

STATE OF TEXAS  
COUNTY OF TRAVIS

**AMENDMENT ONE  
TO THE  
AGREEMENT BETWEEN  
THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION  
AND  
SAN ANTONIO FOOD BANK  
FOR  
SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM EDUCATION  
(SNAP-ED) SERVICES FOR DIRECT NUTRITION EDUCATION SERVICES**

This Amendment One (“Amendment”) is entered into between The Health and Human Services Commission (“HHSC”) and San Antonio Food Bank, (“CONTRACTOR”), for the purpose of authorizing payment for extended services and to extend the term of their Original Agreement. HHSC and CONTRACTOR may be referred to in this Amendment individually as “Party” and collectively as the “Parties.”

The Parties hereby agree to amend their Original Agreement, HHSC Contract No. 529-16-0002-00001 (“the Agreement”), corresponding to RFP No. 529-16-0002, subject to the following terms and conditions. The Parties agree that the modified terms and conditions will apply to the Agreement unless further modified or amended by the Parties.

**ARTICLE I. PURPOSE**

***Section 1.01 Legal Authority.***

The Parties, in accordance with Section I of the Agreement and Article 7 of HHSC's Uniform Contract Terms and Conditions Version 1.5 ("UTC"), execute this Amendment.

***Section 1.02 Amendment's Objectives.***

The Parties desire to modify the Agreement to update certain terms and provisions for Fiscal Year 2017.

**Section 1.03 Modifications to Agreement.**

The Contract is modified for the following purposes:

**(1) Section II. General Terms and Conditions**

**a. HHSC Uniform Terms and Conditions (UTC)**

The exhibits to the contract are re-ordered as set out below:

CONTRACTOR must comply with the HHSC UTC Version 1.5 attached hereto as **Exhibit A.**

**b. Agreement Elements and Order of Precedence**

i. The Agreement between the Parties will consist of the following:

1. The Agreement, this Amendment and all amendments thereto;
2. HHSC UTC Version 1.5 - **Exhibit A;**
3. The Request for Proposal No. 529-16-0002, issued March 30, 2015 (RFP) and all attachments, incorporated for all purposes into the Agreement, including CONTRACTOR's Plan of Operations and attachments ("Plan of Operations") and CONTRACTOR's Budget Pages and attachments ("Budget Pages") as **Exhibit B;**
4. CONTRACTOR's response to RFP ("Response") incorporated for all purposes into the Agreement as **Exhibit C;**
5. HHSC's Data Use Agreement (DUA) and all amendments thereto incorporated for all purposes into the Agreement as **Exhibit D;**
6. The Federal Funding Accountability and Transparency Act of 2006 Requirements incorporated for all purposes into the Agreement as **Exhibit E;**
7. Reporting Requirements incorporated for all purposes into the Agreement as **Exhibit F;**
8. CONTRACTOR's Matching Requirements incorporated for all purpose into the Agreement as **Exhibit G;**
9. CONTRACTOR's fiscal year 2017 Project Description as **Exhibit H;** and
10. CONTRACTOR's fiscal year 2017 Budget as **Exhibit I.**

**ii. Order of Precedence**

In the event of any conflict or contradiction between or among the above documents, the documents shall control in the following:

1. The Agreement and this Amendment, and all amendments thereto,
2. HHSC UTC Version 1.5 - **Exhibit A;**
3. The RFP - **Exhibit B;**
4. The Response - **Exhibit C;** and
5. HHSC DUA - **Exhibit D.**

**c. Contract Period**

The Term of this Amendment begins on October 1, 2016 and expires on September 30, 2017, unless terminated sooner in accordance with the Agreement. The Agreement has three remaining additional 12-month renewal terms (Renewal Terms). The Agreement may be renewed only by a written amendment executed by the Parties. All contract renewals beyond the Initial Term will be subject to the terms and conditions of the Agreement, including those related to the appropriation of funds.

d. **Contract Award**

The costs of the services and deliverables to be supplied by CONTRACTOR are amended as follows:

HHSC shall pay the CONTRACTOR an amount not to exceed \$2,030,243 for the term of this Amendment - October 1, 2016 through September 30, 2017 - for the work performed in accordance with Exhibit H to this Amendment. This amount includes up to \$1,827,219 from HHSC and \$203,024 in matching funds provided by the CONTRACTOR.

HHSC requires a 10% match for the term of this Amendment. Match requirements for any future contract renewals will not exceed 10%.

Continued funding for this Contract is contingent upon availability of State and Federal funds. HHSC will notify CONTRACTOR of funding for Renewal Terms in writing at least thirty (30) calendar days prior to the renewal amendment's effective date.

(2) **Section VIII. Confidentiality**

Subsection (a) is amended to read as follows:

CONTRACTOR and any of its subcontractors associated with this Agreement will ensure the confidentiality of all client and personnel information and records in accordance with HHSC's UTC Version 1.5 - **Exhibit A**, HHSC's DUA - **Exhibit D**, and all applicable federal and state laws, rules, regulations and program policies and procedures. By executing this Agreement, CONTRACTOR agrees to comply with all terms, conditions and requirements of the DUA. The defined terms "CONTRACTOR," "HHSC," and "Base Contract" in the DUA refer to the CONTRACTOR, HHSC and this Agreement, respectively.

(3) **Section IX. Contract Records**

Subsection (b) relating to record retention of all records and documents, other than client files is deleted and replaced with the following:

- (b) CONTRACTOR or its subcontractor must maintain all records for a period of seven (7) years after the submission of the final billing or until the resolution of all litigation, claims, financial management review, or audits pertaining to the Agreement and all amendments thereto, whichever is longer. CONTRACTOR must also comply with HHSC UTC Version 1.5 Section 8.01 Record retention and audit. **Exhibit A.**

(4) **Section XIII. Budget Revisions**

Subsection (a) is deleted and replaced with the following:

- (a) CONTRACTOR must notify HHSC within thirty (30) days of any fund transfers among approved budget categories that are singularly or cumulatively ten percent (10%) or less of the total contract budget.

(5) **Section XIX. Federal Funding Accountability and Transparency Act of (FFATA) 2006 for Subrecipients**

This section is amended to include the correct Exhibit reference as follows:

If FFATA requirements are associated with the funding for this Contract, to the extent possible, CONTRACTOR shall comply with FFATA requirements as prescribed by attached **Exhibit E.**

**(6) Section XXII. SNAP-Ed Specific Terms and Conditions**

Subsection (c) Reporting Requirements **Exhibit F** is amended as follows:

The required reporting period included in **Exhibit F** relating to Education and Administration Reporting Systems (EARS) is changed to a quarterly submission period. The EARS report is due no later than the 20<sup>th</sup> of the month following the end of the reporting quarter. The submission dates are as follows:

QUARTER	DUE DATE
1	January 20
2	April 20
3	July 20
4	October 20

Subsection (d) is amended to include the correct Exhibit reference as follows:

(d) Match Requirements (Cash Contribution and/or In -Kind Donations):

If Match requirements are associated with the funding for this Contract, CONTRACTOR shall comply with the program Match requirements as prescribed in attached **Exhibit G**.

**(7) Section XXIII. Exhibits**

The Exhibits to this Contract are re-ordered and incorporated herein for all purposes as follows:

1. HHSC UTC Version 1.5 - **Exhibit A**;
2. The Request for Proposal No. 529-16-0002, issued March 30, 2015 (RFP) and all attachments, incorporated for all purposes into the Agreement, including CONTRACTOR's Plan of Operations and attachments ("Plan of Operations") and CONTRACTOR's Budget Pages and attachments ("Budget Pages") as **Exhibit B**;
3. CONTRACTOR's response to RFP ("Response") incorporated for all purposes into the Agreement as **Exhibit C**;
4. HHSC's Data Use Agreement (DUA) and all amendments thereto incorporated for all purposes into the Agreement as **Exhibit D**;
5. The Federal Funding Accountability and Transparency Act of 2006 Requirements incorporated for all purposes into the Agreement as **Exhibit E**;
6. Reporting Requirements incorporated for all purposes into the Agreement as **Exhibit F**;
7. CONTRACTOR's Matching Requirements incorporated for all purpose into the Agreement as **Exhibit G**;
8. CONTRACTOR's fiscal year 2017 Project Description as **Exhibit H**; and
9. CONTRACTOR's fiscal year 2017 Budget as **Exhibit I**.

**ARTICLE II. REPRESENTATIONS AND AGREEMENT OF THE PARTIES**

The Parties hereto contract and agree that the terms of the Agreement shall remain in effect and continue to govern except to the extent modified herein. By signing this Amendment, the Parties expressly understand and agree that Amendment One is hereby made a part of the Agreement as though it were set out word for word therein.

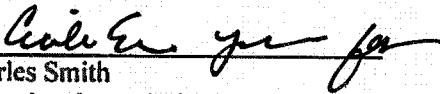
**ARTICLE III. AUTHORITY TO EXECUTE**

The Parties hereby execute this Amendment in their capacities as stated below with authority to bind their organizations on the dates set forth by their signatures.

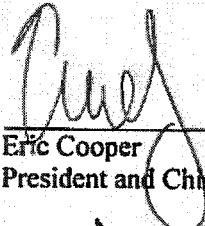
IN WITNESS HEREOF, HHSC and CONTRACTOR have each caused this Agreement to be signed and delivered by its duly authorized representative.

HEALTH & HUMAN SERVICES COMMISSION

SAN ANTONIO FOOD BANK

  
\_\_\_\_\_  
Charles Smith  
Executive Commissioner

Date: 8/2/16

  
\_\_\_\_\_  
Eric Cooper  
President and Chief Executive Officer

Date: Aug 2, 2016

# **Exhibit A - HHSC UTC Version 1.5**

HHSC Uniform Terms and Conditions Version 1.5  
Published and Effective: April 01, 2015  
Responsible Office: Chief Counsel



**Health and Human Services Commission**

**HHSC Uniform Terms and Conditions  
Version 1.5**

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## Article 1. Introduction

### **Section 1.01 Inducements.**

In making the award of the Agreement, the Health and Human Services Commission (HHSC) relies on CONTRACTOR's assurances of the following:

(1) CONTRACTOR and its subcontractors are established providers of the types of services described in the Solicitation;

(2) CONTRACTOR and its subcontractors have the skills, qualifications, expertise, financial resources, and experience necessary to perform the services described in the Solicitation, CONTRACTOR's Proposal, and the Agreement in an efficient, cost-effective manner, with a high degree of quality and responsiveness, and has performed similar services for other public or private entities;

(3) CONTRACTOR has thoroughly reviewed, analyzed, and understood the Solicitation, has timely raised all questions or objections to the Solicitation, and has had the opportunity to review and fully understand the HHSC's current program and operating environment for the activities that are the subject of the Agreement and the needs and requirements of the State during the Agreement term;

(4) CONTRACTOR has had the opportunity to review and understand the State's stated objectives in entering into the Agreement and, based on such review and understanding, CONTRACTOR currently has the capability to perform in accordance with the terms and conditions of the Agreement;

(5) CONTRACTOR also has reviewed and understands the risks associated with the HHSC Programs as described in the Solicitation, including the risk of non-appropriation of funds.

Accordingly, HHSC desires to engage CONTRACTOR to perform the services described in the Agreement under the terms and conditions set forth in the Agreement.

### **Section 1.02 Construction of Agreement.**

(a) *Scope of Introductory Article.*

The provisions of any introductory article to the Agreement are intended to be a general introduction and are not intended to expand the scope of the Parties' obligations under the Agreement or to alter the plain meaning of the terms and conditions of the Agreement.

(b) *References to the "State."*

References in the Agreement to the "State" mean the State of Texas unless otherwise indicated and will be interpreted, as appropriate, to mean or include HHSC and other agencies of the State of Texas that may participate in the administration of HHSC Programs, provided, however, that no provision will be interpreted to include any entity other than HHSC as the contracting agency.

(c) *Severability.*

If any provision of the Agreement is for any reason held to be unenforceable, the rest of it remains fully enforceable.

(d) *Survival of terms.*

Termination or expiration of the Agreement for any reason will not release either Party from any liabilities or obligations set forth in the Agreement that:

(1) The Parties agree will survive the termination or expiration; or

(2) Remain to be performed or by their nature would be intended to be applicable following any such termination or expiration.

(e) *Headings.*

The article and section headings in the Agreement are for reference and convenience only and may not be considered in the interpretation of the Agreement.

(f) *Global drafting conventions.*

(1) The terms "include," "includes," and "including" are terms of inclusion and enlargement, and where used in the Agreement, should be read as if followed by the phrase "without limitation."

(2) Any references to "sections," "appendices," or "attachments" are references to sections, appendices, or attachments of the Agreement.

(3) Any references to agreements, contracts, statutes, or administrative rules or regulations in the Agreement are references to these documents as amended, modified, or supplemented from time to time during the term of the Agreement.

### **Section 1.03 No implied authority.**

The authority delegated to CONTRACTOR by HHSC is limited to the terms of the Agreement. HHSC is the state agency designated by the Texas Legislature to administer the HHSC Programs, and no other state agency grants CONTRACTOR any authority related to the Agreement unless directed through HHSC. CONTRACTOR may not rely upon implied authority and is not delegated authority under the Agreement to:

- (1) make public policy;
- (2) promulgate, amend, or disregard administrative regulations or program policy decisions made by State and federal agencies responsible for administration of HHSC Programs; or
- (3) unilaterally communicate or negotiate with any federal or state agency or the Texas Legislature on behalf of HHSC regarding HHSC Programs or the Agreement.

To the fullest extent possible, CONTRACTOR is required to assist HHSC in communications and negotiations with state and federal governments and agencies as directed by HHSC.

### **Section 1.04 Legal Authority.**

(a) HHSC is authorized to enter into the Agreement under Chapter 531 or 533, Texas Government Code; Section 2155.144, Texas Government Code; or Chapter 62, Texas Health & Safety Code. CONTRACTOR is authorized to enter into the Agreement pursuant to the authorization of its governing board or controlling owner or officer.

(b) The person or persons signing and executing the Agreement on behalf of the Parties, or representing themselves as signing and executing the Agreement on behalf of the Parties, warrant and guarantee that he, she, or they have been duly authorized to execute the Agreement and to validly and legally bind the Parties to all of its terms, performances, and provisions.

## **Article 2. Definitions**

As used in the Agreement, the following terms and conditions have the meanings assigned below:

**"Agreement"** means the formal, written, and legally enforceable agreement and amendments between the Parties.

**"Change"** means any alteration, adjustment, exchange, substitution, or modification of the Services under the Agreement that are authorized in accordance with Article 7 of the Agreement.

**"Change Order Request"** means a request to make a change in the Services or Deliverables under the Agreement.

**"Children's Health Insurance Program"** or **"CHIP"** means the health insurance program authorized and funded pursuant to Title XXI, Social Security Act (42 U.S.C. §§ 1397aa-1397jj) and administered by HHSC.

