

ELIGIBILITY SUPPORT SERVICES AGREEMENT

BETWEEN THE
HEALTH AND HUMAN SERVICES COMMISSION
AND
MAXIMUS, INC.

1. Introduction

This agreement (the Agreement) is between the Health and Human Services Commission (HHSC), an administrative agency within the executive department of the State of Texas, having its principal office in Austin, Texas, and MAXIMUS, Inc. (CONTRACTOR), a corporation organized under the laws of the Commonwealth of Virginia and having its principal place of business at 1891 Metro Center Drive, Reston, VA 20190. HHSC and CONTRACTOR may be referred to in this Agreement individually as "Party" and collectively as the "Parties." The Parties agree that the following terms and conditions shall apply to the Services and Deliverables to be provided by CONTRACTOR under this Agreement in consideration of certain payments to be made by HHSC.

2. Background and Inducements.

(a) Background.

HHSC enters into this Agreement to procure the eligibility support services described in this Agreement (the Services). For purposes of the Agreement, "Services" includes any and all services and deliverables (the Deliverables) that CONTRACTOR is required to perform or to submit to HHSC under the Agreement.

(b) CONTRACTOR'S experience and qualifications.

CONTRACTOR is an established provider of the Services and has the skills, qualifications, expertise, financial resources and experience necessary to provide the Services.

(c) CONTRACTOR's commitment and understanding.

CONTRACTOR has had the opportunity to review and understand HHSC's mission and objectives as described in the request for proposals described in subsection 3.(a) below, and based on such review and understanding, CONTRACTOR represents to HHSC that it currently has the capacity to perform in accordance with the terms and conditions of this Agreement.

3. Agreement Elements

(a) Agreement Documentation.

The Agreement between the Parties consists of:

(1) This final executed document entitled “Eligibility Support Services Agreement between the Health and Human Services Commission and MAXIMUS, Inc.,” including Exhibits A through F attached to this document and listed below. This document and all Exhibits are referred to collectively as the *Signature Document*. The following Exhibits are incorporated into the Signature Document:

- a. Exhibit A: the Revised Terms and Conditions;
- b. Exhibit B: the Data Use Agreement;
- c. Exhibit C: the Revised Proposal;
- d. Exhibit D: Key Performance Requirements;
- e. Exhibit E: Deliverables;
- f. Exhibit F: Payment Schedules; and
- g. Exhibit G: Security and Privacy Initial Inquiry.

(2) The Proposal submitted by CONTRACTOR dated April 24, 2015 which is incorporated hereto by reference as Attachment 1 (the *Proposal*); and

(3) HHSC Request for Proposals for Eligibility Support Services #:529-14-0006 dated December 22, 2014 including all addenda, which is incorporated hereto as Attachment 2 (collectively, the *RFP*).

(b) *Order of Precedence.*

In the event of any conflict or contradiction between or among the Agreement elements, the documents shall control in the following order of precedence:

- (1) The Signature Document including its Exhibits;
- (2) The RFP; and
- (3) The Proposal.

(c) *Interpretation of Language.*

The Parties acknowledge and agree that all language in the Proposal and the Revised Proposal will be read and interpreted in light of, and shall be subordinate to, the requirements set forth in the RFP and the provisions of this Signature Document. Where any provisions in the Proposal or the Revised Proposal appear to conflict with provisions in the RFP or this Signature Document, HHSC will attempt to reconcile the competing provisions by comparing the provisions in the Proposal or the Revised Proposal with the corresponding or competing provisions of the RFP or this Signature Document, as appropriate. To the extent a provision in the Proposal or the Revised Proposal may be susceptible to more than one interpretation, the Parties will adopt the meaning that is consistent with the express provisions of the RFP and this Signature Document and will give effect to both provisions. To the extent a provision in the Proposal or the Revised Proposal may be susceptible to an interpretation that, when read in light of RFP language other than the competing provision, is consistent with the express or implicit provisions of the RFP, the Parties will adopt that interpretation. If the provisions in the Proposal or the Revised Proposal cannot be reconciled with corresponding provisions in the RFP or this Signature Document, then the RFP or this Signature Document shall take precedence.

(d) *No Implied Assumptions.*

The Parties acknowledge and agree that any assumptions contained in the Proposal, including but not limited to general business assumptions, assumptions concerning key performance requirements, and comments concerning the terms and conditions, shall be deemed to have been rejected and will not be a part of the Agreement unless and to the extent the Parties have expressly agreed in writing to include them. Notwithstanding the foregoing, the Parties acknowledge that certain assumptions have been expressly incorporated in the Exhibits attached to this Signature Document, and that those assumptions have been accepted by the Parties and are included in the Agreement.

4. *Term of the Agreement*

This Agreement is effective as of the date of execution by both Parties (the Effective Date), and shall continue in effect until the expiration of the initial term of the Agreement or the expiration of any extension period, or unless otherwise terminated in accordance with the provisions of the Agreement. The initial term of the Agreement commences on the Effective Date and ends on the fifth anniversary after the Effective Date. HHSC may extend the term of this Agreement for up to two (2) successive one-year periods after the expiration of the initial term, or as necessary to complete the mission of the procurement.

5. *Project Managers*

The following Project Managers will serve as the primary contacts for all administrative issues:

CONTRACTOR:

Carrie Thomas
Vice President, Texas Eligibility Support
4000 South IH-35
Austin, Texas 78704

CarrieThomas@maximus.com

HHSC:

Tricia Schulze
Eligibility Support Service Contract Manager
909 West 45th Street
Austin, Texas 78751

Tricia.schulze@hhsc.state.tx.us

6. *Notices*

(a) *Delivery of Notice.*

Any notice or other legal communication required or permitted to be made or given by either Party pursuant to this Agreement will be in writing and deemed to have been duly given:

- (1) Three (3) business days after the date of mailing if sent by registered or certified U.S. mail, postage prepaid, with return receipt requested;
- (2) When transmitted if sent by facsimile, provided a confirmation of transmission is produced by the sending machine; or
- (3) When delivered if delivered personally or sent by express courier service.

(b) Notice to CONTRACTOR.

Any notice under this Agreement will be sufficient if delivered to the following persons or their successors.

- (1) Communications that are routine and administrative in nature should be sent to the Project Managers identified in Section 5 above.
- (2) Legal notices should be sent to the following:

CONTRACTOR:

Bruce Perkins
MAXIMUS, Inc.
4000 S. IH-35
Austin, Texas 78704

With required copy to:

David R Francis
General Counsel
MAXIMUS, Inc.
1891 Metro Center Drive
Reston, VA 20190
davidfrancis@maximus.com

HHSC:

Chris Traylor
Executive Commissioner
Health and Human Services Commission
4900 North Lamar Blvd.
Austin, Texas 78751
Fax: 512-424-6586

With required copy to:

Karen Ray
Chief Counsel
Health and Human Services Commission
4900 North Lamar Blvd.
Austin, Texas 78751

(c) *Change of Designee.*

Either Party may change the above-referenced designees or address with five (5) days' written notice to the other Party.

7. *Laws and Regulations Governing the Administration of the Agreement*

The Parties shall administer the Agreement in accordance with the following rules and regulations:

- (a) Texas Government Code, Chapter 531, as amended or modified, and any administrative rules adopted thereunder; and
- (b) Any other applicable provisions of state or federal law.

8. *Laws and Regulations Governing the Procurement of the Services*

It is the express intention of the Parties that this Agreement be a procurement of services meeting all applicable requirements of the following:

- (1) Texas Government Code Section 2155.144 and Chapter 2157;
- (2) 1 T.A.C. Chapter 391; and
- (3) Any other applicable provisions of state or federal law.

