, and for supplying *EO Policies* upon request to other State agencies that must also comply with this statute. If Contractor is not required by law to have an *EO Policy*, Contractor must submit a written statement to that effect.

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- ii. **Prohibition of Employment of Illegal Immigrants.** Pursuant to Arkansas Code Annotated § 19-11-105, if a state agency is purchasing services, the Office of State Procurement (OSP) is required to have a certification on file from the Contractor stating that the Contractor does not employ or contract with illegal immigrants. The Contractor must certify online at www.arkansas.gov/dfa/procurement that the Contractor does not employ or contract with any illegal immigrant prior to entering into this Addendum.
 - iii. **Performance Standards** Under Arkansas law, all state agencies, boards, commissions, and institutions of higher education must include performance standards when purchasing services. Performance standards shall be mutually agreed upon by the parties hereto for any services purchased.
 - p. **Leasing.** Leasing **shall not** be authorized under this Participating Addendum.
 - q. **Value Added Services.** The Contractor **shall not** propose or provide value-added services unless it meets one (1) or more of the following criteria:
 - i. It is of no cost to the purchasing entity;
 - ii. Services are linked to items the entity has purchased through a current or past transaction.
 - r. **Restriction of Boycott of Israel.** By signing this PA, Contractor agrees and certifies that it does not boycott Israel, and shall not boycott Israel during the aggregate term of the contract. However, in accordance with Arkansas Code Annotated § 25-1-503, should the Contractor boycott Israel at any time during the aggregate term of the contract, the Contractor shall provide the State with at least a twenty percent (20%) reduction in the then-current pricing under the applicable Order(s).
7. **Individual Customer:** Each State agency and political subdivision, as a Participating Entity, that purchases products/services **shall** be treated as if they were Individual Customers. Except to the extent modified by a Participating Addendum, each agency and political subdivision **shall** be responsible to follow the terms and conditions of the Master Agreement; and they **shall** have the same rights and responsibilities for their purchases as the Lead State has in the Master Agreement. Each agency and political subdivision **shall** be responsible for their own charges, fees, and liabilities. Each agency and political subdivision **shall** have the same rights to any indemnity or to recover any costs allowed in the contract for their purchases. The Contractor **shall** apply the charges to each Participating Entity individually.
8. **Purchase Order Instructions:** All purchase orders issued by Purchasing Entities within the jurisdiction of this participating addendum **shall** include the following:

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- a. NASPO ValuePoint Master Agreement number AR2472
- b. This PA and State contract number [SP-17-0134 4600040559]
- c. Agency Name, Address, Contact, and Phone-Number
- d. Applicable approvals
- e. Orders shall be made out to the Contractor or Reseller

Except for any SLA(s) and the applicable Order(s), the Purchasing Entities shall not be required, by the Contractor or its subcontractors, to sign any additional terms and conditions when utilizing this Agreement.

9. Subcontractors: All contactors, dealers, and resellers authorized in the State of Arkansas, as shown on the dedicated Contractor (cooperative contract) website, are approved to provide sales and service support to participants in the NASPO ValuePoint Master Agreement. The contractor's dealer participation will be in accordance with the terms and conditions set forth in the aforementioned Master Agreement. The Contractor will be responsible for any agreements with the subcontractors. Except as otherwise set forth in an SLA the Participating State/Entity is not agreeing to and is not responsible for any terms and conditions with a subcontractor. The following subcontractors are authorized to provide product delivery and services:

Subcontractor	Contact Name	Email	Phone
To be provided			

Subcontractors may be updated by mutual agreement.

10. Orders: Any Order placed by a Participating Entity or Purchasing Entity for a product and/or service available from this Master Agreement shall be deemed to be a sale under (and governed by the prices and other terms and conditions) of the applicable SLA.
11. Terms: The Participating State/Entity is agreeing to the terms of the Master Agreement only to the extent the terms are not in conflict with Arkansas law.
12. Entire Agreement: This Participating Addendum, any SLA(s) and Order(s) made pursuant to this PA, and the Master Agreement number AR2472 (administered by the State of Utah together with its exhibits (including any terms referenced in the Master Agreement), set forth the entire agreement between the parties with respect to the subject matter and supersedes all previous communications, representations or agreements, whether oral or written, with

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respect to the subject matter hereof. Except for terms of any SLA(s) and all terms referenced under any SLA(s), other terms and conditions inconsistent with, contrary or in addition to the terms and conditions of this Addendum and the Master Agreement, together with its exhibits, shall not be added to or incorporated into this Addendum or the Master Agreement and its exhibits, by any subsequent purchase order or otherwise, and any such attempts to add or incorporate such terms and conditions are hereby rejected. Except as otherwise provided in an SLA, the terms and conditions of this Addendum and the Master Agreement and its exhibits shall prevail and govern in the case of any such inconsistent or additional terms within the Participating State.

IN WITNESS WHEREOF, the parties have executed this Addendum as of the date of execution by both parties below.

Participating Entity: State of Arkansas	Contractor: Carahsoft
Signature: 	Signature: 
Name: 	Name: Kristina Smith
Title:  TSS OSP State Procurement Dir.	Title: Director of Contracts
Date:  12/30/2019	Date: 12/30/2019

[Additional signatures may be added if required by the Participating Entity]

For questions on executing a participating addendum, please contact:

NASPO ValuePoint

Cooperative Development Coordinator:	Fay Tan
Telephone:	801-683-2409
Email:	ftan@naspovaluepoint.org

Please email fully executed PDF copy of this document
to
PA@naspovaluepoint.org
to support documentation of participation and posting
in appropriate data bases.