**"Confidential Information"** means any communication or record (whether oral, written, electronically stored or transmitted, or in any other form) provided to or made available to CONTRACTOR or that CONTRACTOR may create, receive, maintain, use, disclose or have access to on behalf of HHS that consists of or includes any or all of the following:

- (1) Client Information;
- (2) Protected Health Information in any form including without limitation, Electronic Protected Health Information or Unsecured Protected Health Information;
- (3) Sensitive Personal Information defined by Texas Business and Commerce Code Ch. 521;
- (4) Federal Tax Information;
- (5) Personally Identifiable Information;
- (6) Social Security Administration Data, including, without limitation, Medicaid information;
- (7) All privileged work product;
- (8) All information designated as confidential under the constitution and laws of the State of Texas and of the United States, including the Texas Health & Safety Code and the Texas Public Information Act, Texas Government Code, Chapter 552; and
- (9) Other Confidential Information as designated in the Agreement.

**"CONTRACTOR"** means the Party identified in the Agreement as the individual or entity that is required to perform the Services and related obligations under the Agreement.

**"Corrective Action Plan"** means the detailed written plan required by HHSC to correct or resolve a material deficiency or breach of the Agreement.

**"Deliverable"** means a work product prepared, developed, or procured by CONTRACTOR as part of the Services under the Agreement for the use or benefit of HHSC or the State of Texas.

**"Disability"** means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

**“Effective Date”** means the date of complete execution of the Agreement unless another date is agreed to by the Parties as the date on which the Agreement takes effect. For purposes of the Agreement, the term includes any period under which work is performed in accordance with a properly executed Letter of Intent between HHSC and CONTRACTOR.

**“Electronic and information resources (EIR)”** --Includes information technology and any equipment or interconnected system or subsystem of equipment used to create, convert, duplicate, or deliver data or information. EIR includes telecommunications products (such as telephones), information kiosks and transaction machines, web sites, multimedia, and office equipment such as copiers and fax machines. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, thermostats or temperature control devices, and medical equipment that contain information technology that is integral to its operation, are not information technology. If the embedded information technology has an externally available web or computer interface, that interface is considered EIR. Other terms such as, but not limited to, Information and Communications Technology (ICT), Electronic Information Technology (EIT), etc. can be considered interchangeable terms with EIR for purposes of the Agreement.

**“Health and Human Services Commission”** or **“HHSC”** means the administrative agency within the executive department of Texas state government established under Chapter 531, Texas Government Code or its designee, including, but not limited to, the Texas Health and Human Services Agencies.

**“HHSC Programs”** means the public health and human service programs administered by HHSC, including but not limited to Medicaid and CHIP.

**“Initial Term”** means the period between the Effective Date and the original expiration date of the Agreement.

**“Material Subcontract”** means any Subcontract that exceeds, or is reasonably expected to exceed, \$100,000 per year. Any Subcontracts between the CONTRACTOR and a single entity that are split into separate agreements by time period, program, or service area, etc., may be consolidated for the purpose of this definition.

**“Material Subcontractor (or Major Subcontractor)”** means any entity with a Material Subcontract with CONTRACTOR.

**“Medicaid”** means the medical assistance entitlement program authorized and funded pursuant to Title XIX, Social Security Act (42 U.S.C. § 1396 *et seq.*) and administered by HHSC.

**“Other Confidential Information”** means any communication or record (whether oral, written, electronically stored or transmitted, or in any other form) provided to or made available to CONTRACTOR or that CONTRACTOR may create, receive, maintain, use, disclose or have access to on behalf of HHSC that is expressly designated as Other Confidential Information in the Agreement.

**“Parties”** means HHSC and CONTRACTOR, collectively.

**“Party”** means either HHSC or CONTRACTOR, individually.

**“Proposal”** means the proposal submitted by the CONTRACTOR in response to the Solicitation.

**“Public information”** means information that:

- (1) Is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body;
- (2) The governmental body owns or has a right of access to; and
- (3) Is not Confidential Information.

**“Solicitation”** means the written invitation for bids, request for offers, request for proposals, or similar instrument that is posted on the HHSC Website and/or Electronic State Business Daily, seeking responses from qualified vendors for needed goods and services. This term also includes "price requests" and "pricing requests" sent to Department of Information Resources vendors to get pricing, based on a specific scope of work, through a Cooperative Contract or DBITS contract. and any addendums under which the Agreement was awarded and is executed.

**“Scope of Work”** means the description of Services and Deliverables specified in the Agreement, the Solicitation, and any agreed modifications.

**“Services”** means the tasks, functions, and responsibilities assigned and delegated to CONTRACTOR under the Agreement.

**“Software”** means all operating system and applications software used or created by CONTRACTOR to provide the Services under the Agreement.

**“Subcontract”** means any written agreement between CONTRACTOR and other party to fulfill the requirements of the Agreement. All subcontracts are required to be in writing.

**“Subcontractor”** means any individual or entity that has entered into a subcontract with CONTRACTOR.

**“Turnover Plan”** means the written plan developed by CONTRACTOR, approved by HHSC, and to be employed in the event that the work described in the Agreement transfers to the State or another vendor from CONTRACTOR. HHSC may require CONTRACTOR to develop a Turnover Plan at any time during the term of the Agreement at HHSC’s discretion. The Turnover Plan describes CONTRACTOR’s policies and procedures that will assure:

- (1) The least disruption in the delivery of services during the transition to a substitute vendor; and
- (2) Cooperation with HHSC and the substitute vendor in transferring information and services to a substitute vendor.

### **Article 3. General Terms and Conditions**

#### **Section 3.01 Agreement elements.**

(a) *Entire Agreement.*

The Agreement between the Parties will consist of the document bearing the signatures of the Parties, Exhibits, or Attachments to that document, these Uniform Terms and Conditions, the Solicitation (CONTRACTOR’s Proposal and any agreed to modifications (incorporated by reference).

(b) *Order of precedence.*

Unless otherwise agreed, in the event of any conflict or contradiction between or among these documents, the documents will control in the following order of precedence:

- (1) The final executed document that bears the signature of the Parties, including any Exhibits or attachments, and all amendments to that document;
- (2) These Uniform Terms and Conditions, including any attachments;
- (3) The Solicitation and any addendums, corrections, and clarifications. ;
- (4) CONTRACTOR’s Proposal and any agreed to modifications.

#### **Section 3.02 Funding.**

The Agreement is conditioned on the availability of state and federal appropriated funds. CONTRACTOR will have no right of action against HHSC in the event that HHSC is unable to perform its obligations under the Agreement as a result of the suspension, termination, withdrawal of funding to HHSC, the failure to fund HHSC, or lack of sufficient funding of HHSC for any activities or functions contained within the scope of the Agreement. If funds become unavailable, the provisions of Article 11 (Remedies and Disputes) will apply. HHSC will use all reasonable efforts to ensure that such funds are available, and will negotiate in good faith with CONTRACTOR to resolve any CONTRACTOR claims for payment that represent accepted Services or Deliverables that are pending at the time funds become unavailable. HHSC will make best efforts to provide reasonable written advance notice to CONTRACTOR upon learning that funding for the Agreement may be discontinued.

#### **Section 3.03 Delegation of authority.**

Whenever, by any provision of the Agreement, any right, power, or duty is imposed or conferred on HHSC, the right, power, or duty so imposed or conferred is possessed and exercised by HHSC’s Executive Commissioner unless any right, power, or duty is delegated to the duly appointed agents or employees of HHSC. HHSC’s Executive Commissioner will reduce any delegation of authority to writing and provide a copy to CONTRACTOR on request.

#### **Section 3.04 No waiver of sovereign immunity.**

The Parties agree that no provision of the Agreement is in any way intended to constitute a waiver by HHSC or the State of Texas of any immunities from suit or from liability that HHSC or the State of Texas may have by operation of law.

#### **Section 3.05 Force majeure.**

A Party will not be liable for any failure or delay in performing its obligations under the Agreement if such failure or delay is due to any cause beyond the reasonable control of the Party, including, but not limited to, unusually severe weather, strikes, natural disasters, fire, civil disturbance, epidemic, war, court order, or acts of God. The existence of such causes of delay or failure will extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. Each Party must inform the other in writing with proof of receipt within five (5) business days of the existence of a force majeure event as described above or otherwise waive this right as a defense.

#### **Section 3.06 Other Health and Human Services Agencies’ participation in the Agreement.**

In addition to providing the Services specified for HHSC, CONTRACTOR agrees to allow other Health and Human Service Agencies the option to participate in the Agreement under the same terms and conditions. Each

agency that elects to obtain services under this section will issue a purchase order to CONTRACTOR, referring to, and incorporating by reference, the terms and conditions specified in the Agreement.

**Section 3.07 Most favored customer.**

The CONTRACTOR agrees that if during the term of the Agreement, the CONTRACTOR enters into any agreement with any other governmental customer, or any non-affiliated commercial customer by which it agrees to provide equivalent services at lower prices, or additional services at comparable prices, the Agreement will, at HHSC's option, be amended to accord equivalent advantage to HHSC.

**Section 3.08 Publicity.**

(a) *No Use*

Except as provided in the paragraphs below, CONTRACTOR must not use the name of, or directly or indirectly refer to, HHSC, the State of Texas, or any other State agency in any media release, public announcement, or public disclosure relating to the Agreement or its subject matter, including in any promotional or marketing materials, customer lists, or business presentations (other than proposals or reports submitted to HHSC, an administrative agency of the State of Texas, or a governmental agency or unit of another state or the Federal government).

(b) *Limited Exception*

CONTRACTOR may publish, at its sole expense, results of CONTRACTOR performance under the Agreement with HHSC's prior review and approval, which HHSC may exercise at its sole discretion. Any publication (written, visual, or sound) will acknowledge the support received from HHSC and any Federal agency, as appropriate. CONTRACTOR will provide HHSC at least three (3) copies of any such publication prior to public release. CONTRACTOR will provide additional copies at the request of HHSC. CONTRACTOR may include information concerning the Agreement's terms, subject matter, and estimated value in any report to a governmental body to which the CONTRACTOR is required by law to report such information.

**Section 3.09 Assignment.**

(a) *Assignment by CONTRACTOR.*

CONTRACTOR will not assign all or any portion of its rights under or interests in the Agreement or delegate any of its duties without prior written consent of HHSC. Any written request for assignment or delegation must be accompanied by written acceptance of the assignment or delegation by the assignee or delegation by the delegate. Except where otherwise agreed in writing by HHSC, assignment or delegation will not release CONTRACTOR from its obligations under the Agreement.

(b) *Assignment by HHSC.*

CONTRACTOR understands and agrees HHSC may in one or more transactions assign, pledge, or transfer the Agreement. This assignment will only be made to another State agency or a non-state agency that is contracted to perform agency support.

(c) *Assumption.*

Each party to whom a transfer is made must assume all or any part of CONTRACTOR'S or HHSC's interests in the Agreement, the product, and any documents executed with respect to the Agreement, including, without limitation, the assignor's obligation for all or any portion of the purchase payments, in whole or in part.

**Section 3.10 Cooperation with other vendors and prospective vendors.**

(a) *Supplemental Contracts*

HHSC may award supplemental contracts for work related to the Agreement, or any portion thereof. HHSC reserves the right to award the Contract as a joint venture between two or more potential vendors, if such an arrangement is in the best interest of HHSC. CONTRACTOR agrees to cooperate with such other vendors, and will not commit or permit any act that may interfere with the performance of work by any other vendor.

(b) *Access*

At HHSC's request, CONTRACTOR will allow parties interested in responding to HHSC Solicitations to have reasonable access during normal business hours to software, systems documentation, and site visits to the CONTRACTOR's facilities. All such parties inspecting the facilities and software and systems documentation may be required to agree to use the information so obtained only in the State of Texas and only for the purpose of responding to the Solicitation.

**Section 3.11 Renegotiation and reprocurement rights.**

(a) *Renegotiation of Agreement terms.*

Notwithstanding anything in the Agreement to the contrary, HHSC may at any time during the term of the Agreement exercise the option to notify CONTRACTOR that HHSC has elected to renegotiate certain terms of the



Agreement within the scope of the Agreement and as permitted by law. Upon CONTRACTOR's receipt of any notice under this Section, CONTRACTOR and HHSC will undertake good faith negotiations of the subject terms of the Agreement.

(b) *Reprocurement of the services or procurement of additional services.*

Notwithstanding anything in the Agreement to the contrary, whether or not HHSC has accepted or rejected CONTRACTOR's Services or Deliverables provided during any period of the Agreement, HHSC may at any time issue requests for proposals or offers to other potential contractors for performance of any portion of the Services covered by the Agreement or services similar or comparable to the Services performed by CONTRACTOR under the Agreement.

(c) *Termination rights upon reprocurement.*

If HHSC elects to procure the Services or any portion of the Services from another vendor in accordance with this Section, HHSC will have the termination rights set forth in Article 11.

### **Section 3.12 Solicitation errors and omissions.**

CONTRACTOR will not take advantage of any errors or omissions in the Solicitation or the resulting Agreement. CONTRACTOR must promptly notify HHSC of any errors or omissions that are discovered. Failure to notify HHSC of any errors will constitute a waiver of those errors.

### **Section 3.13 Attorneys' fees.**

In the event of any litigation, appeal, or other legal action to enforce any provision of the Agreement, CONTRACTOR agrees to pay all expenses of such action, including attorneys' fees and costs if HHSC is the prevailing or substantially prevailing Party.

### **Section 3.14 Preferences under service contracts.**

CONTRACTOR is required in performing the Agreement to purchase products and materials produced in the State of Texas when they are available at a price and time comparable to products and materials produced outside the State.

### **Section 3.15 Ensuring timely performance.**

The Parties acknowledge the need to ensure uninterrupted and continuous performance of the Scope of Work under the Agreement, therefore, HHSC may terminate the Agreement or apply any other remedy as noted in Article 11 (Remedies and Disputes) if CONTRACTOR's performance is not timely.

## **Article 4. Contractor Personnel Management**

### **Section 4.01 Qualifications, retention and replacement of CONTRACTOR employees.**

CONTRACTOR agrees to maintain the organizational and administrative capacity and capabilities to carry out all duties and responsibilities under the Agreement. The personnel CONTRACTOR assigns to perform the duties and responsibilities under the Agreement will be properly trained and qualified for the functions they are to perform. CONTRACTOR does not warrant the quality of training for which the State is responsible. Notwithstanding transfer or turnover of personnel, CONTRACTOR remains obligated to perform all duties and responsibilities under the Agreement without degradation and in accordance with the terms of the Agreement.

### **Section 4.02 Responsibility for CONTRACTOR personnel.**

(a) *Employment and Agency*

CONTRACTOR's employees and subcontractors will not in any sense be considered employees of HHSC or the State of Texas, but will be considered CONTRACTOR's employees for all purposes. Except as provided in the Agreement, neither CONTRACTOR nor any of CONTRACTOR's employees or subcontractors may act in any sense as agents or representatives of HHSC or the State of Texas.

(b) *E-Verify System*

By entering into this Contract, the Contractor certifies and ensures that it utilizes and will continue to utilize, for the term of this Contract, the U.S. Department of Homeland Security's E-Verify system to determine the eligibility of:

1. All persons employed to perform duties within Texas, during the term of the Contract; and
2. All persons (including subcontractors) assigned by the Respondent to perform work pursuant to the Contract, within the United States of America.