9. *Services and Deliverables*

CONTRACTOR will provide the Services and Deliverables identified or described in the Agreement, including any agreed modifications to the Agreement.

10. *Payment*

(a) During the term of this Agreement, HHSC will compensate CONTRACTOR for the Services and Deliverables specified herein following the receipt, and as applicable, testing and acceptance of Services and Deliverables. Payment will be made in accordance with all applicable provisions of the Agreement.

(b) The cost of the Services and Deliverables supplied by CONTRACTOR to HHSC during the term of this Agreement will not exceed the rates stated in this Agreement, unless modified by the Parties in accordance with Section 14 of this Signature Document.

(c) CONTRACTOR understands and expressly assumes all risks associated with the commitment of delivery of the contracted Services and Deliverables, including the failure, termination or suspension of funding to HHSC, delays or denials of required third party approvals not under the control of HHSC, and cost overruns not reasonably attributable to HHSC.

11. *Invoices*

CONTRACTOR will be paid upon HHSC's acceptance of Services and Deliverables. CONTRACTOR will, in accordance with the Payment terms in Section 10 above, submit an invoice to:

Health and Human Services Commission
Tricia Schulze
Eligibility Support Service Contract Manager
909 West 45th Street
Austin, Texas 78751

The invoice will include a brief summary of all Services and Deliverables provided. Upon HHSC's request, CONTRACTOR shall provide additional information to the degree of reasonable detail necessary to resolve any review, examination, inquiry, or audit by HHSC or any other responsible authority.

12. Time and manner of payment.

Payments for Services and Deliverables under the Agreement will be made in accordance with the Texas Prompt Payment Act, Chapter 2251, Texas Government Code. In the event HHSC disputes payment of an invoice for purposes of enforcing a remedy or obtaining set-off against payments due, HHSC may limit payments in accordance with the provisions of the Agreement.

13. Performance Remedies / Damages

CONTRACTOR is expected to meet or exceed the objectives and standards set forth in this Agreement. All areas of responsibility and all requirements listed in the Agreement will be subject to performance evaluation by HHSC acting reasonably and consistent with the objectives and standards and Key Performance Requirements. Performance reviews may be conducted at HHSC's discretion at any time and may relate to any responsibility and/or requirement. Any and all responsibilities and requirements not fulfilled consistently with the objectives and standards and Key Performance Requirements may be subject to the remedies set forth in the Agreement.

14. Contract Change Orders and Amendments

All modifications to the Agreement must be accomplished through the formal amendment process set forth herein.

(a) HHSC or CONTRACTOR may propose changes in the Services, Deliverables, or other aspects of this Agreement.

(b) If HHSC proposes a change, it shall deliver a written notice to CONTRACTOR describing the proposed change. CONTRACTOR must prepare a response, at no additional cost to HHSC, within 30 calendar days, or within another time period that is mutually agreed upon by both Parties. The response must specify:

(1) The effect, if any, of the proposed change on the amounts payable by HHSC under this Agreement and the manner used to calculate such effect;

(2) The effect, if any, of the proposed changes on CONTRACTOR's performance of its obligations under this Agreement, including the effect on the Services or Deliverables;

(3) The anticipated time schedule for implementing the proposed changes; and

(4) Any other information requested by HHSC or reasonably necessary for HHSC to make an informed decision regarding the offer.

(c) If HHSC accepts CONTRACTOR's response, CONTRACTOR must indemnify and hold harmless HHSC from and against any losses, costs or expenses resulting from any inaccurate or incomplete information contained in the response.

(d) If CONTRACTOR desires to propose a change, it must deliver a change request to HHSC that includes the information described in Section 14(b) above.

(e) If HHSC accepts CONTRACTOR's proposal or change request, the Parties will draft and execute an amendment to this Agreement. The amendment must be signed by HHSC's Executive Commissioner or his designee, and a duly authorized CONTRACTOR representative.

(f) If (1) actual call volumes; (2) outbound documents; (3) application support transactions and (iv) image only transactions vary materially from volume projections and the variation is not caused by factors within MAXIMUS control, MAXIMUS and HHSC will negotiate in good faith to determine whether an equitable adjustment to the rates paid under the Contract is appropriate under the circumstances. If the Parties jointly determine that an equitable adjustment is appropriate, MAXIMUS and HHSC will negotiate in good faith to adjust the rates by means of a mutually-agreed formal amendment to the Agreement.

15. Authority to Execute

The Parties have executed this Agreement in their capacities as stated below with authority to bind their organizations on the dates set forth by their signatures.

HEALTH & HUMAN SERVICES COMMISSION

MAXIMUS, INC.

By: 

Chris Traylor
Executive Commissioner

Date: 12-14-15

By: 

Richard Montoni
Chief Executive Officer

Date: OCT. 12, 2015

EXHIBITS AND ATTACHMENTS

EXHIBIT A: REVISED TERMS AND CONDITIONS
EXHIBIT B: DATA USE AGREEMENT
EXHIBIT C: REVISED PROPOSAL
EXHIBIT D: KEY PERFORMANCE REQUIREMENTS
EXHIBIT E: DELIVERABLES
EXHIBIT F: PAYMENT SCHEDULES
EXHIBIT G: SECURITY AND PRIVACY INITIAL INQUIRY

ATTACHMENT 1: THE PROPOSAL

ATTACHMENT 2: THE RFP

ELIGIBILITY SUPPORT SERVICES AGREEMENT
HHSC CONTRACT NO. 529-14-0006-00001

EXHIBIT A

Revised Terms and Conditions 1.4.1

ELIGIBILITY SUPPORT SERVICES AGREEMENT
BETWEEN THE
HEALTH AND HUMAN SERVICES COMMISSION
AND
MAXIMUS, INC.

529-14-0006-00001



**Health & Human Services Commission
Enterprise Project Office**

Contractual Document

CONTENTS

Article 1. Introduction	1
Section 1.01 Inducements.	1
Section 1.02 Construction of Agreement.	1
(a) Scope of Introductory Article.	1
(b) References to the "State."	1
(c) Severability.	1
(d) Survival of terms.	1
(e) Headings.	1
(f) Global drafting conventions.	1
Section 1.03 No implied authority.	1
Section 1.04 Legal Authority.	2
Article 2. Definitions	2
Article 3. General Terms and Conditions	3
Section 3.01 Agreement elements.	3
(a) Agreement documentation.	Error! Bookmark not defined.
(b) Order of documents.	Error! Bookmark not defined.
Section 3.02 Funding.	3
Section 3.03 Delegation of authority.	3
Section 3.04 No waiver of sovereign immunity.	3
Section 3.05 Force majeure.	3
Section 3.06 Other Health and Human Services Agencies' participation in the Agreement.	3
Section 3.07 Most favored customer.	4
Section 3.08 Publicity.	4
Section 3.09 Assignment.	4
(a) Assignment by CONTRACTOR.	4
(b) Assignment by HHSC.	4
(c) Assumption.	4
Section 3.10 Cooperation with other vendors and prospective vendors.	4
Section 3.11 Renegotiation and reprocurement rights.	5
(a) Renegotiation of Agreement terms.	5
(b) Reprocurement of the services or procurement of additional services.	5
(c) Termination rights upon reprocurement.	5
Section 3.12 RFP errors and omissions.	5
Section 3.13 Attorneys' fees.	5
Section 3.14 Preferences under service contracts.	5
Section 3.15 Time of the essence.	5
Article 4. Contractor Personnel Management	5
Section 4.01 Qualifications, retention and replacement of CONTRACTOR employees.	5
Section 4.02 Responsibility for CONTRACTOR personnel.	5
Section 4.03 Cooperation with HHSC and state administrative agencies.	6
(a) Cooperation with HHSC contractors.	6
(b) Cooperation with state and federal administrative agencies.	6
Section 4.04 Conduct of and responsibility for CONTRACTOR personnel.	6
Section 4.05 Responsibility for subcontractors.	6
Section 4.06 HHSC's ability to contract with subcontractors.	7
Article 5. Governing Law and Regulations	7
Section 5.01 Governing law and venue.	7
Section 5.02 CONTRACTOR responsibility for compliance with laws and regulations.	7
Section 5.03 Immigration Reform and Control Act of 1986.	8