(c) *Liability*

CONTRACTOR's employees must be paid exclusively by CONTRACTOR for all services performed. CONTRACTOR is responsible for and must comply with all requirements and obligations related to such employees under local, state or federal law, including minimum wage, social security, unemployment insurance, state and federal income tax, and workers' compensation obligations. CONTRACTOR assumes sole and full responsibility for its acts and omissions and the acts and omissions of its personnel and subcontractors.

**CONTRACTOR AGREES THAT ANY CLAIM ON BEHALF OF ANY PERSON ARISING OUT OF EMPLOYMENT OR ALLEGED EMPLOYMENT (INCLUDING, BUT NOT LIMITED TO, CLAIMS OF DISCRIMINATION AGAINST CONTRACTOR, ITS OFFICERS, OR ITS AGENTS) ARE THE SOLE RESPONSIBILITY OF CONTRACTOR AND ARE NOT THE RESPONSIBILITY OF HHSC, AND THAT CONTRACTOR WILL INDEMNIFY AND HOLD HARMLESS THE STATE FROM ANY AND ALL SUCH CLAIMS ASSERTED AGAINST THE STATE.**

CONTRACTOR understands that any person who alleges a claim arising out of employment or alleged employment by CONTRACTOR will not be entitled to any compensation, rights, or benefits from HHSC (including, but not limited to, tenure rights, medical and hospital care, sick and annual/vacation leave, severance pay, or retirement benefits).

***Section 4.03 Cooperation with HHSC and state administrative agencies.***

(a) *Cooperation with HHSC contractors.*

CONTRACTOR agrees to reasonably cooperate with and work with the State's contractors, subcontractors and third-party representatives as requested by HHSC. To the extent permitted by HHSC's financial and personnel resources, HHSC agrees to reasonably cooperate with CONTRACTOR and to use its best efforts to ensure that HHSC's other HHSC Programs contractors reasonably cooperate with CONTRACTOR.

(b) *Cooperation with state and federal administrative agencies.*

CONTRACTOR must ensure that CONTRACTOR personnel will cooperate with HHSC or other state or federal administrative agency personnel at no charge to HHSC for purposes relating to the administration of HHSC programs including, but not limited to the following purposes:

- (1) The investigation and prosecution of fraud, abuse, and waste in the HHSC programs;
- (2) Audit, inspection, or other investigative purposes; and
- (3) Testimony in judicial or quasi-judicial proceedings relating to the Services under the Agreement or other delivery of information to HHSC or other agencies' investigators or legal staff.

***Section 4.04 Conduct of and responsibility for CONTRACTOR personnel.***

(a) *Conduct*

While performing the Services or Deliverables, CONTRACTOR's personnel and subcontractors must:

- (1) Comply with applicable Agreement terms, State and federal rules, regulations, HHSC's policies, and HHSC's requests regarding personal and professional conduct; and
- (2) Otherwise conduct themselves in a businesslike and professional manner.

(b) *Removal*

If HHSC determines in good faith that a particular employee or subcontractor is not conducting himself or herself in accordance with this Section, HHSC may provide CONTRACTOR with notice and documentation concerning such conduct. Upon receipt of such notice, CONTRACTOR must promptly investigate the matter and, at HHSC's request, take appropriate action that may include:

- (1) Removing the employee from the project;
- (2) Providing HHSC with written notice of such removal; and
- (3) Replacing the employee with a similarly qualified individual acceptable to HHSC.

Nothing in the Agreement will prevent CONTRACTOR, at the request of HHSC, from replacing any personnel who HHSC determines are not adequately performing their assigned responsibilities or who, in the reasonable opinion of HHSC's Project Director, after consultation with CONTRACTOR, are unable to work effectively with the members of the HHSC's staff. In such event, CONTRACTOR will provide replacement personnel with equal or greater skills and qualifications as soon as reasonably practicable. Replacement of Key Personnel will be subject to HHSC review and approval. The Parties will work together in the event of any such required replacement so as not to disrupt the overall project schedule.

(c) *Sole Control*

CONTRACTOR agrees that anyone employed by CONTRACTOR to fulfill the terms of the Agreement is an employee of CONTRACTOR and remains under CONTRACTOR's sole direction and control.

CONTRACTOR agrees to be responsible for the following with respect to its employees:

- (1) Any and all employment taxes or other payroll withholding;
- (2) Damages caused by CONTRACTOR's employees acting within or outside the scope of their duties under the Agreement; and
- (3) Determination of the hours to be worked and the duties to be performed by CONTRACTOR's employees.

CONTRACTOR agrees and will inform its employees and subcontractor(s) that there is no right of action against HHSC for any duty owed by CONTRACTOR under the Agreement. CONTRACTOR understands that HHSC does not assume liability for the actions of, or judgments rendered against, the CONTRACTOR, its employees, agents or subcontractors. CONTRACTOR agrees that it has no right to indemnification or contribution from HHSC for any judgments rendered against CONTRACTOR or its subcontractors. HHSC's liability to the CONTRACTOR's employees, agents and subcontractors, if any, will be governed by the Texas Tort Claims Act, as amended or modified (Tex. Civ. Pract. & Rem. Code § 101.001 *et seq.*).

#### **Section 4.05 Responsibility for subcontractors.**

CONTRACTOR remains fully responsible for obligations, services, and functions performed by its subcontractors to the same extent as if such obligations, services, and functions were performed by CONTRACTOR'S employees, and for purposes of the Agreement such work will be deemed work performed by CONTRACTOR. HHSC reserves the right to require the replacement of any subcontractor found by HHSC to be unacceptable.

CONTRACTOR must not disclose Confidential Information of HHSC or the State of Texas to a subcontractor unless and until such subcontractor has agreed in writing to protect the confidentiality of such Confidential Information in the manner required of CONTRACTOR under the Agreement.

CONTRACTOR must identify any subcontractor that is a newly-formed subsidiary or entity, whether or not an affiliate of CONTRACTOR, substantiate the proposed subcontractor's ability to perform the subcontracted Services, and certify to HHSC that no loss of service will occur as a result of the performance of such subcontractor. The CONTRACTOR will assume responsibility for all contractual responsibilities whether or not the CONTRACTOR performs them. Further, HHSC considers the CONTRACTOR to be the sole point of contact with regard to contractual matters, including payment of any and all charges resulting from the Agreement.

At least 30 days prior to executing a Material Subcontract or other agreement with a third party with a value greater than \$100,000.00, CONTRACTOR must submit a copy of the agreement to HHSC for HHSC's review at HHSC's option. HHSC reserves the right to: (1) reject the agreement or require changes to any provisions that do not comply with the requirements or duties and responsibilities of the Agreement or create significant barriers for HHSC in monitoring compliance with the Agreement; (2) object to the selection of the subcontractor; or (3) object to the subcontracting of the Services and Deliverables proposed to be subcontracted.

#### **Section 4.06 HHSC's ability to contract with subcontractors.**

The CONTRACTOR may not limit or restrict, through a covenant not to compete, employment agreement or other contractual arrangement, HHSC's ability to contract with subcontractors or former employees of the CONTRACTOR.

### **Article 5. Governing Law and Regulations**

#### **Section 5.01 Governing law and venue.**

The Agreement is governed by the laws of the State of Texas and interpreted in accordance with Texas law. Provided CONTRACTOR first complies with the procedures set forth in Section 11.11, Dispute Resolution, proper venue for a claim arising from the Agreement will be in a court of competent jurisdiction in Travis County, Texas.

#### **Section 5.02 CONTRACTOR responsibility for compliance with laws and regulations.**

CONTRACTOR is responsible for compliance with all laws, regulations, and administrative rules that govern the performance of the Services including all State and Federal tax laws, State and Federal employment laws, State and Federal regulatory requirements, and licensing provisions.

CONTRACTOR is responsible for ensuring each of its employees, agents, or subcontractors who provide Services or Deliverables under the Agreement are properly licensed, certified, or have proper permits to perform any activity related to the Services.

CONTRACTOR warrants that the Services and Deliverables comply with all applicable Federal, State, and County laws, regulations, codes, ordinances, guidelines, and policies. **CONTRACTOR WILL INDEMNIFY AND HOLD HARMLESS HHSC FROM AND AGAINST ANY LOSSES, LIABILITY, CLAIMS, DAMAGES, PENALTIES, COSTS, FEES, OR EXPENSES ARISING FROM OR IN CONNECTION WITH CONTRACTOR'S NEGLIGENCE OR**

**CONTRACTOR'S FAILURE TO COMPLY WITH OR VIOLATION OF ANY SUCH LAW, REGULATION, CODE, ORDINANCE, OR POLICY.**

**Section 5.03 Compliance with immigration laws.**

CONTRACTOR must comply with the requirements of the Immigration and Nationality Act (8 U.S.C § 1101 et seq.) and all subsequent immigration laws and amendments.

**Section 5.04 Compliance with anti-discrimination laws, regulations, and rules.**

CONTRACTOR must comply with state and federal anti-discrimination laws, including:

- (a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*);
- (b) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794);
- (c) Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*);
- (d) Age Discrimination Act of 1975 (42 U.S.C. §§ 6101-6107);
- (e) Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1688);
- (f) Food Stamp Act of 1977 (7 U.S.C. § 200 *et seq.*); and
- (g) HHSC's administrative rules, as set forth in the Texas Administrative Code, to the extent applicable to the Agreement.

CONTRACTOR must comply with all amendments to the above-referenced laws, and all requirements imposed by the regulations issued under these laws. These laws provide in part that no persons in the United States may, on the grounds of race, color, national origin, sex, age, disability, political beliefs, or religion, be excluded from participation in or denied any aid, care, service or other benefits provided by Federal or State funding, or otherwise be subjected to discrimination.

CONTRACTOR must comply with Title VI of the Civil Rights Act of 1964, and its implementing regulations at 45 C.F.R. Part 80 and 7 C.F.R. Part 15, prohibiting a contractor from adopting and implementing policies and procedures that exclude or have the effect of excluding or limiting the participation of clients in its programs, benefits, or activities on the basis of national origin. Applicable state and federal civil rights laws require contractors to provide alternative methods for ensuring access to services for applicants and recipients who cannot express themselves fluently in English. CONTRACTOR must ensure that its policies do not have the effect of excluding or limiting the participation of persons in its programs, benefits, and activities on the basis of national origin. CONTRACTOR also must take reasonable steps to provide services and information, both orally and in writing, in appropriate languages other than English, in order to ensure that persons with limited English proficiency are effectively informed and can have meaningful access to programs, benefits, and activities.

CONTRACTOR must comply with Executive Order 13279, and its implementing regulations at 45 C.F.R. Part 87 or 7 C.F.R. Part 16. These provide in part that any organization that participates in programs funded by direct financial assistance from the United States Department of Agriculture or the United States Department of Health and Human Services will not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief. Upon request, CONTRACTOR will provide HHSC with copies of all of the CONTRACTOR'S civil rights policies and procedures.

CONTRACTOR must notify HHSC's Civil Rights Office of any civil rights complaints received relating to its performance under the Agreement. This notice must be delivered no more than ten calendar days after receipt of a complaint. Notice provided under this section must be directed to:

HHSC Civil Rights Office  
701 W. 51<sup>st</sup> Street, Mail Code W206  
Austin, Texas 78751  
Phone Toll Free: (888) 388-6332  
Phone: (512) 438-4313  
TTY Toll Free: (877) 432-7232  
Fax: (512) 438-5885.

**Section 5.05 Compliance with environmental protection laws.**

CONTRACTOR must comply with state and federal environmental laws, including, without limitation:

- (a) *Pro-Children Act of 1994.*

CONTRACTOR must comply with the Pro-Children Act of 1994 (20 U.S.C. § 6081 *et seq.*), as applicable, regarding the provision of a smoke-free workplace and promoting the non-use of all tobacco products.

(b) *National Environmental Policy Act of 1969.*

CONTRACTOR must comply with any applicable provisions relating to the institution of environmental quality control measures contained in the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*) and Executive Order 11514 (“Protection and Enhancement of Environmental Quality”).

(c) *Clean Air Act and Water Pollution Control Act regulations.*

CONTRACTOR must comply with any applicable provisions relating to required notification of facilities violating the requirements of Executive Order 11738 (“Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans”).

(d) *State Clean Air Implementation Plan.*

CONTRACTOR must comply with any applicable provisions requiring conformity of federal actions to State (Clean Air) Implementation Plans under §176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. § 7401 *et seq.*).

(e) *Safe Drinking Water Act of 1974.*

CONTRACTOR must comply with applicable provisions relating to the protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (21 U.S.C. § 349; 42 U.S.C. §§ 300f to 300j-9).

**Section 5.06 Compliance with Fraud, Waste, and Abuse requirements.**

CONTRACTOR, CONTRACTOR’s personnel, and all subcontractors must comply with all fraud, waste, and abuse requirements found in [HHS Circular C-027](#).

**Section 5.07 Electronic and Information Resources Accessibility Standards.**

(a) *Applicability.*

The following Electronic and Information Resources (EIR) requirements apply to the Agreement because CONTRACTOR performs services that include EIR that: (i) HHSC employees are required or permitted to access; or (ii) members of the public are required or permitted to access. This Section does not apply to incidental uses of EIR in the performance of the Agreement, unless the Parties agree that the EIR will become property of the State of Texas or will be used by HHSC’s clients or recipients after completion of the Agreement. Nothing in this section is intended to prescribe the use of particular designs or technologies or to prevent the use of alternative technologies, provided they result in substantially equivalent or greater access to and use of a Product.

(b) *Definitions.*

For purposes of this Section:

**“Accessibility Standards”** means accessibility standards and specifications for Texas agency and institution of higher education websites and EIR set forth in 1 Tex.Admin. Code Texas Administrative Code, Chapter 206 and/or Chapter 213

**“Electronic and Information Resources”** means information resources, including information resources technologies, and any equipment or interconnected system of equipment that is used in the creation, conversion, duplication, or delivery of data or information. The term includes telephones and other telecommunications products, information kiosks, transaction machines, Internet websites, multimedia resources, and office equipment, including copy machines and fax machines.

**“Electronic and Information Resources Accessibility Standards”** means the accessibility standards for electronic and information resources contained in 1 Tex.Admin. Code Chapter 213.

**“Product”** means information resources technology that is, or is related to, EIR.

**“Web Site Accessibility Standards/ Specifications”** means standards contained in Volume 1 Tex. Admin. Code Chapter 206.(c) Accessibility Requirements.

Under Tex. Gov’t Code Chapter 2054, Subchapter M, and implementing rules of the Texas Department of Information Resources, HHSC must procure Products and services that comply with the Accessibility Standards when those Products are available in the commercial marketplace or when those Products are developed in response to a procurement solicitation. Accordingly, CONTRACTOR must provide electronic and information resources and associated Product documentation and technical support that comply with the Accessibility Standards.

(c) *Evaluation, Testing, and Monitoring.*

(1) HHSC may review, test, evaluate and monitor CONTRACTOR’s Products and services, as well as associated documentation and technical support for compliance with the Accessibility Standards. Review, testing, evaluation and monitoring may be conducted before and after the award of a contract. Testing and monitoring may include user acceptance testing.

Neither (1) the review, testing (including acceptance testing), evaluation or monitoring of any Product or service, nor (2) the absence of review, testing, evaluation or monitoring, will result in a waiver of the State's right to contest the CONTRACTOR's assertion of compliance with the Accessibility Standards.

(2) CONTRACTOR agrees to cooperate fully and provide HHSC and its representatives timely access to Products, records, and other items and information needed to conduct such review, evaluation, testing, and monitoring.

(d) *Representations and Warranties.*

(1) CONTRACTOR represents and warrants that: (i) as of the Effective Date of the Agreement, the Products and associated documentation and technical support comply with the Accessibility Standards as they exist at the time of entering the Agreement, unless and to the extent the Parties otherwise expressly agree in writing; and (ii) if the Products will be in the custody of the state or an HHS Agency's client or recipient after the Contract expiration or termination, the Products will continue to comply with Accessibility Standards after the expiration or termination of the Contract Term, unless HHSC or its clients or recipients, as applicable, use the Products in a manner that renders it noncompliant.

(2) In the event CONTRACTOR becomes aware, or is notified that the Product or service and associated documentation and technical support do not comply with the Accessibility Standards, CONTRACTOR represents and warrants that it will, in a timely manner and at no cost to HHSC, perform all necessary steps to satisfy the Accessibility Standards, including remediation, replacement, and upgrading of the Product or service, or providing a suitable substitute.

(3) CONTRACTOR acknowledges and agrees that these representations and warranties are essential inducements on which HHSC relies in awarding this Agreement.

(4) CONTRACTOR's representations and warranties under this subsection will survive the termination or expiration of the Contract and will remain in full force and effect throughout the useful life of the Product.

(e) *Remedies.*

(1) Under Tex. Gov't Code § 2054.465, neither CONTRACTOR nor any other person has cause of action against HHSC for a claim of a failure to comply with Tex. Gov't Code Chapter 2054, Subchapter M, and rules of the Department of Information Resources.

(2) In the event of a breach of CONTRACTOR's representations and warranties, CONTRACTOR will be liable for direct, consequential, indirect, special, or liquidated damages and any other remedies to which HHSC may be entitled under this Contract and other applicable law. This remedy is cumulative of any other remedies to which HHSC may be entitled under this Contract and other applicable law.

**Section 5.08 Prohibition Against Performance Outside the United States.**

(a) *Authority*

(1) HHSC is responsible for administering several public programs that require the collection and maintenance of information relating to persons who apply for and receive services from HHSC programs. This information consists of, among other things, personal financial and medical information and information designated "Confidential Information". Some of this information may, within the limits of the law and this Agreement, be shared from time to time with CONTRACTOR or a subcontractor for purposes of performing the Services or providing the Deliverables under this Agreement.

(2) HHSC is also responsible for collecting and maintaining personal information, including personal financial and medical information, concerning persons employed by HHSC and other health and human services agencies. Some of this information may be shared from time to time with CONTRACTOR or a subcontractor or collected and maintained by CONTRACTOR or a subcontractor for purposes of performing the Services or providing the Deliverables under this Agreement.

(3) HHSC is legally responsible maintaining the confidentiality and integrity of information relating to applicants and recipients of HHSC services and employees of HHS agencies and ensuring that any person or entity that receives such information, including CONTRACTOR and any subcontractor, is similarly bound by these obligations.

(4) HHSC also is responsible for the development and implementation of computer software and hardware to support HHSC programs. These items are paid for, in whole or in part, with state and federal funds. The federal agencies that fund these items maintain a limited interest in the software and hardware so developed or acquired.

(5) Some of the software used or developed by HHSC may also be subject to statutory restrictions on the export of technology to foreign nations, including but not limited to the Export Administration Regulations, 15 C.F.R. Parts 730-774.

(b) *Prohibition*

(1) In view of these obligations, and to ensure accountability, integrity, and the security of the information maintained by or for HHSC and the work performed on behalf of HHSC

**HHSC DETERMINES THAT IT IS NECESSARY AND APPROPRIATE TO REQUIRE THAT:**

**(A) ALL WORK PERFORMED UNDER THIS AGREEMENT MUST BE PERFORMED EXCLUSIVELY WITHIN THE UNITED STATES; AND**

**(B) ALL INFORMATION OBTAINED BY CONTRACTOR OR A SUBCONTRACTOR UNDER THIS AGREEMENT MUST BE MAINTAINED WITHIN THE UNITED STATES.**

(2) HHSC, without prior written approval, forbids the performance of any work or the maintenance of any information relating or obtained pursuant to this Agreement to occur outside of the United States except as specifically authorized or approved by HHSC.

(c) *Meaning of "within the United States" and "outside the United States."*

(1) As used in this Section 17.01, the term "within the United States" means any location inside the territorial boundaries comprising the republic of the United States of America, including of any of the 48 coterminous states in North America, the states of Alaska and Hawaii, and the District of Columbia.

(2) Conversely, the phrase "outside the United States" means any location that is not within the territorial boundaries comprising the republic of the United States of America, including of any of the 48 coterminous states in North America, the states of Alaska and Hawaii, and the District of Columbia.

(d) *Maintenance of Confidential Information*

(1) CONTRACTOR and all subcontractors, vendors, agents, and service providers of or for CONTRACTOR must not allow any Confidential Information that CONTRACTOR receives from or on behalf of HHSC to leave the United States by any means (physical or electronic) at any time, for any period of time, for any reason.

(2) CONTRACTOR and all subcontractors, vendors, agents, and service providers of or for CONTRACTOR must not permit any person to have remote access to HHSC information, systems, or Deliverables from a location outside the United States.

(e) *Performance of Work under Agreement*

(1) Unless otherwise approved in advance by HHSC in writing, and subject to the exceptions specified in paragraph (e) of this Section 17.01, CONTRACTOR and all subcontractors, vendors, agents, and service providers of or for CONTRACTOR must perform all services under this Agreement, including all tasks, functions, and responsibilities assigned and delegated to CONTRACTOR under this Agreement, within the United States.

(A) This obligation includes all Services, including but not limited to information technology services, processing, transmission, storage, archiving, data center services, disaster recovery sites and services, customer support, medical, dental, laboratory and clinical services.

(B) All custom software prepared for performance of this Agreement, and all modifications of custom, third party, or vendor proprietary software, must be performed within the United States.

(2) Unless otherwise approved in advance by HHSC in writing, and subject to the exceptions specified in this Section, CONTRACTOR and all subcontractors, vendors, agents, and service providers of or for CONTRACTOR must not permit any person to perform work under this Agreement from a location outside the United States.

(f) *Exceptions*

(1) COTS Software. The foregoing requirements will not preclude the acquisition or use of commercial off-the-shelf (COTS) software that is developed outside the United States or hardware that is generically configured outside the United States.

(2) Foreign-made Products and Supplies. The foregoing requirements will not preclude CONTRACTOR from acquiring, using, or reimbursing products or supplies that are manufactured outside the United States, provided such products or supplies are commercially available within the United States for acquisition or reimbursement by HHSC.

(3) HHSC Prior Approval. The foregoing requirements will not preclude CONTRACTOR from performing work outside the United States that HHSC has approved in writing and that HHSC has confirmed will not involve the sharing of Confidential Information outside the United States.

(g) *Disclosure*

CONTRACTOR must disclose all Services and Deliverables under or related to this Agreement that CONTRACTOR intends to perform or has performed outside the United States, whether directly or via subcontractors, vendors, agents, or service providers.

(h) *Remedy*

(1) CONTRACTOR's violation of this Section will constitute a material breach of the Agreement. CONTRACTOR will be liable to HHSC for all actual and consequential damages in accordance with the UTC.

(2) For breach of the requirements under this Section, HHSC may terminate the Agreement with Notice to CONTRACTOR at least 1 calendar day before the effective date of such termination.

## **Article 6. Service Levels and Performance Measurement**

### **Section 6.01 Performance measurement.**

Satisfactory performance of the Agreement will be measured by:

- (1) Adherence to the Agreement, including all representations and warranties;
- (2) Compliance with project work plans, schedules, and milestones as proposed by CONTRACTOR in its Proposal and as revised by CONTRACTOR and finally approved by HHSC;
- (3) Delivery of the Services and Deliverables in accordance with the service levels and availability proposed in Contractor's Proposal and as finally approved or accepted by HHSC;
- (4) Results of audits performed by HHSC or its representatives in accordance with Article 8;
- (5) Timeliness, completeness, and accuracy of required Deliverables; and
- (6) Achievement of performance measures developed by CONTRACTOR and HHSC and as modified from time to time by written agreement during the Initial Term of the Agreement.

## **Article 7. Amendments, Modifications, and Change Order Requests**

### **Section 7.01 Amendments and modifications.**

(a) *Amendments and modifications resulting from changes in law or contract.*

The Agreement may be amended by mutual written agreement of the Parties if changes in federal or state laws, rules, regulations, policies, guidelines or circumstances affect the performance of the work. The Parties will develop a business plan for negotiating appropriate change order and amendment procedures.

(b) *Modifications resulting from imposition of remedies.*

The Agreement may be modified under the terms of Article 11 (relating to Remedies and Disputes).

### **Section 7.02 Required compliance with amendment modification procedures.**

No different or additional services, work, or products will be authorized or performed except those that are within scope and that are memorialized in an amendment or modification of the Agreement that is executed in compliance with this article. No waiver of any term, covenant, or condition of the Agreement will be valid unless executed in compliance with this article. CONTRACTOR will not be entitled to payment for any services, work or products that are not authorized by a properly executed Agreement amendment or modification, or through the express authorization of HHSC.

## **Article 8. Audit and Financial Compliance**

### **Section 8.01 Record retention and audit.**

CONTRACTOR must maintain, and require its subcontractors to maintain, supporting information and documents that are adequate to ensure that payments are made and paid in accordance with applicable Federal and State requirements, and are sufficient to ensure the accuracy and validity of CONTRACTOR invoices. These documents, including all original claims forms, will be maintained and retained by CONTRACTOR or its subcontractors for a period of seven years after the date of submission of the final billing or until the resolution of all litigation, claim, financial management review, or audit pertaining to the Agreement, whichever is longer. CONTRACTOR agrees to timely repay any undisputed audit exceptions taken by HHSC in any audit of the Agreement.



**Section 8.02 Access to records, books, and documents.**

(a) *Notice*

Upon reasonable notice, CONTRACTOR must provide, and cause its subcontractors to provide, the officials and entities identified in this Section with prompt, reasonable, and adequate access to any records, books, documents, and papers that are directly pertinent to the performance of the Agreement.

(b) *Access*

CONTRACTOR and its subcontractors must provide the access described in this Section upon HHSC's request. This request may include the following purposes:

- (1) Examination;
- (2) Audit;
- (3) Investigation;
- (4) Contract administration; or
- (5) The making of copies, excerpts, or transcripts.

(c) *Entities*

The access required must be provided to the following officials or entities:

- (1) The United States Department of Health and Human Services or its designee;
- (2) The Comptroller General of the United States or its designee;
- (3) Medicaid program personnel from HHSC or its designee;
- (4) The Office of Investigations and Enforcement of HHSC;
- (5) Any independent verification and validation contractor or quality assurance contractor, when acting on behalf of HHSC;
- (6) The Office of the State Auditor of Texas or its designee;
- (7) A State or Federal law enforcement agency;
- (8) A special or general investigating committee of the Texas Legislature or its designee; and
- (9) Any other entity identified by HHSC.

(d) *Accommodations*

CONTRACTOR agrees to provide the access described wherever CONTRACTOR maintains the books, records, and supporting documentation described above. CONTRACTOR further agrees to provide such access in reasonable comfort and to provide any furnishings, equipment, or other conveniences deemed reasonably necessary to fulfill the purposes described in this Section. CONTRACTOR will require its subcontractors to provide comparable access and accommodations.

Upon request, CONTRACTOR must provide copies of the information described in this Section free of charge to HHSC and the entities described in subsection (c).

**Section 8.03 Audits and inspections of Services and Deliverables.**

Upon notice from HHSC where possible, CONTRACTOR will provide, and will cause its subcontractors to provide, such auditors and inspectors as HHSC may from time to time designate, with access to:

- (1) CONTRACTOR service locations, facilities, or installations;
- (2) CONTRACTOR Software and Equipment; and
- (3) CONTRACTOR records.

CONTRACTOR must provide as part of the Services any assistance that such auditors and inspectors reasonably may require to complete such audits or inspections.

**Section 8.04 Response/compliance with audit or inspection findings.**

(a) CONTRACTOR must take action to ensure its or a subcontractor's compliance with a correction of any finding of noncompliance with any law, regulation, audit requirement, or generally accepted accounting principle relating to the Services and Deliverables or any other deficiency contained in any audit, review, or inspection conducted under the Agreement. This action will include CONTRACTOR'S delivery to HHSC, for HHSC'S approval, a Corrective Action Plan that addresses deficiencies identified in any audit(s), review(s), or inspection(s) within thirty (30) calendar days of the close of the audit(s), review(s), or inspection(s).

(b) CONTRACTOR must bear the expense of compliance with any finding of noncompliance under the Agreement that is:

- (1) Required by a Texas or Federal law, regulation, rule or other audit requirement relating to CONTRACTOR's business;
- (2) Performed by CONTRACTOR as part of the Services and Deliverables; or
- (3) Necessary due to CONTRACTOR's noncompliance with any law, regulation, rule or audit requirement imposed on CONTRACTOR.

(c) As part of the Services, CONTRACTOR must provide to HHSC upon request a copy of those portions of CONTRACTOR's and its subcontractors' internal audit reports relating to the Services and Deliverables provided to the State under the Agreement.

**Section 8.05 Audit of CONTRACTOR fees.**

(a) CONTRACTOR will provide, and will cause its subcontractors to provide, to HHSC and its designees access to financial records and supporting documentation reasonably requested by HHSC.

(b) In addition to the normal monthly review and payment of administrative vouchers, HHSC may audit the Fees charged to HHSC to determine whether such Fees are accurate and in accordance with the Agreement.

(c) If, as a result of such audit, HHSC determines that CONTRACTOR has overcharged the State, HHSC will notify CONTRACTOR of the amount of such overcharge and CONTRACTOR will promptly pay to HHSC the amount of the overcharge, plus interest. Interest on such overpayment amount will be calculated from the date of receipt by the CONTRACTOR of the overcharged amount until the date of payment to HHSC, and will be calculated at the Department of Treasury's Median Rate (resulting from the Treasury's auction of 13-week bills) for the week in which liability is assessed, but in no event to exceed the highest lawful rate of interest. In the event any such audit reveals an overcharge to HHSC, CONTRACTOR will reimburse HHSC for the cost of such audit.

**Section 8.06 SAO Audit.**

The CONTRACTOR understands that acceptance of funds under this Contract acts as acceptance of the authority of the State Auditor's Office (SAO), or any successor agency, to conduct an investigation in connection with those funds. The CONTRACTOR further agrees to cooperate fully with the SAO or its successor in the conduct of the audit or investigation, including providing all records requested. The CONTRACTOR will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through CONTRACTOR and the requirement to cooperate is included in any subcontract it awards.