Section 5.04 Compliance with state and federal anti-discrimination laws.	8
Section 5.05 Environmental protection laws.	8
(a) Pro-Children Act of 1994.	9
(b) National Environmental Policy Act of 1969.	9
(c) Clean Air Act and Water Pollution Control Act regulations.	9
(d) State Clean Air Implementation Plan.	9
(e) Safe Drinking Water Act of 1974.	9
Article 6. Service Levels and Performance Measurement	9
Section 6.01 Performance measurement.	9
Article 7. Amendments, Modifications, and Change Orders.....	9
Section 7.01 Amendments and modifications.....	9
(a) Amendments and modifications resulting from changes in law or contract.	9
(b) Modifications resulting from imposition of remedies.	9
Section 7.02 Required compliance with amendment modification procedures.	9
Article 8. Audit and Financial Compliance.....	Error! Bookmark not defined.
Section 8.01 Financial record retention and audit.	10
Section 8.02 Access to records, books, and documents.	10
Section 8.03 Audits of Services, Deliverables and inspections.	10
Section 8.04 Response/compliance with audit or inspection findings.	10
Section 8.05 Audit of CONTRACTOR fees.	11
Section 8.06 SAO Audit	11
Article 9. Terms and Conditions of Payment.....	11
Section 9.01 Rights of set-off.....	11
(a) General right of set-off.....	11
(b) Duty to make payments.....	11
Section 9.02 Expenses.	11
Section 9.03 Disputed fees.	11
Section 9.04 Liability for taxes.	12
Section 9.05 Liability for employment-related charges and benefits.	12
Section 9.06 No additional consideration.	12
Section 9.07 No increase in charges.	12
Article 10. Disclosure and Confidentiality of Information	12
Section 10.01 Confidentiality.	12
Section 10.02 Disclosure of HHSC's Confidential Information.	13
Section 10.03 Requests for public information.	13
Section 10.04 Privileged Work Product.	13
Section 10.05 Unauthorized acts.	14
Section 10.06 Legal action.....	14
Section 10.07 Information Security	14
Article 11. Remedies and Disputes.....	15
Section 11.01 Understanding and expectations.	15
Section 11.02 Tailored remedies.	15
(a) Understanding of the Parties.....	15
(b) Notice and opportunity to cure for non-material breach.	15
(c) Corrective action plan.....	16
(d) Administrative remedies.	16
(e) Damages.	17
(f) Equitable Remedies	18
(g) Suspension of Agreement	18
Section 11.03 Termination of Agreement.	18

(a)	Termination by mutual agreement of the Parties.	18
(b)	Termination in the best interest of the State.....	18
(c)	Termination for cause.....	18
Section 11.04	Effective date of termination.	20
Section 11.05	Extension of termination effective date.....	20
Section 11.06	Payment and other provisions at Agreement termination.	20
Section 11.07	Modification of Agreement in the event of remedies.	20
Section 11.08	Turnover assistance.....	20
Section 11.09	Rights upon termination or expiration of Agreement.	20
Section 11.10	CONTRACTOR responsibility for associated costs.....	20
Section 11.11	Dispute resolution.	20
(a)	General agreement of the Parties.	20
(b)	Duty to negotiate in good faith.....	20
(c)	Claims for breach of Agreement.....	21
Section 11.12	Liability of CONTRACTOR.	21
Article 12.	Assurances and Certifications	22
Section 12.01	Proposal certifications.....	22
Section 12.02	Conflicts of interest.	22
(a)	Representation.	22
(b)	General duty regarding conflicts of interest.....	22
Section 12.03	Organizational conflicts of interest.....	22
(a)	Definition.....	22
(b)	Warranty.	22
(c)	Continuing duty to disclose.	23
(d)	Remedy.	23
(e)	Flow down obligation.	23
Section 12.04	HHSC personnel recruitment prohibition.	23
Section 12.05	Anti-kickback provision.	23
Section 12.06	Debt or back taxes owed to the State of Texas.....	23
Section 12.07	Certification regarding status of license, certificate, or permit.	23
Section 12.08	Outstanding debts and judgments.	23
Section 12.09	Anti-trust.....	23
Article 13.	Representations and Warranties	24
Section 13.01	Authorization.	24
Section 13.02	Ability to perform.	24
Section 13.03	Workmanship and performance.....	24
Section 13.04	Warranty of deliverables.	24
Section 13.05	Manufacturers' warranties.	24
Section 13.06	Compliance with Agreement.....	24
Article 14.	Intellectual Property.....	24
Section 14.01	Infringement and misappropriation.	24
Section 14.02	Exceptions.	25
Article 15.	Liability	25
Section 15.01	Property damage.	25
Section 15.02	Risk of Loss.	25
Section 15.03	Limitation of HHSC's Liability.....	25
Article 16.	Special Terms and Conditions.....	25
Section 16.01	HIPAA.	25
(a)	Definitions.....	25
(b)	Background.	25
(c)	Uses and disclosures.	26

(d) Contractor's commitment and obligations.	26
(e) Ownership of Protected Health Information.	27
(f) Injunctive relief; survival of terms.	27
Section 16.02 Technology access.	27
Section 16.03 Member records.	27
Section 16.04 Financial/performance audits.	28
Section 16.05 Audit software.	28
Section 16.06 Ownership and licenses.	28
(a) Custom Software.	28
(b) Ownership rights.	28
(c) License Rights	29
(d) Proprietary Notices	29
(e) Third Party Software and Documentation Licenses	29
(f) State and Federal Governments	29
Section 16.07 Insurance Coverage.	29
(a) Required Coverage.	29
(b) Proof of Insurance Coverage	30
Section 16.08 Historically Underutilized Business Participation Requirements	31
This Subsection applies if HHSC identified that there are sub-contracting opportunities for this contract.	31
(a) Definitions.	31
(b) HUB Requirements.	31

Article 1. Introduction

Section 1.01 Inducements.

In making the award of this 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 Request for Proposals (RFP);

(2) CONTRACTOR and its subcontractors have the skills, qualifications, expertise, financial resources and experience necessary to perform the services described in the RFP, CONTRACTOR's Proposal, and this 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 RFP, has timely raised all questions or objections to the RFP, 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 this Agreement and, based on such review and understanding, CONTRACTOR currently has the capability to perform in accordance with the terms and conditions of this Agreement;

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

Accordingly, on the basis of the terms and conditions of this Agreement, HHSC desires to engage CONTRACTOR to perform the services described in this Agreement under the terms and conditions set forth in this 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" shall mean the State of Texas unless otherwise specifically indicated and shall 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 this Agreement is construed to be illegal or invalid, such interpretation will not affect the legality or validity of any of its other provisions. The illegal or invalid provision will be deemed stricken and deleted to the same extent and effect as if never incorporated in this Agreement, but all other provisions will remain in full force and effect.

(d) Survival of terms.

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

(1) The Parties have expressly agreed shall survive any such 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 this Agreement are for reference and convenience only and may not be considered in the interpretation of this Agreement.