**Article 9. Terms and Conditions of Payment**

**Section 9.01 Rights of set-off.**

(a) *General right of set-off.*

With respect to any undisputed amount that a Party in good faith determines should be reimbursed to it or is otherwise payable to it by the other Party under the Agreement, the Party seeking the set-off may deduct the entire amount owed against the charges otherwise payable or expenses owed to it under the Agreement until such time as the entire amount determined to be owed has been paid.

(b) *Duty to make payments.*

HHSC will be relieved of its obligation to make any payments to the CONTRACTOR until such time as all set-off amounts have been credited to HHSC and the CONTRACTOR will be relieved of its obligation to make any payments to HHSC until such time as such amounts have been credited to the CONTRACTOR.

**Section 9.02 Expenses.**

Except as provided in the Agreement, all other expenses incurred by the CONTRACTOR in connection with its provision of the Services or Deliverables will not be reimbursed by HHSC unless agreed to by HHSC. CONTRACTOR will be responsible for payment of all expenses related to salaries, benefits, employment taxes, and insurance for its Staff. In addition, the costs associated with transportation, delivery, and insurance for each Deliverable will be paid by CONTRACTOR.

**Section 9.03 Disputed fees.**

If HHSC disputes payment of all or any portion of an invoice from the CONTRACTOR, HHSC will notify the CONTRACTOR of the dispute and both Parties will attempt in good faith to resolve the dispute. HHSC will not be required to pay any disputed portion of a CONTRACTOR invoice unless and until the dispute is resolved. Notwithstanding any such dispute, the CONTRACTOR must continue to perform the Services and produce Deliverables in compliance with the terms of the Agreement pending resolution of such dispute so long as all undisputed amounts continue to be paid to CONTRACTOR.

**Section 9.04 Liability for taxes.**

HHSC is not responsible in any way for the payment of any federal, state or local taxes related to or incurred in connection with the CONTRACTOR'S performance of the Agreement. CONTRACTOR must pay and discharge any and all such taxes, including any penalties and interest. In addition, HHSC is exempt from Federal excise taxes, and will not pay for any personal property taxes or income taxes levied on CONTRACTOR or on any taxes levied on employee wages.

**Section 9.05 Liability for employment-related charges and benefits.**

CONTRACTOR will perform work under the Agreement as an independent contractor and not as agent or representative of HHSC. CONTRACTOR is solely and exclusively liable for all taxes and employment-related charges incurred in connection with the performance of the Agreement. HHSC will not be liable for any employment-related charges or benefits of CONTRACTOR, such as workers compensation benefits, unemployment insurance and benefits, or fringe benefits.

**Section 9.06 No additional consideration.**

CONTRACTOR will not be entitled to nor receive from HHSC any additional consideration, compensation, salary, wages, or any other type of remuneration for services rendered under the Agreement. CONTRACTOR will not be entitled by virtue of the Agreement to consideration in the form of overtime, health insurance benefits, retirement benefits, disability retirement benefits, sick leave, vacation time, paid holidays, or other paid leaves of absence of any type or kind whatsoever. In addition, the costs associated with transportation, delivery, and insurance relating to the CONTRACTOR'S performance of the Agreement will be paid for by the CONTRACTOR.

**Section 9.07 No increase in rates.**

CONTRACTOR will not increase rates during the term of the Agreement, except as authorized in Article 7.

**Article 10. Disclosure and Confidentiality of Information**

**Section 10.01 Confidentiality.**

(a) *HHSC Data Use Agreement*

The HHSC Data Use Agreement, Attachment A to these UTCs, is incorporated into the Agreement and describes CONTRACTOR'S rights and obligations with respect to the Confidential Information and the limited purposes for which the CONTRACTOR may create, receive, maintain, use, disclose or have access to Confidential Information.

**Section 10.02 Requests for public information.**

(a) HHSC agrees that it will promptly notify CONTRACTOR of a request for disclosure of public information filed in accordance with the Texas Public Information Act, Texas Government Code Chapter 552, which consists of the CONTRACTOR'S Confidential Information, including information to which CONTRACTOR believes it has a proprietary or commercial interest. HHSC will deliver a copy of the request for public information to CONTRACTOR.

(b) With respect to any information that is the subject of a request for disclosure, CONTRACTOR is required to demonstrate to the Texas Office of Attorney General the specific reasons why the requested information is confidential or otherwise excepted from required public disclosure under law. CONTRACTOR will provide HHSC with copies of all such communications.

(c) CONTRACTOR must make information defined as public information not otherwise excepted from disclosure under the Texas Public Information Act, Texas Government Code Chapter 552, available to HHSC in a format agreeable to HHSC, accessible by the public, and at no additional charge to HHSC.

(d) To the extent authorized under the Texas Public Information Act, HHSC agrees to safeguard from disclosure information received from CONTRACTOR that the CONTRACTOR believes to be Confidential Information. CONTRACTOR must clearly mark such information as Confidential Information or provide written notice to HHSC that it considers the information confidential.

(e) To the extent allowed under the Texas Public Information Act, Texas Government Code Chapter 552, CONTRACTOR agrees that any consultant reports received by HHSC in connection with the Agreement, may be distributed by HHSC, in its discretion, to any other state agency and the Texas legislature. Any distribution may include posting on HHSC'S website or the website of a standing committee of the legislature.

**Section 10.03 Privileged Work Product.**

(a) CONTRACTOR acknowledges that HHSC asserts that Privileged Work Product may be prepared in anticipation of litigation and that CONTRACTOR is performing the Services with respect to Privileged Work Product as an agent of HHSC, and that all matter related thereto is protected from disclosure by the Texas Rules of Civil Procedure, Texas Rules of Evidence, Federal Rules of Civil Procedure, or Federal Rules of Evidence.

(b) HHSC will notify CONTRACTOR of any Privileged Work Product to which CONTRACTOR has or may have access. After the CONTRACTOR is notified or otherwise becomes aware that such documents, data, database, or communications are Privileged Work Product, only CONTRACTOR personnel for whom such access is necessary for the purposes of providing the Services may have access to Privileged Work Product.

(c) If CONTRACTOR receives notice of any judicial or other proceeding seeking to obtain access to HHSC's Privileged Work Product, CONTRACTOR will:

- (1) Immediately notify HHSC; and
- (2) Use all reasonable efforts to resist providing such access.

(d) If CONTRACTOR resists disclosure of HHSC's Privileged Work Product in accordance with this Section, HHSC will, to the extent authorized under Civil Practices and Remedies Code or other applicable State law, have the right and duty (i) to represent CONTRACTOR in such resistance; (ii) to retain counsel to so represent CONTRACTOR; or (iii) to reimburse CONTRACTOR for reasonable attorneys' fees and expenses incurred in resisting such access. HHSC will make the sole determination as to which of the preceding duties it will undertake.

(e) If a court of competent jurisdiction orders CONTRACTOR to produce documents, disclose data, or otherwise breach Contractor's confidentiality obligations or maintenance obligations regarding the confidentiality, proprietary nature, and secrecy of Privileged Work Product, CONTRACTOR will not be liable for breach of such obligation.

#### **Section 10.04 Unauthorized acts.**

Each Party agrees to:

(1) Notify the other Party promptly of any unauthorized possession, use, or knowledge, or attempt thereof, of any of the other Party's Confidential Information by any person or entity that may become known to it;

(2) Promptly furnish to the other Party full details of the unauthorized possession, use, or knowledge, or attempt thereof, and use reasonable efforts to assist the other Party in investigating or preventing the reoccurrence of any unauthorized possession, use, or knowledge, or attempt thereof, of Confidential Information;

(3) Cooperate with the other Party in any litigation and investigation against third Parties deemed necessary by such Party to protect its proprietary rights; and

(4) Promptly prevent a reoccurrence of any such unauthorized possession, use, or knowledge of Confidential Information.

#### **Section 10.05 Legal action.**

A party may not commence any legal action or proceeding with a third party with respect to any unauthorized possession, use, or knowledge, or attempt thereof, of the other Party's Confidential Information by any person or entity, if that action or proceeding identifies the other Party or its Confidential Information without such Party's consent.

### **Article 11. Remedies and Disputes**

#### **Section 11.01 Understanding and expectations.**

The remedies described in this Article are directed to CONTRACTOR's timely and responsive performance of the Services and Deliverables, and to the creation of a flexible and responsive relationship between the Parties.

#### **Section 11.02 Tailored remedies.**

(a) *Understanding of the Parties.*

CONTRACTOR agrees and understands that HHSC may pursue tailored contractual remedies for noncompliance with the Agreement. At any time and at its discretion, HHSC may impose or pursue one or more remedies for each item of noncompliance and will determine remedies on a case-by-case basis. HHSC's pursuit or non-pursuit of a tailored remedy does not constitute a waiver of any other remedy that HHSC may have at law or equity.

(b) *Notice and opportunity to cure for non-material breach.*

(1) HHSC will notify CONTRACTOR in writing of specific areas of CONTRACTOR performance that fail to meet performance expectations, standards, or schedules, but that, in the determination of HHSC, do not result in a material deficiency or delay in the implementation or operation of the Services.

(2) CONTRACTOR will, within three business days (or another date approved by HHSC) of receipt of written notice of a non-material deficiency, provide HHSC a written response that:

(A) Explains the reasons for the deficiency, CONTRACTOR's plan to address or cure the deficiency, and the date and time by which the deficiency will be cured; or

(B) If CONTRACTOR disagrees with HHSC's findings, explains its reasons for disagreeing with HHSC's findings.

(3) CONTRACTOR's proposed cure of a non-material deficiency is subject to the approval of HHSC. CONTRACTOR's repeated commission of non-material deficiencies or repeated failure to resolve any such deficiencies may be regarded by HHSC as a material deficiency and entitle HHSC to pursue any other remedy provided in the Agreement or any other appropriate remedy HHSC may have at law or equity.

(c) *Corrective action plan.*

(1) At its option, HHSC may require CONTRACTOR to submit to HHSC a detailed written plan (the "Corrective Action Plan") to correct or resolve a material deficiency or breach of the Agreement.

(2) The Corrective Action Plan must provide:

- (A) A detailed explanation of the reasons for the cited deficiency;
- (B) CONTRACTOR's assessment or diagnosis of the cause;
- (C) A specific proposal to cure or resolve the deficiency; and
- (D) CONTRACTOR's timeline for cure or resolution of the deficiency

(3) The Corrective Action Plan must be submitted by the deadline set forth in HHSC's request for a Corrective Action Plan. The Corrective Action Plan is subject to approval by HHSC, which will not be withheld unreasonably.

(4) HHSC will notify CONTRACTOR in writing of HHSC's final disposition of HHSC's concerns regarding the Corrective Action Plan. If HHSC accepts CONTRACTOR's proposed Corrective Action Plan, HHSC may:

- (A) Condition such approval on completion of tasks in the order or priority that HHSC may prescribe;
- (B) Disapprove portions of CONTRACTOR's proposed Corrective Action Plan; or
- (C) Require additional or different corrective action(s).

(5) At any time during this remedial process, HHSC reserves the right to:

- (A) Suspend all, or part of, the Agreement, and to withhold further payment for the suspended portions of the Agreement; or
- (B) Prohibit CONTRACTOR from incurring additional obligations of funds during investigation of the pending corrective action, if necessary, by CONTRACTOR or a decision by HHSC to terminate the Agreement for cause.

(6) If HHSC rejects CONTRACTOR's written explanation or proposed Corrective Action Plan, HHSC may issue a Stop Work Order to CONTRACTOR or any of its subcontractors or suppliers. HHSC may delay the implementation of the Stop Work Order if it affects the completion of any of the Services in accordance with the approved schedule or work plan.

(7) HHSC's acceptance of a Corrective Action Plan under this Section will not:

- (A) Excuse CONTRACTOR's prior substandard performance;
- (B) Relieve CONTRACTOR of its duty to comply with performance standards; or
- (C) Prohibit HHSC from assessing additional tailored remedies or pursuing other appropriate remedies for continued substandard performance.

(d) *Administrative remedies.*

(1) At its discretion, HHSC may impose one or more of the following remedies for each item of noncompliance and will determine the scope and severity of the remedy on a case-by-case basis:

- (A) Assess liquidated damages in accordance with the terms of the Agreement if provided in the Agreement;
- (B) Conduct accelerated monitoring of the CONTRACTOR. Accelerated monitoring includes more frequent or more extensive monitoring by HHSC or its agent;
- (C) Require additional, more detailed, financial or programmatic reports to be submitted by CONTRACTOR;
- (D) Decline to renew or extend the Agreement;
- (E) Withhold or recoup payment for the noncompliant Service or Deliverable; or
- (F) Terminate the Agreement in accordance with Section 11.03.

(2) For purposes of the Agreement, an item of noncompliance means a specific action of CONTRACTOR that:

- (A) Violates a provision of the Agreement;
- (B) Fails to meet an agreed measure of performance; or
- (C) Represents a failure of CONTRACTOR to be reasonably responsive to a reasonable request of HHSC relating to the Services and Deliverables for information, assistance, or support within the timeframe specified by HHSC.

(3) HHSC will provide notice to CONTRACTOR of the imposition of an administrative remedy in accordance with this Section, with the exception of accelerated monitoring, which may be unannounced. HHSC may require CONTRACTOR to file a written response as part of the Tailored Remedy approach.

(4) The Parties agree that a State or Federal statute, rule, regulation, or Federal guideline will prevail over the provisions of this Section unless the statute, rule, regulation, or guidelines can be read together with this Section to give effect to both.

(e) *Damages.*

(1) HHSC will be entitled to actual and consequential damages resulting from the CONTRACTOR's failure to comply with any of the terms of the Agreement.

(2) In some cases, the actual damage to HHSC or the State of Texas as a result of CONTRACTOR's failure to meet any aspect of the responsibilities of the Agreement or to meet specific performance standards set forth in the Agreement are difficult or impossible to determine with precise accuracy. Therefore, liquidated damages may be assessed in writing against and paid by the CONTRACTOR for failure to meet any aspect of the responsibilities of the Agreement or to meet the specific performance standards identified by the HHSC. Liquidated damages may be assessed if HHSC determines such failure is the fault of the CONTRACTOR (including the CONTRACTOR's subcontractors or consultants) and is not materially caused or contributed to by HHSC or its agents. If at any time, HHSC determines the CONTRACTOR has not met any aspect of the responsibilities of the Agreement or the specific performance standards due to mitigating circumstances, HHSC reserves the right to waive all or part of the liquidated damages. All such waivers must be in writing, contain the reasons for the waiver, and be signed by the appropriate executive of HHSC.

(a) The liquidated damages prescribed in this Section are not intended to be in the nature of a penalty, but are intended to be reasonable estimates of HHSC's projected financial loss and damage resulting from the CONTRACTOR's nonperformance, including financial loss as a result of project delays. Accordingly, in the event CONTRACTOR fails to perform in accordance with the Agreement, HHSC may assess liquidated damages as provided in this Section.

(3) If CONTRACTOR fails to perform any of the Services described in the Agreement, HHSC may assess liquidated damages for each occurrence of a liquidated damages event, to the extent consistent with HHSC's tailored approach to remedies and Texas law.

(4) HHSC may elect to collect liquidated damages:

(A) Through direct assessment and demand for payment delivered to CONTRACTOR; or

(B) By deduction of amounts assessed as liquidated damages as set-off against payments then due to CONTRACTOR for the Services or Deliverables or that become due at any time after assessment of the liquidated damages. HHSC will make deductions until the full amount payable by the CONTRACTOR is received by the State.

(f) *Equitable Remedies*

(1) CONTRACTOR acknowledges that, if CONTRACTOR breaches (or attempts or threatens to breach) its obligation under the Agreement, the State will be irreparably harmed. In such a circumstance, HHSC may proceed directly to court.

(2) If a court of competent jurisdiction finds that CONTRACTOR breached (or attempted or threatened to breach) any such obligations, CONTRACTOR agrees that without any additional findings of irreparable injury or other conditions to injunctive relief, it will not oppose the entry of an appropriate order compelling performance by CONTRACTOR and restraining it from any further breaches (or attempted or threatened breaches).

(g) *Suspension of Agreement*

(1) HHSC may suspend performance of all or any part of the Agreement if:

(A) HHSC determines that CONTRACTOR has committed a material breach of the Agreement;

(B) HHSC has reason to believe that CONTRACTOR has committed, assisted in the commission of, or failed to take appropriate action concerning fraud, abuse, malfeasance, misfeasance, or nonfeasance by any party concerning the Agreement; or

(C) HHSC determines that suspension of the Agreement in whole or in part is convenient or in the best interests of the State of Texas or the HHSC Programs.

(2) HHSC will notify CONTRACTOR in writing of its intention to suspend the Agreement in whole or in part. Such notice will:

(A) Be delivered in writing to CONTRACTOR;

(B) Include a concise description of the facts or matter leading to HHSC's decision; and

(C) Unless HHSC is suspending the contract for convenience, request a Corrective Action Plan from CONTRACTOR or describe actions that CONTRACTOR must take to avoid the contemplated suspension of the Agreement.

### **Section 11.03 Termination of Agreement.**

In addition to other provisions of this article allowing termination, the Agreement will terminate upon the expiration date unless extended in accordance with the terms of the Agreement, or terminated sooner under the terms of the Agreement. Prior to completion of the Initial Term and any extensions or renewal thereof, all or a part of the Agreement may be terminated for any of the following reasons:

(a) *Termination by mutual agreement of the Parties.*

The Agreement may be terminated by mutual agreement of the Parties. Such agreement must be in writing.

(b) *Termination in the best interest of the State.*

HHSC may terminate the Agreement at any time when, in its sole discretion, HHSC determines that termination is in the best interests of the State of Texas. The termination will be effective on the date specified in HHSC's notice of termination.

(c) *Termination for cause.*

Except as otherwise provided by the U.S. Bankruptcy Code, or any successor law, HHSC may terminate the Agreement, in whole or in part, upon the following conditions:

(1) *Assignment for the benefit of all or substantially all of its creditors, appointment of receiver, or inability to pay debts.*

HHSC may terminate the Agreement if CONTRACTOR:

(A) Makes an assignment for the benefit of its creditors;

(B) Admits in writing its inability to pay its debts generally as they become due; or

(C) Consents to the appointment of a receiver, trustee, or liquidator of CONTRACTOR or of all or any part of its property.

(2) *Failure to adhere to laws, rules, ordinances, or orders.*

HHSC may terminate the Agreement if a court of competent jurisdiction finds CONTRACTOR failed to adhere to any laws, ordinances, rules, regulations or orders of any public authority having jurisdiction and such violation prevents or substantially impairs performance of CONTRACTOR's duties under the Agreement.

(3) *Breach of confidentiality.*

HHSC may terminate the Agreement if CONTRACTOR breaches confidentiality obligations with respect to the Services and Deliverables provided under the Agreement.

(4) *Failure to maintain adequate personnel or resources.*

HHSC may terminate the Agreement if, after providing notice and an opportunity to correct, HHSC determines that CONTRACTOR has failed to supply personnel or resources and such failure results in CONTRACTOR's inability to fulfill its duties under the Agreement.

(5) *Termination for gifts and gratuities.*

(A) HHSC may terminate the Agreement following the determination by a competent judicial or quasi-judicial authority and CONTRACTOR's exhaustion of all legal remedies that CONTRACTOR, its employees, agents or representatives have either offered or given anything of value to an officer or employee of HHSC or the State of Texas in violation of state law.

(B) CONTRACTOR must include a similar provision in each of its subcontracts and will enforce this provision against a subcontractor who has offered or given anything of value to any of the persons or entities described in this Section, whether or not the offer or gift was in CONTRACTOR's behalf.

(C) Termination of a subcontract by CONTRACTOR under this provision will not be a cause for termination of the Agreement unless:

(1) CONTRACTOR fails to replace such terminated subcontractor within a reasonable time.

(D) For purposes of this Section, a "thing of value" means any item of tangible or intangible property that has a monetary value of more than \$50.00 and includes, but is not limited to, cash, food, lodging, entertainment, and charitable contributions. The term does not include contributions to holders of public office or candidates for public office that are paid and reported in accordance with State or Federal law.

(6) *Termination for non-appropriation of funds.*

Notwithstanding any other provision of the Agreement, if funds for the continued fulfillment of the Agreement by HHSC are at any time not forthcoming or are insufficient, through failure of any entity to appropriate funds or otherwise, then HHSC will have the right to terminate the Agreement at no additional

cost and with no penalty whatsoever. HHSC will make best efforts to provide reasonable written advance notice to CONTRACTOR upon learning that funding for the Agreement may be discontinued.

*(7) Termination for lack of financial viability.*

HHSC may terminate the Agreement if, in its sole discretion, HHSC has a good faith belief that CONTRACTOR no longer maintains the financial viability required to complete the Services and Deliverables, or otherwise fully perform the Agreement.

*(8) Judgment and execution.*

(A) HHSC may terminate the Agreement if judgment for the payment of money in excess of \$500,000.00 that is not covered by insurance, is rendered by any court or governmental body against CONTRACTOR, and CONTRACTOR does not:

- (1) Discharge the judgment or provide for its discharge in accordance with the terms of the judgment;
- (2) Procure a stay of execution of the judgment within 30 days from the date of entry thereof; or
- (3) Perfect an appeal of such judgment and cause the execution of such judgment to be stayed during the appeal, providing such financial reserves as may be required under generally accepted accounting principles.

(B) If a writ or warrant of attachment or any similar process is issued by any court against all or any material portion of the property of CONTRACTOR, and such writ or warrant of attachment or any similar process is not released or bonded within 30 days after its entry, HHSC may terminate the Agreement in accordance with this Section.

*(8) Termination for CONTRACTOR's material breach of the Agreement.*

HHSC will have the right to terminate the Agreement in whole or in part if HHSC determines, at its sole discretion, that CONTRACTOR has materially breached the Agreement.

**Section 11.04 Effective date of termination.**

Except as otherwise provided in the Agreement, termination will be effective as of the date specified in the notice of termination.

**Section 11.05 Extension of termination effective date.**

HHSC may extend the effective date of termination one or more times as it elects, in its sole discretion.

**Section 11.06 Payment and other provisions at Agreement termination.**

(a) If HHSC terminates the Agreement, HHSC will pay CONTRACTOR on the effective date of termination (or as soon as possible thereafter taking into account appropriation and fund accounting requirements) any undisputed amounts due for all completed, approved, and accepted Services or Deliverables.

(b) HHSC further agrees to negotiate in good faith with CONTRACTOR to equitably adjust and settle any accrued or outstanding liabilities for any unaccepted Service or deliverable and Change Order Requests that

- (1) Is due or delivered prior to or upon contract termination;
- (2) Is complete or substantially complete, or for which CONTRACTOR can document to the satisfaction of HHSC substantial progress; and
- (3) Benefits HHSC or the State of Texas, notwithstanding its unaccepted status.

(c) CONTRACTOR must provide HHSC all reasonable access to records, facilities, and documentation as is required to efficiently and expeditiously close out the Services under the Agreement.

(d) CONTRACTOR must prepare a turnover plan, which is acceptable to and approved by HHSC. That turnover plan will be implemented during the time period between receipt of notice and the termination date.

**Section 11.07 Modification of Agreement in the event of remedies.**

HHSC may propose a modification of the Agreement in response to the imposition of a remedy under this article. Any modifications under this Section must be reasonable, limited to the matters causing the exercise of a remedy, within the scope of the Agreement, and in writing. CONTRACTOR must negotiate such proposed modifications in good faith.

**Section 11.08 Turnover assistance.**

Upon receipt of notice of termination of the Agreement by HHSC, CONTRACTOR will provide any turnover assistance reasonably necessary to enable HHSC or its designee to effectively close out the Agreement and move the work to another vendor or to perform the work by itself.



**Section 11.09 Rights upon termination or expiration of Agreement.**

In the event that the Agreement is terminated for any reason, or upon its expiration, HHSC will, at HHSC's discretion, retain ownership of any and all associated work products, Deliverables or Documentation in whatever form that they exist.

**Section 11.10 CONTRACTOR responsibility for associated costs.**

If HHSC terminates the Agreement for Cause, the CONTRACTOR will be responsible to HHSC for all costs incurred by HHSC, the State of Texas, or any of its administrative agencies to replace the CONTRACTOR. These costs include, but are not limited to, the costs of procuring a substitute vendor and the cost of any claim or litigation that is reasonably attributable to CONTRACTOR's failure to perform any Service in accordance with the terms of the Agreement

**Section 11.11 Dispute resolution.**

*(a) General agreement of the Parties.*

The Parties mutually agree that the interests of fairness, efficiency, and good business practices are best served when the Parties employ all reasonable and informal means to resolve any dispute under the Agreement. The Parties mutually commit to using all reasonable and informal means of resolving disputes prior to invoking a remedy provided elsewhere in this Article, unless HHSC immediately terminates the Agreement in accordance with the terms and conditions of the Agreement.

*(b) Duty to negotiate in good faith.*

Any dispute that in the judgment of any Party to the Agreement may materially or substantially affect the performance of any Party will be reduced to writing and delivered to the other Party within 10 business days. The Parties must then negotiate in good faith and use every reasonable effort to resolve the dispute and the Parties will not resort to any formal proceedings unless they have reasonably determined that a negotiated resolution is not possible and notified the other Party. The resolution of any dispute disposed of by agreement between the Parties will be reduced to writing and delivered to all Parties within 10 business days.

*(c) Claims for breach of Agreement.*

(1) *General requirement.* As required by Chapter 2260, Government Code, CONTRACTOR's claim for breach of the Agreement must be resolved in accordance with the dispute resolution process established by HHSC in accordance with Chapter 2260, Government Code.

(2) *Negotiation of claims.* The Parties agree that the CONTRACTOR's claim for breach of the Agreement that the Parties cannot resolve in the ordinary course of business or through the use of all reasonable and informal means will be submitted to the negotiation process provided in Chapter 2260, Subchapter B, Government Code.

(A) To initiate the process, CONTRACTOR must submit written notice to HHSC that states that CONTRACTOR invokes the provisions of Chapter 2260, Subchapter B, Government Code. The notice must comply with the requirements of Title 1, Chapter 392, Subchapter B of the Texas Administrative Code.

(B) The Parties agree that the CONTRACTOR's compliance with Chapter 2260, Subchapter B, Government Code, will be a condition precedent to the filing of a contested case proceeding under Chapter 2260, Subchapter C, of the Government Code.

(3) *Contested case proceedings.* The contested case process provided in Chapter 2260, Subchapter C, Government Code, will be CONTRACTOR's sole and exclusive process for seeking a remedy for any and all alleged breaches of contract by HHSC if the Parties are unable to resolve their disputes under Subsection (c)(2) of this Section.

(A) The Parties agree that compliance with the contested case process provided in Chapter 2260, Subchapter C, Government Code, will be a condition precedent to seeking consent to sue from the Texas Legislature under Chapter 107, Civil Practices & Remedies Code. Neither the execution of the Agreement by HHSC nor any other conduct of any representative of HHSC relating to the Agreement will be considered a waiver of the State's sovereign immunity to suit.

(4) *HHSC rules.* The submission, processing and resolution of CONTRACTOR's claim is governed by the rules adopted by HHSC under Chapter 2260, Government Code, found at Title 1, Chapter 392, Subchapter B of the Texas Administrative Code.

(5) *CONTRACTOR's duty to perform.* Neither the occurrence of an event constituting an alleged breach of contract nor the pending status of any claim for breach of contract is grounds for the suspension of performance, in whole or in part, by CONTRACTOR of any duty or obligation with respect to the performance of the Agreement. Any changes to the Agreement as a result of a Dispute Resolution will be implemented in accordance with Article 8, Amendments, Modifications and Change Order Requests.

**Section 11.12 Liability of CONTRACTOR.**

(a) CONTRACTOR bears all risk of loss or damage due to:

- (1) Defects in products, Services or Deliverables;
- (2) Unfitness or obsolescence of products, Services or Deliverables; or

(3) The negligence or intentional misconduct of CONTRACTOR or its employees, agents, subcontractors, or representatives.

**(b) CONTRACTOR MUST, AT THE CONTRACTOR'S OWN EXPENSE, DEFEND WITH COUNSEL APPROVED BY THE STATE, INDEMNIFY, AND HOLD HARMLESS THE STATE AND STATE EMPLOYEES, OFFICERS, DIRECTORS, CONTRACTORS AND AGENTS FROM AND AGAINST ANY LOSSES, LIABILITIES, DAMAGES, PENALTIES, COSTS, FEES, INCLUDING WITHOUT LIMITATION REASONABLE ATTORNEYS' FEES, AND EXPENSES FROM ANY CLAIM OR ACTION FOR PROPERTY DAMAGE, BODILY INJURY OR DEATH, TO THE EXTENT CAUSED BY OR ARISING FROM THE NEGLIGENCE OR INTENTIONAL MISCONDUCT OF THE CONTRACTOR AND ITS EMPLOYEES, OFFICERS, AGENTS, OR SUBCONTRACTORS.**

(c) CONTRACTOR will not be liable to HHSC for any loss, damages or liabilities attributable to or arising from:

(1) The failure of HHSC or any state agency or HHSC CONTRACTOR to perform a service or activity in connection with the Agreement; or

(2) CONTRACTOR's prudent and diligent performance of the Services in compliance with instructions given by HHSC in accordance with Section 1.03 (relating to implied authority) and Section 3.03 (relating to delegation of authority) of the Agreement.

(d) CONTRACTOR will ship all Equipment and Software purchased and Third Party Software licensed under the Agreement, freight prepaid, FOB HHSC's destination. The method of shipment will be consistent with the nature of the Equipment and Software and hazards of transportation. Regardless of FOB point, CONTRACTOR agrees to bear all risks of loss, damage, or destruction of Deliverables, in whole or in part, ordered hereunder that occurs prior to Acceptance, except loss or damage attributable to HHSC's fault or negligence; and such loss, damage, or destruction will not release CONTRACTOR from any obligation hereunder. After Acceptance, the risk of loss or damage will be borne by HHSC, except loss or damage attributable to CONTRACTOR's fault or negligence.

**Article 12. Assurances and Certifications**

**Section 12.01 Proposal certifications.**

CONTRACTOR acknowledges its continuing obligation to comply with the requirements of any certifications contained in the Agreement, and will immediately notify HHSC of any changes in circumstances affecting those certifications.