(f) Global drafting conventions.

(1) The terms "include," "includes," and "including" are terms of inclusion, and where used in this Agreement, are deemed to be followed by the words "without limitation."

(2) Any references to "sections," "appendices," or "attachments" are deemed to be references to sections, appendices, or attachments to this Agreement.

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

Section 1.03 No implied authority.

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

implied authority, and specifically is not delegated authority under this 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 the HHSC Programs.

CONTRACTOR is required to cooperate to the fullest extent possible 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 this Agreement under Chapter 531, Texas Government Code; Section 2155.144, Texas Government Code; and/or Chapter 62, Texas Health & Safety Code. CONTRACTOR is authorized to enter into this Agreement pursuant to the authorization of its governing board or controlling owner or officer.

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

Article 2. Definitions

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

"Agreement" or "Contract" means this formal, written, and legally enforceable agreement and amendments thereto between the Parties.

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

"Change Order" means an authorization to make a change in the Services or Deliverables under this 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) that consists of:

- (1) Confidential Client information, including Protected Health Information;

- (2) All non-public budget, expense, payment and other financial information;

- (3) All Privileged Work Product;

- (4) All information designated by HHSC or any other State agency as confidential, including all information designated as confidential under the Texas Public Information Act, Texas Government Code, Chapter 552;

- (5) Unless publicly disclosed by HHSC or the State, the pricing, payments, and terms and conditions of the Agreement; and

- (6) Information that is utilized, developed, received, or maintained by HHSC, the CONTRACTOR, or participating State agencies for the purpose of fulfilling a duty or obligation under this Agreement and that has not been publicly disclosed.

"Corrective Action Plan" means the detailed written plan required by HHSC to correct or resolve a deficiency or event causing the assessment of a liquidated damage against CONTRACTOR.

"Deliverable" means a written or recorded work product prepared, developed, or procured by CONTRACTOR as part of the Services under this 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 this Agreement. For purposes of this Agreement, the term includes any period under which work is performed in accordance with a properly executed Letter of Intent between HHSC and CONTRACTOR.

"Force majeure event" means any failure or delay in performance of a duty by a Party under this Agreement that is caused by fire, flood, hurricane, tornadoes, earthquake, an act of God, an act of war, riot, civil disorder, or any similar event beyond the reasonable control of such Party and without the fault or negligence of such Party.

"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 this Agreement.

"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.

“Parties” means HHSC and CONTRACTOR, collectively.

“Party” means either HHSC or CONTRACTOR, individually.

“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; and

(2) The governmental body owns or has a right of access to.

“Request for Proposals” or **“RFP”** means the procurement solicitation instrument issued by HHSC under which this Agreement was awarded and is executed.

“Scope of Work” means the description of Services and Deliverables specified in this Agreement, the RFP, and any agreed modifications thereto.

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

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

“Subcontract” means any written agreement between CONTRACTOR and other party to fulfill the requirements of this 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 this Agreement transfers to another vendor. 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.

Deleted by agreement of the Parties.

Section 3.02 Funding.

This Agreement is expressly 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 this Agreement as a result of the suspension, termination, withdrawal, or failure of

funding to HHSC or lack of sufficient funding of HHSC for any activities or functions contained within the scope of this 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 shall make best efforts to provide reasonable written advance notice to CONTRACTOR upon learning that funding for this Agreement may be discontinued.

Section 3.03 Delegation of authority.

Whenever, by any provision of this 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 the Commissioner unless any such right, power, or duty is specifically delegated to the duly appointed agents or employees of HHSC. The Commissioner will reduce any such delegation of authority to writing and provide a copy to CONTRACTOR on request.

Section 3.04 No waiver of sovereign immunity.

The Parties expressly agree that no provision of this 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.

Neither Party will 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 such 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 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) Except as provided in the paragraphs below, CONTRACTOR must not use the name of HHSC, the State of Texas, or any other State agency, or refer to HHSC or any such agency directly or indirectly in any media release, public announcement, or public disclosure relating to the Agreement or its subject matter, including, but not limited to, 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) 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.

(c) 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.

(d)¹ Either Party may indicate to third parties that CONTRACTOR is providing services to HHSC and with prior written approval CONTRACTOR may use HHSC as a reference and may disclose any publicly available information.

(e)² HHSC May Publish CONTRACTOR Performance. If HHSC publishes the results of CONTRACTOR's performance under the Agreement, it will use reasonable efforts to allow CONTRACTOR to review the results prior to publication

Section 3.09 Assignment.

(a) *Assignment by CONTRACTOR.*

CONTRACTOR shall 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 pursuant to the Agreement. Notwithstanding the foregoing, CONTRACTOR shall have the right to assign this Agreement to a firm or corporation as part of a merger or sale of substantially all of CONTRACTOR's assets, but only if HHSC determines in its sole discretion that the assignee has sufficient financial and operational capacity to perform CONTRACTOR's obligations, and CONTRACTOR has obtained HHSC's prior written consent to make such assignment, such consent shall not be unreasonably withheld.

(b) *Assignment by HHSC.*

CONTRACTOR understands and agrees HHSC may in one or more transactions assign, pledge, transfer, or hypothecate 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 (an "Assignee") 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, its 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) 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 will agree 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) CONTRACTOR agrees that when HHSC so requests, the CONTRACTOR will allow parties interested in bidding for HHSC contracts, during the competitive procurement, 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 bidding on the contract and⁴ shall be subject to such other confidentiality restrictions and non-disclosure agreements CONTRACTOR may reasonably require to protect CONTRACTOR's confidential information and intellectual property.

¹ Added to UTCs.

² Added to UTCs.

³ Paragraph added to UTCs.

⁴ Last clause added to UTCs.

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. Upon CONTRACTOR's receipt of any notice pursuant to 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 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 of the Agreement.

Section 3.12 RFP errors and omissions.

CONTRACTOR will not take advantage of any errors and/or omissions in the RFP or the resulting Agreement. CONTRACTOR must promptly notify HHSC of any such errors and/or omissions that are discovered.

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 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 Time of the essence.

⁵In consideration of the need to ensure uninterrupted and continuous HHSC Program services, time is of the essence in the performance of the Services under the Agreement as specified in the Key Performance Requirements and other parts of

⁵ Paragraph replaces language of UTCs.

this Agreement where a performance standard or deadline is referenced.

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 this Agreement. The personnel CONTRACTOR assigns to perform the duties and responsibilities under this 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 this Agreement without degradation and in accordance with the terms of this Agreement.

Section 4.02 Responsibility for CONTRACTOR personnel.

(a) 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.

(b) Except as expressly provided in this 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.

(c) ⁶Each Party's employees must be paid exclusively by such Party for all services performed. Each Party 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.

(d) ⁷Each Party assumes sole and full responsibility for its acts and the acts of its personnel and subcontractors.

(e) ⁸Each Party 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 such Party, its officers, or its agents) are the sole responsibility of such Party and are not the responsibility of the other Party. CONTRACTOR will indemnify and hold harmless the State from any and all such claims asserted against the State. Each Party understands that any person who alleges a claim arising out of employment or alleged employment by such Party will not be entitled to any compensation, rights, or benefits from the other

⁶ Paragraph replaces language of UTCs.

⁷ Paragraph replaces language of UTCs.

⁸ Paragraph replaces language of UTCs.

Party (including, but not limited to, tenure rights, medical and hospital care, sick and annual/vacation leave, severance pay, or retirement benefits).

Section 4.03 (e) 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 this 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) While performing the Services, CONTRACTOR's personnel and subcontractors must:

- (1) Comply with applicable State rules, and regulations and HHSC's requests regarding personal and professional conduct generally applicable to the service locations; and
- (2) Otherwise conduct themselves in a businesslike and professional manner.

(b) 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 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.

(c) Nothing in the Agreement will prevent CONTRACTOR, at the request of HHSC, from replacing any personnel who 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.

(d) 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.

(e) CONTRACTOR agrees to be responsible for the following in respect to its employees:

- (1) Any and all employment taxes and/or other payroll withholding;
- (2) Damages incurred by CONTRACTOR's employees within 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 pursuant to this 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.

(a) 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 this 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.

(b) 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 this Agreement.

(c) 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.

(d) At least 30 days prior to executing a 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. 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 this Agreement or create significant barriers for HHSC in monitoring compliance with this Agreement, and (2) object to the selection of the subcontractor.

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.

Section 4.07 Right to Access Facilities⁹

(a) Reasonable Access to HHSC Service Facilities

During the Term, at no cost to CONTRACTOR and to the extent necessary for CONTRACTOR to provide the Services, HHSC shall provide CONTRACTOR with reasonable access to the facilities of HHSC or its contractors appropriate to the Project (the HHSC Service Locations).

(b) No Other Clients Permitted

Unless otherwise approved by HHSC, CONTRACTOR may use the HHSC Service Locations only in connection with the provision of the Services to HHSC and not for the provision of services to other clients or customers of CONTRACTOR.

(c) Policies and Procedures of HHSC

While working at any of the HHSC Service Locations, CONTRACTOR personnel will comply with HHSC's or such HHSC contractor's standard workplace security, administrative, safety and other

policies and procedures applicable to HHSC's or such HHSC contractor's own employees. HHSC shall provide CONTRACTOR with a copy of each such policy and procedure as necessary.

(d) Advance Notice to HHSC of Need To Access HHSC Facilities

CONTRACTOR will provide HHSC with reasonable prior written notice of a need for CONTRACTOR to obtain access to HHSC facilities. All information learned or exchanged in connection with such access, will constitute, as appropriate, HHSC Confidential Information or confidential information under a pre-existing agreement of HHSC, except to the extent that the Texas Public Information Act or other applicable law may subject such information to public disclosure. CONTRACTOR will be required to sign reasonable confidentiality agreements with either HHSC or an HHSC contractor, as required by HHSC.

(e) Access to CONTRACTOR Service Locations

During the Term, at no cost to HHSC and to the extent necessary for HHSC to supervise the Services and perform its own functions, CONTRACTOR shall provide HHSC with reasonable access to the facilities of CONTRACTOR or its contractors appropriate to the Project (the CONTRACTOR Service Locations).

(f) HHSC Use for Supervisory Purposes

HHSC may use the CONTRACTOR Service Locations in connection with its supervision and functions related to and in support of the provision of the Services provided by CONTRACTOR to HHSC.

(g) CONTRACTOR Policies and Procedures

While working at any of the CONTRACTOR Service Locations, HHSC personnel will comply with CONTRACTOR's reasonable workplace security, administrative, safety and other policies and procedures applicable to CONTRACTOR's own employees to the extent they are consistent with comparable policies and procedures of HHSC.

(h) Prior Notice to CONTRACTOR

HHSC will provide CONTRACTOR with reasonable prior notice of a need for HHSC to obtain access to HHSC facilities.

Article 5. Governing Law and Regulations

Section 5.01 Governing law and venue.

This 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 11.12, Dispute Resolution, proper venue claim arising from this Agreement will be in a court of competent jurisdiction in Travis County, Texas.

Section 5.02 CONTRACTOR responsibility for compliance with laws and regulations.

(a) CONTRACTOR is responsible for compliance with all laws, regulations, and

⁹ Section added to UTCs.

administrative rules that govern the performance of the Services including, but not limited to, all State and Federal tax laws, State and Federal employment laws, State and Federal regulatory requirements, and licensing provisions.

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

(c) CONTRACTOR warrants that the Services comply with all applicable Federal, State, and County laws, regulations, codes, ordinances, guidelines, and policies. CONTRACTOR will indemnify HHSC from and against any losses, liability, claims, damages, penalties, costs, fees, or expenses arising from or in connection with CONTRACTOR's failure to comply with or violation of any such law, regulation, code, ordinance, or policy.

Section 5.03 Immigration Reform and Control Act of 1986.

CONTRACTOR shall comply with the requirements of the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990 (8 U.S.C. §1101, *et seq.*) regarding employment verification and retention of verification forms for any individual(s) hired on or after November 6, 1986, who will perform any labor or services under this Agreement.

Section 5.04 Compliance with state and federal anti-discrimination laws.

(a) CONTRACTOR agrees to comply with state and federal anti-discrimination laws, including without limitation:

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

CONTRACTOR agrees to comply with all amendments to the above-referenced laws, and all requirements imposed by the regulations issued pursuant to 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.

(b) CONTRACTOR agrees to comply with Title VI of the Civil Rights Act of 1964, and its implementing regulations at 45 C.F.R. Part 80 or 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 agrees to 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 agrees to 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.

(c) CONTRACTOR agrees to 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 shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(d) Upon request, CONTRACTOR will provide HHSC with copies of all of the CONTRACTOR'S civil rights policies and procedures.

(e) CONTRACTOR must notify HHSC's Civil Rights Office of any civil rights complaints received relating to its performance under this Agreement. This notice must be delivered no more than ten (10) calendar days after receipt of a complaint. Notice provided pursuant to this section must be directed to:

HHSC Civil Rights Office
701 W. 51st 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 Environmental protection laws.

CONTRACTOR agrees to comply with the applicable provisions of federal environmental protection laws as described in this Section:

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

CONTRACTOR agrees to 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 agrees to 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 agrees to 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 agrees to 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. §740 *et seq.*).

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

CONTRACTOR agrees to 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).

Article 6. Service Levels and Performance Measurement

Section 6.01 Performance measurement.

Satisfactory performance of this Agreement will be measured by:

(a) Adherence to this Agreement, including all representations and warranties;

(b) 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;

(c) Delivery of the Services and Deliverables in accordance with the service levels and availability proposed in its Proposal and as finally approved or accepted by HHSC;

(d) Results of audits performed by HHSC or its representatives in accordance with Article 8;

(e) Timeliness, completeness, and accuracy of required reports; and

(f) Achievement of performance measures developed by CONTRACTOR and HHSC and as

modified from time to time by written agreement during the Initial Term of this Agreement.

Article 7. Amendments, Modifications, and Change Orders

Section 7.01 Amendments and modifications.

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

This 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.*

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

Section 7.02 Required compliance with amendment modification procedures.¹⁰

(a) *No Changes Without Formal Amendment.*

No different or additional services, work, or products will be authorized or performed except pursuant to an amendment or modification of this Agreement that is executed in compliance with this article. No waiver of any term, covenant, or condition of this 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.

(b) *Process for Change Orders and Amendments*

All modifications to the Agreement must be accomplished through the formal amendment process set forth herein.

(1) HHSC or CONTRACTOR may propose changes in the Services, Deliverables, or other aspects of this Agreement.

(2) If HHSC proposes a change, it shall deliver a written notice to CONTRACTOR describing the proposed change. CONTRACTOR must prepare a response, at no additional cost to HHSC, within 30 calendar days, or within another time period that is mutually agreed upon by both Parties. The response must specify:

(A) The effect, if any, of the proposed change on the amounts payable by HHSC under this Agreement and the manner used to calculate such effect;

(B) The effect, if any, of the proposed changes on CONTRACTOR's performance of its obligations

¹⁰ Language from UTCs revised.

under this Agreement, including the effect on the Services or Deliverables

(C) The anticipated time schedule for implementing the proposed changes; and

(D) Any other information requested by HHSC or reasonably necessary for HHSC to make an informed decision regarding the offer.