**Section 12.02 Conflicts of interest.**

(a) *Representation.*

CONTRACTOR agrees to comply with applicable state and federal laws, rules, and regulations regarding conflicts of interest in the performance of its duties under the Agreement. CONTRACTOR warrants that it, its subcontractors, and employees, officers, directors and agents of Contractor and Contractor's subcontractors have no interest and will not acquire any direct or indirect interest that would conflict in any manner or degree with its performance under the Agreement.

(b) *General duty regarding conflicts of interest.*

CONTRACTOR will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain. CONTRACTOR will operate with complete independence and objectivity without actual, potential or apparent conflict of interest with respect to the activities conducted under the Agreement with the State of Texas.

**Section 12.03 Organizational conflicts of interest.**

(a) *Definition.*

An organizational conflict of interest is a set of facts or circumstances, a relationship, or other situation under which a contractor, or a subcontractor has past, present, or currently planned personal or financial activities or interests that either directly or indirectly:

- (1) Impairs or diminishes the offeror's, contractor's, or subcontractor's ability to render impartial or objective assistance or advice to HHSC; or
- (2) Provides the contractor or subcontractor an unfair competitive advantage in future HHSC procurements.

(b) *Warranty.*

Except as otherwise disclosed and approved by HHSC prior to the Effective Date of the Contract, CONTRACTOR warrants that, as of the Effective Date and to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to organizational conflict of interest affecting the Agreement.

CONTRACTOR affirms that it has neither given, nor intends to give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant or any employee or representative of same, at any time during the procurement process or in connection with the procurement process except as allowed under relevant state and federal law.

(c) *Continuing duty to disclose.*

(1) CONTRACTOR agrees that, if after the Effective Date, CONTRACTOR discovers is made aware of an organizational conflict of interest, CONTRACTOR will immediately and fully disclose such interest in writing to the HHSC project manager. In addition, CONTRACTOR must promptly disclose any relationship that might be perceived or represented as a conflict after its discovery by CONTRACTOR or by HHSC as a potential conflict. HHSC reserves the right to make a final determination regarding the existence of conflicts of interest, and CONTRACTOR agrees to abide by HHSC's decision.

(2) The disclosure will include a description of the action(s) that CONTRACTOR has taken or proposes to take to avoid or mitigate such conflicts.

(d) *Remedy.*

If HHSC determines that an organizational conflict of interest exists, HHSC may, at its discretion, terminate the contract. If HHSC determines that CONTRACTOR was aware of an organizational conflict of interest before the award of the Agreement and did not disclose the conflict to the contracting officer, such nondisclosure will be considered a material breach of the Agreement. Furthermore, such breach may be submitted to the Office of the Attorney General, Texas Ethics Commission, or appropriate State or Federal law enforcement officials for further action.

(e) *Flow down obligation.*

CONTRACTOR must include the provisions of this Section 12.03 in all subcontracts for work to be performed similar to the service provided by CONTRACTOR, and the terms "Agreement," "CONTRACTOR," and "project manager" modified appropriately to preserve the State's rights.

***Section 12.04 HHSC personnel recruitment prohibition.***

CONTRACTOR has not retained or promised to retain any person or company, or utilized or promised to utilize a consultant that participated in HHSC's development of specific criteria of the Agreement or who participated in the selection of the CONTRACTOR for the Agreement.

CONTRACTOR will not recruit or employ any HHSC professional or technical personnel who have worked on projects relating to the subject matter of the Agreement, or who have had any influence on decisions affecting the subject matter of the Agreement, for two (2) years following the completion of the Agreement.

***Section 12.05 Anti-kickback provision.***

CONTRACTOR certifies that it will comply with the Anti-Kickback Act of 1986, 41 USC §51-58 and Federal Acquisition Regulation 52.203-7.

***Section 12.06 Debt or back taxes owed to the State of Texas.***

In accordance with Section 403.055 of the Government Code, CONTRACTOR agrees that any payments due to CONTRACTOR under the Agreement will be first applied toward any debt or back taxes CONTRACTOR owes the State of Texas. CONTRACTOR further agrees that payments will be so applied until such debts and back taxes are paid in full.

***Section 12.07 Certification regarding status of license, certificate, or permit.***

Article IX, Section 163 of the General Appropriations Act for the 1998/1999 state fiscal biennium prohibits an agency that receives an appropriation under either Article II or V of the General Appropriations Act from awarding an Agreement with the owner, operator, or administrator of a facility that has had a license, certificate, or permit revoked by another Article II or V agency. CONTRACTOR certifies it is not ineligible for an award under this provision.

***Section 12.08 Outstanding debts and judgments.***

CONTRACTOR certifies that it is not presently indebted to the State of Texas, and that CONTRACTOR is not subject to an outstanding judgment in a suit by the State of Texas against CONTRACTOR for collection of the balance. For purposes of this Section, an indebtedness is any amount sum of money that is due and owing to the State of Texas and is not currently under dispute. A false statement regarding CONTRACTOR's status will be treated as a material breach of the Agreement and may be grounds for termination at the option of HHSC.

***Section 12.09 Anti-trust.***

In submitting a proposal, and in accepting the Contract or purchase order, Contractor certifies and agrees as follows:

(1) Neither the CONTRACTOR, nor the person represented by the CONTRACTOR, nor any person acting for the represented person has:

(a) violated the antitrust laws codified by Chapter 15, Business & Commerce Code, or the federal antitrust laws; or

(b) directly or indirectly communicated the bid/offer associated with this contract to a competitor or other person engaged in the same line of business.

(2) CONTRACTOR assigns to HHSC all of CONTRACTOR's rights, title, and interest in and to all claims and causes of action CONTRACTOR may have under the antitrust laws of Texas or the United States for overcharges associated with this contract.

## **Article 13. Representations and Warranties**

### ***Section 13.01 Authorization.***

(a) The execution, delivery and performance of the Agreement has been duly authorized by CONTRACTOR and no approval, authorization or consent of any governmental or regulatory agency is required to be obtained in order for CONTRACTOR to enter into the Agreement and perform its obligations under the Agreement.

(b) CONTRACTOR has obtained and will maintain all licenses, certifications, permits, and authorizations necessary to perform the Services under the Agreement and currently is in good standing with all regulatory agencies that regulate any or all aspects of CONTRACTOR's performance of the Agreement. CONTRACTOR will maintain all required certifications, licenses, permits, and authorizations to remain in good standing during the term of the Agreement.

### ***Section 13.02 Ability to perform.***

CONTRACTOR warrants that it has the financial resources to fund the capital expenditures required under the Agreement without advances by HHSC or assignment of any payments by HHSC to a financing source.

### ***Section 13.03 Workmanship and performance.***

(a) All Services and Deliverables provided under the Agreement will be provided in a manner consistent with the standards of quality and integrity as outlined in the Agreement, the Solicitation, and CONTRACTOR's Proposal.

(b) All Services and Deliverables must meet or exceed the required levels of performance specified in or under the Agreement, and will meet or exceed HHSC's Missions and Objectives, as set forth in the Solicitation.

(c) CONTRACTOR will perform the Services in a workmanlike manner, in accordance with best practices and high professional standards used in well-managed operations performing services similar to the services described in the Agreement.

### ***Section 13.04 Warranty of deliverables.***

CONTRACTOR warrants that Deliverables developed and delivered under the Agreement will meet the specifications as described in the Agreement during the period following its acceptance by HHSC, through the term of the Agreement, including any extensions as provided in the Agreement, that are subsequently negotiated by CONTRACTOR and HHSC. CONTRACTOR will promptly repair or replace any such Deliverables not in compliance with this warranty at no charge to HHSC.

### ***Section 13.05 Manufacturers' warranties.***

CONTRACTOR assigns to HHSC all of the manufacturers' warranties and indemnities relating to all products, including without limitation, Third Party Software to the extent CONTRACTOR is permitted by the manufacturers to make such assignments to HHSC. Such assignment is subject to all of the terms and conditions imposed by the manufacturers with respect thereto.

### ***Section 13.06 Compliance with Agreement.***

CONTRACTOR will not take any action substantially or materially inconsistent with any of the terms and conditions set forth in the Agreement without the written approval of HHSC.

## **Article 14. Intellectual Property**

### ***Section 14.01 Infringement and misappropriation.***

(a) CONTRACTOR warrants that all Deliverables provided by CONTRACTOR will not infringe or misappropriate any right of, and will be free of any claim of, any third person or entity based on copyright, patent, trade secret, or other intellectual property rights.

(b) **CONTRACTOR WILL, AT ITS EXPENSE, DEFEND WITH COUNSEL APPROVED BY HHSC, INDEMNIFY, AND HOLD HARMLESS HHSC, ITS EMPLOYEES, OFFICERS, DIRECTORS, CONTRACTORS, AND AGENTS FROM AND AGAINST ANY LOSSES, LIABILITIES, DAMAGES, PENALTIES, COSTS, FEES, INCLUDING WITHOUT LIMITATION REASONABLE ATTORNEYS' FEES AND EXPENSES, FROM ANY CLAIM OR ACTION AGAINST HHSC THAT IS BASED ON A CLAIM OF BREACH OF THE WARRANTY SET FORTH IN THE PRECEDING PARAGRAPH. HHSC WILL PROMPTLY NOTIFY CONTRACTOR IN WRITING OF THE CLAIM, PROVIDE CONTRACTOR A COPY OF ALL INFORMATION RECEIVED BY HHSC WITH RESPECT TO THE CLAIM, AND COOPERATE WITH CONTRACTOR IN DEFENDING OR SETTLING THE CLAIM.**

(c) In case the Deliverables, or any one or part thereof, is in such action held to constitute an infringement or misappropriation, or the use thereof is enjoined or restricted or if a proceeding appears to CONTRACTOR to be likely to be brought, CONTRACTOR will, at its own expense, either:

- (1) Procure for HHSC the right to continue using the Deliverables; or
- (2) Modify or replace the Deliverables to comply with the Specifications and to not violate any intellectual property rights.

If neither of the alternatives set forth in (1) or (2) above are available to the CONTRACTOR on commercially reasonable terms, CONTRACTOR may require that HHSC return the allegedly infringing Deliverable(s) in which case CONTRACTOR will refund all amounts paid for all such Deliverables and reimburse HHSC for any related direct and indirect damages incurred by HHSC due to the infringing Deliverable(s).

#### **Section 14.02 Exceptions.**

CONTRACTOR is not responsible for any claimed breaches of the warranties set forth in Section 14.01 to the extent caused by:

- (a) Modifications made to the item in question by anyone other than CONTRACTOR or its subcontractors or HHSC or its Contractors working at CONTRACTOR's direction or in accordance with the specifications; or
- (b) The combination, operation, or use of the item with other items if CONTRACTOR did not supply or approve for use with the item; or
- (c) HHSC's failure to use any new or corrected versions of the item made available by CONTRACTOR.

### **Article 15. Liability**

#### **Section 15.01 Property damage.**

(a) CONTRACTOR will protect HHSC's real and personal property from damage arising from CONTRACTOR's, its agent's, employees' and subcontractors' performance of the Agreement, and CONTRACTOR will be responsible for any loss, destruction, or damage to HHSC's property that results from or is caused by CONTRACTOR's, its agents', employees' or subcontractors' negligent or wrongful acts or omissions. Upon the loss of, destruction of, or damage to any property of HHSC, CONTRACTOR will notify the HHSC Project Manager thereof and, subject to direction from the Project Manager or her or his designee, will take all reasonable steps to protect that property from further damage.

(b) CONTRACTOR agrees to observe and require its employees and agents to observe safety measures and proper operating procedures at HHSC sites at all times.

(c) CONTRACTOR will distribute a policy statement to all of its employees and agents that directs the employee or agent to immediately report to HHSC or to CONTRACTOR any special defect or unsafe condition encountered while on HHSC premises. CONTRACTOR will immediately report to HHSC any special defect or an unsafe condition it encounters or otherwise learns about.

#### **Section 15.02 Risk of Loss.**

During the period Deliverables are in transit and in possession of CONTRACTOR, its carriers or HHSC prior to being accepted by HHSC, CONTRACTOR will bear the risk of loss or damage thereto, unless such loss or damage is caused by the negligence or intentional misconduct of HHSC. After HHSC accepts a Deliverable, the risk of loss or damage to the Deliverable will be borne by HHSC, except loss or damage attributable to the negligence or intentional misconduct of CONTRACTOR's agents, employees or subcontractors.

#### **Section 15.03 Limitation of HHSC's Liability.**

**HHSC WILL NOT BE LIABLE FOR ANY INCIDENTAL, INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES UNDER CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHER LEGAL THEORY. THIS WILL APPLY REGARDLESS OF THE CAUSE OF ACTION AND EVEN IF HHSC HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**

**HHSC'S LIABILITY TO CONTRACTOR UNDER THE AGREEMENT WILL NOT EXCEED THE TOTAL CHARGES TO BE PAID BY HHSC TO CONTRACTOR UNDER THE AGREEMENT, INCLUDING CHANGE ORDER REQUEST PRICES AGREED TO BY THE PARTIES OR OTHERWISE ADJUDICATED.**

**Article 16. Special Terms and Conditions**

**Section 16.01 HHSC Data Use Agreement Not Required**

The HHSC Data Use Agreement is not required to be incorporated into the Agreement because:

CONTRACTOR does not Access Confidential Information; or

CONTRACTOR accesses Other Confidential Information as defined in the Agreement and CONTRACTOR agrees:

CONTRACTOR and all subcontractors, consultants, or agents under the Agreement will treat all information that is obtained through performance of the Services under the Agreement, including, but not limited to, information relating to applicants or recipients of HHSC Programs as Other Confidential Information to the extent that such information is considered Other Confidential Information in the Agreement.

(a) CONTRACTOR is responsible for understanding the degree to which information obtained through performance of the Agreement is confidential under state and federal law, regulations, or administrative rules as applicable.

(b) CONTRACTOR and all subcontractors, consultants, or agents under the Agreement will not use any information obtained through performance of the Agreement in any manner except as is necessary to the proper discharge of obligations and securing of rights under the Agreement.

(c) CONTRACTOR will have a system in effect to protect all records, documents, or Other Confidential Information under the Agreement that is obtained or maintained in connection with the activities funded under the Agreement. Any disclosure or transfer of Other Confidential Information by CONTRACTOR, including information required by HHSC, will be in accordance with the Agreement. If the CONTRACTOR receives a request for information deemed Other Confidential Information under the Agreement, CONTRACTOR will immediately notify the State of the request, and will make reasonable efforts to protect the information from public disclosure until further instructed by HHSC.

(d) In addition to the requirements stated in this Section, CONTRACTOR must comply with any policy, rule, or reasonable requirement of HHSC that relates to the safeguarding or disclosure of Other Confidential Information relating to HHSC Programs recipients, CONTRACTOR'S operations, or the CONTRACTOR performance of the Agreement.

(e) Upon expiration of the Agreement, or termination of the Agreement for any reason, all Other Confidential Information of a Party disclosed to, and all copies made by the other Party, will be returned to the disclosing Party or, at the disclosing Party's option, erased or destroyed, subject to laws governing the destruction of public information. The recipient of the Other Confidential Information must provide the disclosing Party certificates evidencing this erasure or destruction.