(c) **CONTRACTOR Indemnifies HHSC**

If HHSC accepts CONTRACTOR's response, CONTRACTOR must indemnify and hold harmless HHSC from and against any losses, costs, or expenses resulting from any inaccurate or incomplete information contained in the response.

(d) **Notice of Change Request**

If CONTRACTOR desires to propose a change, it must deliver a change request to HHSC that includes the information described in Section 7.2(b)(2), above.

(e) **Execution of Amendments**

If HHSC accepts CONTRACTOR's proposal or change request, the Parties will draft and execute an amendment to this Agreement. The amendment must be signed by HHSC's Executive Commissioner or his designee, and a duly authorized CONTRACTOR representative.

Article 8. Audit and Financial Compliance

Section 8.01 Financial record retention and audit.

CONTRACTOR agrees to maintain, and require its subcontractors to maintain, supporting financial information and documents that are adequate to ensure that claims are made in accordance with applicable Federal and State requirements, and are sufficient to ensure the accuracy and validity of CONTRACTOR invoices. Such documents, including all original claims forms, will be maintained and retained by CONTRACTOR or its subcontractors for a period of seven (7) 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 this 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) 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 Scope of Work.

(b) CONTRACTOR and its subcontractors must provide the access described in this Section upon HHSC's request. This request may be for, but is not limited to, the following purposes:

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

(c) The access required must be provided to the following officials and/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) CONTRACTOR agrees to provide the access described wherever CONTRACTOR maintains such books, records, and supporting documentation. 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.

Section 8.03 Audits of Services, Deliverables and inspections.

(a) Upon notice from HHSC, 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; and
- (2) CONTRACTOR Software and Equipment.

(b) 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 or 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 this Article. 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 this Section 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; 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 such 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 that 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 pursuant to this Agreement, the Party seeking the set-off may deduct the entire amount owed against the charges otherwise payable or expenses owed to it under this 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 such 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 its Cost Proposal, 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 upon 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 for by CONTRACTOR.

Section 9.03 Disputed fees.¹¹

(1) If HHSC disputes payment of all or any portion of an invoice from the CONTRACTOR, HHSC will notify the CONTRACTOR of such dispute and both Parties will attempt in good faith to resolve the dispute. HHSC shall not be required to pay any disputed portion of a CONTRACTOR invoice.

Notwithstanding any such dispute, the CONTRACTOR must continue to perform the Services and produce Deliverables in compliance with the terms of this Agreement pending resolution of such dispute so long as all undisputed amounts continue to be paid to CONTRACTOR.

¹¹ Language from UTCs revised.

(2) For purposes of this section 9.03 the dispute resolution process may be invoked by either Party for the purpose of determining

(A) the amount, if any, owed by the Contractor;

(B) the amount, if any, of such withheld amounts that are not in dispute;

(C) the amount, if any, of any reduction of CONTRACTOR'S liability due to the section below on liability, if applicable; and the method by which disputed and undisputed amounts may be withheld, credited, and/or released and arranging for any payments that are not in dispute to be paid to CONTRACTOR.

(3) The HHSC Project Manager and the CONTRACTOR Project Director will meet no later than 15 business days after a Party invokes the dispute resolution process pursuant to this Section 9.03. In the event the Parties' representatives are unable to resolve the dispute the Parties will then follow the procedure set out in Remedies and Disputes section 11.12 below.

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 this 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 this 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 this 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. Specifically, 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 this Agreement will be paid for by the CONTRACTOR.

Section 9.07 No increase in charges.

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

Article 10. Disclosure and Confidentiality of Information

Section 10.01 Confidentiality.

(a) CONTRACTOR and all subcontractors, consultants, or agents under the Agreement must 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 Confidential Information to the extent that confidential treatment is provided under law and regulations.

(b) CONTRACTOR is responsible for understanding the degree to which information obtained through performance of this Agreement is confidential under State and Federal law, regulations, or administrative rules.

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

(d) CONTRACTOR must have a system in effect to protect all records and all other documents deemed confidential under this Agreement that are maintained in connection with the activities funded under the Agreement. Any disclosure or transfer of Confidential Information by CONTRACTOR, including information required by HHSC, will be in accordance with applicable law. If the CONTRACTOR receives a request for information deemed confidential under this Agreement, the CONTRACTOR will immediately notify the State of such request, and will make reasonable efforts to protect the information from public disclosure.

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

(f) In the event of the expiration of the Agreement or termination of the Agreement for any reason, all Confidential Information of a Party disclosed to and all copies thereof made by the other Party shall be returned to the disclosing Party or, at the disclosing Party's option, erased or destroyed. The recipient of the Confidential Information shall provide the disclosing Party certificates evidencing such destruction.

(g) The obligations in this Section shall not restrict any disclosure by a Party pursuant to any applicable law, or by order of any court or government

agency, provided that the disclosing Party shall give prompt notice to the non-disclosing Party of such order.

(h) With the exception of confidential HHSC Program recipient or client information, Confidential Information of a Party shall not be afforded the protection of the Agreement if such 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 10.02 Disclosure of HHSC's Confidential Information.

(a) CONTRACTOR will immediately report to HHSC any and all unauthorized disclosures or uses of HHSC's Confidential Information of which it or its subcontractor(s), consultant(s), or agent(s) is aware or has knowledge. CONTRACTOR acknowledges that any publication or disclosure of HHSC's Confidential Information to others 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 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 HHSC's Confidential Information.

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

Section 10.03 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, Chapter 552 of the Texas Government Code, that consists of the CONTRACTOR'S Confidential Information, including

data to which CONTRACTOR 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) 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.

Section 10.04 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 of 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 to represent CONTRACTOR in such resistance or to retain counsel to so represent CONTRACTOR or to reimburse CONTRACTOR for reasonable attorneys' fees and expenses incurred in resisting such access.

(e) If a court of competent jurisdiction orders CONTRACTOR to produce documents, disclose data, or otherwise breach the confidentiality obligations imposed in the Agreement, or otherwise with respect to maintaining the confidentiality, proprietary nature,

and secrecy of Privileged Work Product, CONTRACTOR will not be liable for breach of such obligation.

Section 10.05 Unauthorized acts.

Each Party agrees to:

- (1) Notify the other Party promptly of any unauthorized possession, use, or knowledge, or attempt thereof, of any 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 10.06 Legal action.

Neither Party may commence any legal action or proceeding in respect to any unauthorized possession, use, or knowledge, or attempt thereof, of Confidential Information by any person or entity, which action or proceeding identifies the other Party or its Confidential Information without such Party's consent.

Section 10.07 Information Security

(a) CONTRACTOR and all subcontractors, consultants, or agents under the Agreement (collectively "CONTRACTOR") must comply with the following:

- (1) Health and Human Services Enterprise Information Security Standards and Guidelines and
- (2) Title 1, Sections 202.1 and 202.3 through 202.28, Texas Administrative Code.

(b) CONTRACTOR must comply with the following, as applicable:

- (1) The Federal Information Security Management Act of 2002 (FISMA);
- (2) The Health Insurance Portability and Accountability Act of 1996 (HIPAA);
- (3) The Health Information Technology for Economic and Clinical Health Act (HITECH Act);
- (4) Publication 1075 – Tax Information Security Guidelines for Federal, State and Local Agencies;

- (5) National Institute of Standards and Technology (NIST) Special Publication 800-66 Revision 1 – An Introductory Resource Guide for Implementing the Health Insurance Portability and Accountability Act (HIPAA) Security Rule;
- (6) NIST Special Publication 800-53 Revision 3 – Recommended Security Controls for Federal Information Systems and Organizations; and
- (7) NIST Special Publication 800-47 – Security Guide for Interconnecting Information Technology Systems.

(c) In addition to the requirements expressly stated in this Section, CONTRACTOR must comply with any other State or Federal law, regulation, or administrative rule relating to the specific HHSC program area that CONTRACTOR supports.

(d) Upon reasonable notice, CONTRACTOR must provide, and cause its subcontractors and agents to provide, HHSC or its designee, prompt, reasonable, and adequate access to any information security records, books, documents, and papers that are directly pertinent to the performance of the Scope of Work including, but not limited to:

- (1) CONTRACTOR information security policies;
- (2) CONTRACTOR information security procedures;
- (3) CONTRACTOR information security standards;
- (4) CONTRACTOR information security guidelines;
- (5) CONTRACTOR security plan in compliance with NIST Special Publication 800-53 Revision 3;
- (6) CONTRACTOR security violation reports;
- (7) CONTRACTOR employee security acknowledgement agreements; and
- (8) Lists of CONTRACTOR's employees with authorized access to HHSC confidential information.

Items (1) through (5) above are subject to HHSC's review and approval. Neither HHSC's review or approval, nor its fail to review or approve, will relieve, waive or satisfy any of CONTRACTOR's obligations under this Agreement.

(e) CONTRACTOR will provide, and will cause its subcontractors and agents to provide, to HHSC periodic written certifications of compliance with controls and provisions relating to information security, including but not limited, those related to confidential data transfers and the handling and disposal of Protected Health Information (PHI), Electronic Protected Health Information (EPHI), and Personally Identifiable Information (PII). Acceptable forms of written compliance may be, but are not limited to:

-
- (1) Statement on Auditing Standards No.70, Service Organizations (SAS-70) Report;
 - (2) General Security Controls Audit;
 - (3) Application Controls Audit;
 - (4) Vulnerability Assessment; and
 - (5) Network/Systems Penetration Test.

Article 11. Remedies and Disputes

Section 11.01 Understanding and expectations.

The remedies described in this Section are directed to CONTRACTOR's timely and responsive performance of the Services and production of 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) Performance Remedies / Damages¹²

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.

(c) Proportionate Liability

So long as CONTRACTOR could not, by taking reasonable and appropriate steps to mitigate the harm caused by its noncompliance, have reduced the proportionate liability, in the event that one of the parties below in subsection 1-4 fail to act or take action which negatively affects CONTRACTOR's ability to meet its obligations, CONTRACTOR will be liable to HHSC only for the proportionate amount of liability attributable to CONTRACTOR's breach. Additionally, CONTRACTOR's liability to HHSC will be reduced if and to the extent MAXIMUS can demonstrate to HHSC or to a lawful authority that any action or inaction by any of the following entities contributed to the liability:

- (1) HHSC, its employees, agents, or contractors;
- (2) A health and human services agency
- (3) Another State of Texas or Federal agency that oversees, approves, monitors, or audits HHSC or this Agreement;
- (4) A Third Party (other than a Subcontractor, supplier, affiliate, or other entity related to CONTRACTOR) outside of CONTRACTOR's reasonable control.

(d) CONTRACTOR Liability for Reliance on HHSC

If HHSC fails to timely perform an obligation under this Agreement and CONTRACTOR demonstrates that such delay materially affects scope, schedule or cost of performing the Services, the Parties shall execute an appropriate Change Order in accordance with the provisions of Article 7 to account for such delay.

Such Change Order will address appropriate reimbursement or other consideration for reasonable, necessary, actual and substantiated costs paid or incurred by CONTRACTOR that were directly caused by the HHSC delay. Notwithstanding the foregoing, CONTRACTOR shall not have to reimburse HHSC for any costs beyond those permitted under the Agreement.

(e) 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

¹² Section 11.02 (b) - (d) added to the UTCs.

not result in a material deficiency or delay in the implementation or operation of the Services.

(2) CONTRACTOR will, within three (3) business days (or another date approved by HHSC) of receipt of written notice of a non-material deficiency, provide the HHSC Project Manager 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, 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.

(f) *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 breach of this 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; and

(C) A specific proposal to cure or resolve 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 unreasonably be withheld.

(4) HHSC will notify CONTRACTOR in writing of HHSC's final disposition of HHSC's concerns. 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 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 alleged breach and pending corrective action, if necessary, by CONTRACTOR or a decision by HHSC to terminate 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.

(g) *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 this 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 and/or programmatic reports to be submitted by CONTRACTOR;

(D) Decline to renew or extend the Agreement; or

(E) 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 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 in accordance with this Section.

(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.

(h) *Damages.*

(1) HHSC will not be entitled to ANY INCIDENTAL, INDIRECT or SPECIAL damages. HHSC will be entitled to DIRECT and CONSEQUENTIAL DAMAGES resulting from the CONTRACTOR'S failure to comply with any of the terms of the Agreement. However, CONTRACTOR shall not be liable to HHSC under any circumstance or legal theory for exemplary damages and/or punitive damages. This contract for Eligibility Support Services provides essential services connecting Texans to services including the Children's Health Insurance Program (CHIP), Medicaid, Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and other State and Federal health and human services programs. It is essential that the functions contemplated by this Agreement are performed as described. The parties acknowledge the following:

(i) HHSC must provide eligibility services as contemplated under this Agreement in a timely, complete, and seamless manner.

(ii) The program recipients who will utilize these eligibility services rely on the services being provided in a timely, complete, and seamless manner.

(iii) CONTRACTOR'S failure to provide these eligibility services in the manner specified in this Agreement will adversely impact both HHSC and the program recipients.¹³

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 and/or to meet specific performance standards set forth in the Agreement are difficult or impossible to determine with precise accuracy. Therefore, liquidated damages will be assessed in writing against and paid by the CONTRACTOR for failure to meet any aspect of the responsibilities of the Agreement and/or to meet the specific performance standards identified by the HHSC. Liquidated damages will be assessed if HHSC determines such failure is the fault of the CONTRACTOR (including the CONTRACTOR'S subcontractors and/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 and/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.

(2) 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.

(5)¹⁴ HHSC may assess the Progressive Liquidated Damages under the Liquidated Damages Methodology contained in Exhibit E to this Agreement, HHSC will notify CONTRACTOR's Project Manager in writing of HHSC's intention to assess Progressive Liquidated Damages.

(A) Unless the Parties otherwise agree as described in subsection (ii) below, CONTRACTOR must correct the performance deficiencies identified in HHSC's written notification of HHSC's intention to assess Progressive Liquidated Damages within 30 calendar days after CONTRACTOR's receipt of HHSC's written notification.

(B) If the Parties agree that a CONTRACTOR performance deficiency cannot reasonably be remedied within 30 calendar days after CONTRACTOR's receipt

¹³ The foregoing section of (h) (1) added to the UTCs.

¹⁴ Section 11.02 (h)(5) added to the UTCs.

of HHSC's written notification of HHSC's intention to assess Progressive Liquidated Damages, then the Parties may agree to extend the 30-calendar-day period for a reasonable period, not to exceed 90 calendar days from the date of HHSC's written notification.

(C) If the Parties do not mutually agree on the length of the extension of the 30-day cure period described above, HHSC may determine a reasonable period to cure and will notify CONTRACTOR's Project Manager in writing of HHSC's determination.

(i) *Equitable Remedies*

(1) CONTRACTOR acknowledges that, if CONTRACTOR breaches (or attempts or threatens to breach) its obligation under this 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).