(f) CONTRACTOR will immediately report to HHSC any and all unauthorized disclosures or uses of Other Confidential Information upon it or its subcontractor(s), consultant(s), or agent(s) becoming aware or acquiring knowledge of the disclosure. CONTRACTOR acknowledges that any publication or disclosure of Other Confidential Information may cause immediate and irreparable harm to HHSC and may constitute a violation of State or federal laws. If CONTRACTOR, its subcontractor(s), consultant(s), or agent(s) should publish or disclose such Other Confidential Information to others without authorization, HHSC will immediately be entitled to injunctive relief or any other remedies to which it is entitled under law or equity without requiring a cure period as described in Article 11. HHSC will have the right to recover from CONTRACTOR all damages and liabilities caused by or arising from Contractor's, its subcontractors', consultants', or agents' failure to protect HHSC's Confidential Information. **CONTRACTOR WILL DEFEND WITH COUNSEL APPROVED BY HHSC, INDEMNIFY AND HOLD HARMLESS HHSC FROM ALL DAMAGES, COSTS, LIABILITIES, AND EXPENSES (INCLUDING WITHOUT LIMITATION REASONABLE ATTORNEYS' FEES AND COSTS) CAUSED BY OR ARISING FROM CONTRACTOR'S OR ITS SUBCONTRACTORS', CONSULTANTS' OR AGENTS' FAILURE TO PROTECT OTHER CONFIDENTIAL INFORMATION.**

(g) CONTRACTOR will require its subcontractor(s), consultant(s), and agent(s) to comply with the terms of this provision.

(h) The obligations in this Section do not restrict any disclosure by a Party under any applicable law, or by order of any court or government agency, provided that the disclosing Party must give prompt notice to the non-disclosing Party of such order.

(i) With the exception of HHSC Program recipient or client information, Other Confidential Information of a Party will not be afforded the protection of the Agreement if this data was:

- (1) Already known to the receiving Party without restrictions at the time of its disclosure by the furnishing Party;
- (2) Independently developed by the receiving Party without reference to the furnishing Party's confidential Information;
- (3) Rightfully obtained by the other Party without restriction from a third party after its disclosure by the furnishing Party;
- (4) Publicly available other than through the fault or negligence of the other Party; or
- (5) Released without restriction to anyone.

**Section 16.02 Financial/performance audits.**

(a) Texas Health and Safety Code Section 12.0123 directs HHSC to contract with an independent auditor to perform annual independent external financial and performance audits of any Medicaid contractor used by HHSC in HHSC's operation of a part of the State Medicaid program. "Medicaid contractor" means an entity that, under a contract with or otherwise on behalf of HHSC, performs one or more administrative services in relation to HHSC's operation of a part of the State Medicaid program, such as claims processing, utilization review, client enrollment, provider enrollment, quality monitoring, or payment of claims. The independent auditor will deliver to the CONTRACTOR and to HHSC a report of the findings and recommendations within 30 calendar days of the close of each audit. The report will be prepared in accordance with generally accepted auditing standards.

(b) CONTRACTOR agrees to deliver to HHSC, for HHSC's approval, a Corrective Action Plan that addresses deficiencies identified in the audit within 30 calendar days of the delivery of the independent auditor's report.

(c) CONTRACTOR understands that the independent auditor ("the auditor") will make specific inquiries of CONTRACTOR's management for information, including but not limited to information concerning the representations embodied in the financial statements and reports CONTRACTOR is required to furnish the State as per any financial report requirements in the Agreement. CONTRACTOR understands that as part of the auditor's audit procedures, the auditor will request, and CONTRACTOR's management will provide to the auditor a representation letter;

- (1) Acknowledging management's responsibility for the preparation of the financial statements and reports;
- (2) Acknowledging management's responsibility for compliance with laws and regulations; and

(3) Affirming management's belief that the effects of any uncorrected financial statement or report misstatements aggregated by the auditor during the current audit engagement and pertaining to the period presented are immaterial, both individually and in the aggregate, to the financial statements and reports taken as a whole.

(d) CONTRACTOR understands and agrees that the auditor will also request that CONTRACTOR's management confirm certain representations made to the auditor during the audit. The responses to those inquiries, and the related written representations of management required by generally accepted auditing standards, are part of the evidential matter that the auditor will rely on in forming its opinion on the CONTRACTOR's financial statements and reports.

**Section 16.03 Audit software.**

As part of the Services, CONTRACTOR must operate and maintain audit software that HHSC or its designees may provide to CONTRACTOR from time to time during the Term of the Agreement.

**Section 16.04 Ownership and licenses.**

(a) *Custom software.*

The Parties agree that any Deliverable, including any software, developed by CONTRACTOR in connection with the Agreement (the "Custom Software"), will be the exclusive property of HHSC.

(b) *Ownership rights.*

(1) HHSC will own all right, title, and interest in and to its Confidential Information and the Deliverables provided by CONTRACTOR, including without limitation the specifications, a work plan, and the Custom Software, except that the Deliverables will not include the third party software and the associated Documentation for purposes of this Section. CONTRACTOR will take all actions necessary and transfer ownership of the Deliverables to HHSC,

including the Custom Software and associated Documentation on final acceptance or as otherwise provided in the Agreement.

(2) CONTRACTOR will furnish Custom Software and Documentation, upon request of HHSC, in accordance with applicable State law. All Deliverables, in whole and in part, will be deemed works made for hire of HHSC for all purposes of copyright law, and copyright will belong solely to HHSC. To the extent that any Deliverable under this Section does not qualify as a work for hire under applicable law, and to the extent that the Deliverable includes materials subject to copyright, patent, trade secret, or other proprietary right protection, CONTRACTOR assigns all right, title, and interest in and to Deliverables, including all copyrights, inventions, patents, trade secrets, and other proprietary rights in the Deliverables (including any proprietary right renewals) to HHSC.

(3) CONTRACTOR will, at the expense of HHSC, assist HHSC or its designees to obtain copyrights, trademarks, or patents for all such Deliverables in the United States and any other countries. CONTRACTOR agrees to execute all papers and to give all facts known to it necessary to secure United States or foreign country copyrights and patents, and to transfer or cause to transfer to HHSC all the right, title, and interest in and to such Deliverables. CONTRACTOR also agrees not to assert any moral rights under applicable copyright law with regard to such Deliverables.

(c) *License Rights*

HHSC will have ownership and unlimited rights to use, disclose, duplicate, or publish all information and data developed, derived, documented, or furnished by CONTRACTOR under or resulting from the Agreement. Such data will include all results, technical information, and materials developed for or obtained by HHSC from CONTRACTOR in the performance of the Services hereunder, including but not limited to all reports, surveys, plans, charts, recordings (video or sound), pictures, drawings, analyses, source and object code, graphic representations, computer programs and printouts, notes and memoranda, and documents whether finished or unfinished, which result from or are prepared in connection with the Services performed as a result of the Agreement.

(d) *Proprietary Notices*

CONTRACTOR will reproduce and include HHSC's copyright and other proprietary notices and product identifications provided by CONTRACTOR on such copies, in whole or in part, or on any form of the Deliverables.

(e) *Third Party Software and Documentation Licenses*

(1) CONTRACTOR grants HHSC a non-exclusive, perpetual, license for HHSC to use the Third Party Software and its associated Documentation for its internal business purposes. HHSC will be entitled to use the Third Party Software on the Equipment or any replacement equipment used by HHSC, and with any replacement Third Party Software chosen by HHSC, without additional Charges. Terms in any licenses for Third Party Software will be consistent with the requirements of this Section.

(2) The licenses hereunder are granted as of the date when such Third Party Software is installed and certified by CONTRACTOR as operational, and the licenses will continue until HHSC permanently discontinues the use of the Third Party Software.

(3) Prior to utilizing any Third Party Software product that may be included as part of a Software Deliverable to HHSC, CONTRACTOR will provide to HHSC copies of the license agreement from the licensor of the Third Party Software to allow HHSC to pre-approve the license agreement that must, at a minimum, provide HHSC with necessary rights consistent with the short and long-term goals of the Agreement. CONTRACTOR will assign to HHSC the licenses for the Third Party Software upon Final Acceptance.

(4) CONTRACTOR will, during the project, maintain any and all Third Party Software products at their most current version or no more than one version back from the most current version. However, CONTRACTOR will not maintain any Third Party Software versions, including one version back, if any such version would prevent HHSC from using any functions, in whole or in part, or would cause deficiencies in the system.

(f) *State and Federal Governments*

In accordance with 45 C.F.R. Part 95.617, all appropriate State and Federal agencies will have a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, translate, or otherwise use, and to authorize others to use for Federal Government purposes all materials, the Custom Software and modifications thereof, and associated documentation designed, developed, or installed with Federal Financial Participation under the Agreement, including but not limited to those materials covered by copyright, all Software source and object code, instructions, files, and Documentation composing the System.

**Section 16.05 Insurance Coverage.**

(a) *Required Coverage.*

(1) CONTRACTOR will procure, at CONTRACTOR's own expense, during the Term of the Agreement and until final acceptance of all Services and Deliverables, the following insurance coverage. CONTRACTOR will



provide HHSC with proof of the following insurance coverage within 10 calendar days after the Agreement is awarded upon HHSC's request:

- (A) Standard Worker's Compensation Insurance coverage;
- (B) Automobile Liability; and
- (C) Commercial General Liability Insurance including Bodily Injury coverage of \$100,000.00 per each occurrence and Property Damage Coverage of \$25,000.00 per each occurrence.

(2) If CONTRACTOR's current Commercial General Liability insurance coverage does not meet the above stated requirements, CONTRACTOR will obtain excess liability insurance to compensate for the difference in the coverage amounts prior to effective date of the Agreement.

(3) CONTRACTOR is responsible for all deductibles stated in the policies. Insurance will be maintained at all times during the performance of the Agreement. Insurance coverage will be issued by insurance companies with "A" rating from Best that are authorized by applicable law to conduct business and provide the required coverage in the State of Texas, and must name HHSC as an additional insured.

(4) The policy will have an extended reporting period of two years. When policies are renewed or replaced, the policy retroactive date must coincide with, or precede, start of work on the Agreement.

(b) *Proof of Insurance Coverage*

(1) CONTRACTOR will furnish the HHSC Project Manager original Certificates of Insurance evidencing the required coverage to be in force on the date of award, and renewal certificates of insurance, or such similar evidence, if the coverages have an expiration or renewal date occurring during the term of the Agreement. The failure of HHSC to obtain this evidence from CONTRACTOR before permitting CONTRACTOR to commence work will not be deemed to be a waiver by HHSC and CONTRACTOR will remain under continuing obligation to maintain and provide proof of the insurance coverage.

(2) The insurance specified above will be carried until all services required to be performed under the terms of the Agreement are satisfactorily completed. Failure to carry or keep such insurance in force will constitute a violation of the Agreement, and HHSC maintains the right to stop work until proper evidence of insurance is provided.

(3) The insurance will provide for 30 calendar days prior written Notice to be given to HHSC in the event coverage is substantially changed, canceled, or non-renewed. CONTRACTOR must submit a new coverage binder to HHSC to ensure no break in coverage.

(4) CONTRACTOR will require all subcontractors operating in Texas to carry the same or more coverage as CONTRACTOR is required to carry under the Agreement. CONTRACTOR may provide the coverage for any subcontractor, and, if provided, the evidence of insurance submitted will so stipulate.

(5) The Parties understand and agree that any insurance coverages and limits furnished by CONTRACTOR will in no way expand or limit CONTRACTOR's liabilities and responsibilities specified within the Contract documents or by applicable law.

(6) CONTRACTOR and each subcontractor will require that insurer will waive their rights of subrogation against HHSC.

(7) CONTRACTOR understands and agrees that any insurance maintained by HHSC will apply in excess of and not contribute with insurance provided by CONTRACTOR under the Agreement.

(8) If CONTRACTOR, or its subcontractor(s), desire additional coverage, higher limits of liability, or other modifications for its own protection, CONTRACTOR and each of its subcontractors will be responsible for the acquisition and cost of this additional protection at no additional cost to HHSC.

(9) CONTRACTOR may not transport a client or conduct any other official business on behalf of HHSC without the required coverage of the Agreement. CONTRACTOR agrees and understands that HHSC will not be liable for any accident or death due to an automobile accident involving the CONTRACTOR or CONTRACTOR's employee, even if the accident or death occurs in the course of performing any work under the Agreement. Failure to meet this provision may be considered a material breach of the Agreement.

**Section 16.06 Background Checks.**

CONTRACTOR must obtain a criminal background check, including fingerprints in a form and of a quality acceptable to the Department of Public Safety and the Federal Bureau of Investigation, on any Contractor's employees or agents, including Subcontractors and Subcontractor employees or agents, who would be placed in direct contact with a resident or client.

CONTRACTOR must also perform checks against the Nurse Aide Registry and the Employee Misconduct Registry maintained on DADS' Employability Status Check Search website. CONTRACTOR must perform any criminal background checks at its expense and should limit its search to the United States of America.

CONTRACTOR will not utilize an employee, Subcontractor, or Subcontractor's employee to perform a site visit or have any contact with stakeholders, patients, residents, or their family members if:

(a) CONTRACTOR determines, as a result of a criminal background check, that the person has been convicted of an offense listed in Tex. Health & Safety Code § 250.006 that bars employment or if the Consultant makes a reasonable determination that a conviction may pose a risk to any stakeholders, patients, residents, or their family members; or

(b) the employee or Subcontractor or Subcontractor's employee is listed in the Nurse Aide Registry or the Employee Misconduct Registry.

**Section 16.07 Historically Underutilized Business Participation Requirements**

This Subsection applies if HHSC determined that sub-contracting opportunities were probable for the procurement/contract.

(a) Definitions.

For purposes of this Section:

(1) "**Historically Underutilized Business**" or "**HUB**" means a minority or women-owned business as defined by Texas Government Code, Chapter 2161.

(2) "**HSP**" means a HUB Subcontracting Plan.

(b) HUB Requirements.

(1) Contractor must submit an HSP for HHSC's approval.

(2) Contractor must report to HHSC's contract manager and HUB Office monthly, in the format required by the HUB Office, its use of HUB subcontractors to fulfill the subcontracting opportunities identified in the HSP.

(3) If the Parties amend the Agreement to include additional funds or a change to the Scope of Work, the Contractor must submit a revised HSP to the HHSC HUB Office, when a determination is made for additional subcontracting opportunities. All proposed changes to the HSP must comply with the requirements of **Section 16.07(b)(4)**.

(4) Contractor must obtain prior written approval from the HHSC HUB Office before making any changes to the HSP. The proposed changes must comply with HHSC's good faith effort requirements relating to the development and submission of HSPs.

(5) HHSC will determine if the value of Subcontracts to HUBs meet or exceed the HUB subcontracting provisions specified in the Contractor's HSP. If HHSC determines that the Contractor's subcontracting activity does not demonstrate a good faith effort, the Contractor may be subject to provisions in the Vendor Performance and Debarment Program

(34 Tex. Admin. Code Chapter 20, Subchapter C), and subject to remedies for Breach.