(j) *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 may 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, this Agreement will terminate upon the Expiration Date unless extended in accordance with the terms of this Agreement, or terminated sooner under the terms of this Agreement. Prior to completion of the Initial Term and any extensions or renewal thereof, all or a part of this Agreement may be terminated for any of the following reasons:

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

This 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.*

HHSC reserves the right to terminate this Agreement, in whole or in part, upon the following conditions:

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

HHSC may terminate this 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 this 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 this Agreement.

(3) *Breach of confidentiality.*

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

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

HHSC may terminate this 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 this Agreement.

(5) *Termination for gifts and gratuities.*

(A) HHSC may terminate this 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 any thing of value 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 shall enforce this provision against a subcontractor who has offered or given any thing 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 pursuant to 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; and

(2) Such failure constitutes Cause as described in this Section.

(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 and/or Federal law.

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

Notwithstanding any other provision of this Agreement, if funds for the continued fulfillment of this 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 this Agreement at no additional cost and with no penalty whatsoever by giving prior written notice documenting the lack of funding.

(7) *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 insolvency.*

(A) HHSC may terminate the Agreement if CONTRACTOR:

(1) Files for bankruptcy;

(2) Becomes or is declared insolvent, or is the subject of any proceedings related to its liquidation, insolvency, or the appointment of a receiver or similar officer for it;

(3) Makes an assignment for the benefit of all or substantially all of its creditors; or

(4) Enters into an Agreement for the composition, extension, or readjustment of substantially all of its obligations.

(B) CONTRACTOR agrees to pay for all reasonable expenses of HHSC including the cost of counsel, incident to:

(1) The enforcement of payment of all obligations of the CONTRACTOR by any action or participation in, or in connection with a case or proceeding under Chapters 7, 11, or 13 of the United States Bankruptcy Code, or any successor statute;

(2) A case or proceeding involving a receiver or other similar officer duly appointed to handle the CONTRACTOR's business; or

(3) A case or proceeding in a State court initiated by HHSC when previous collection attempts have been unsuccessful.

(9) *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 this 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 this 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 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 this 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 this 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, 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 and/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 this Agreement. The Parties express their mutual commitment to using all reasonable and informal means of resolving disputes prior to invoking a remedy provided elsewhere in this Section.

(b) Duty to negotiate in good faith.

Any dispute that in the judgment of any Party to this Agreement may materially or substantially affect the performance of any Party will be reduced to writing and delivered to the other Party. The Parties must then negotiate in good faith and use every reasonable effort to resolve such dispute and the Parties shall not resort to any formal proceedings unless such Party has complied in good faith with the process set forth in subsections 1-3 below, which process has resulted in such Party's reasonable determination that a negotiated resolution is not possible, or unless such Party has determined that compliance with the process could result in a waiver, loss or diminution of a Party's rights or remedies under the Agreement or applicable statute and they have reasonably determined that a negotiated resolution is not possible. The resolution of any dispute disposed of by agreement between the Parties shall be reduced to writing and delivered to all Parties within ten (10) business days.

(1) CONTRACTOR and HHSC will use their reasonable best efforts to resolve disputes arising in the normal course of business at the lowest organizational level between each Party's staff with appropriate authority to resolve such disputes. When

a dispute between CONTRACTOR and HHSC cannot be resolved in the normal course of business, the HHSC Project Manager and the CONTRACTOR Project Director will each notify the other in writing of the dispute, specifying the disputed issues. The HHSC Project Manager and CONTRACTOR Project Director will use their reasonable best efforts to resolve the dispute within seven Business Days of submission by either Party to the other of such notice.

(2) If the HHSC Project Manager and the CONTRACTOR Project Director are unable to resolve the dispute within such period, the matter will be escalated to the next highest levels within the CONTRACTOR and HHSC organizations with responsibility over the program or business area that pertains to the subject matter of the dispute, who shall have 12 Business Days to resolve the dispute.

(3) If the dispute cannot be resolved within such period, the matter will be escalated to the CONTRACTOR Chief Executive Officer and the Executive Commissioner or his or her designee. If the dispute cannot be resolved within a reasonable period of time, either Party may pursue its available legal and equitable remedies.¹⁵

(c) *Claims for breach of Agreement.*

(1) *General requirement.* As required by Chapter 2260, Government Code, CONTRACTOR's claim for breach of this 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 expressly agree that the CONTRACTOR's claim for breach of this 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 specifically 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 expressly 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 expressly 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 this Agreement by HHSC nor any other conduct of any representative of HHSC relating to this Agreement shall 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 pursuant to 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 this 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 Orders.

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 this Agreement; or

(2) CONTRACTOR's prudent and diligent performance of the Services in compliance with

¹⁵ Section 11.11 (b) has been revised from the that found in the UTCs.

instructions given by HHSC in accordance with Section 1.03 (relating to implied authority) and Section 3.03 (relating to delegation of authority) of this Agreement.

(d) CONTRACTOR will ship all Equipment and Software purchased and Third Party Software licensed pursuant to 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.

(e) CONTRACTOR's General Liability¹⁶

(1) SUBJECT TO THE EXCLUSIONS SET FORTH IN SUBSECTION (4) OF THIS SECTION 11.12(e), IF CONTRACTOR SHALL BE FOUND LIABLE TO HHSC FOR ANY MATTER RELATING TO OR ARISING FROM THIS AGREEMENT, WHETHER BASED UPON AN ACTION OR CLAIM IN CONTRACT, WARRANTY, EQUITY, NEGLIGENCE, INTENDED CONDUCT OR OTHERWISE (INCLUDING ANY ACTION OR CLAIM ARISING FROM THE ACTS OR OMISSIONS, NEGLIGENCE OR OTHERWISE, OF THE LIABLE PARTY), THE AGGREGATE AMOUNT OF DAMAGES RECOVERABLE AGAINST CONTRACTOR FOR DAMAGES WITH RESPECT TO ANY AND ALL BREACHES, PERFORMANCE, NONPERFORMANCE, ACTS OR OMISSIONS HEREUNDER WILL NOT EXCEED THE LIABILITY CAP DESCRIBED IN SUBSECTION (4) OF THIS SECTION 11.12(e).

(2) The limitation described in subsection (4) of this Section 11.12 will not apply to CONTRACTOR's obligations under Article 10 (relating to Confidential Information) or Article 14.01 (relating to infringement and misappropriation).

(3) Each Party has a duty to mitigate the damages that would otherwise be recoverable from the other Party pursuant to this Agreement by taking such actions as may be required under Texas law to reduce or limit the amount of such damages.

(4) CONTRACTOR's limitation of liability under this Agreement during the first year shall be equal to \$50 million; CONTRACTOR's limitation of liability for subsequent years shall be \$50 million plus 35% of the amounts actually paid during the second year of the Agreement.

(5) If CONTRACTOR fails to meet a Key Performance Requirement with respect to which Liquidated Damages apply, payment by CONTRACTOR of such Liquidated Damages shall reduce CONTRACTOR's maximum aggregate liability to HHSC under Section 11.12(e)(4) hereof by an amount equal to the Liquidated Damages paid.

Article 12. Assurances and Certifications

Section 12.01 Proposal certifications.

CONTRACTOR acknowledges its continuing obligation to comply with the requirements of the following certifications contained in its Proposal, and will immediately notify HHSC of any changes in circumstances affecting these certifications:

- (1) Federal lobbying;
- (2) Debarment and suspension;
- (3) Child support; and
- (4) Nondisclosure statement.

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 this Agreement. CONTRACTOR warrants that it has no interest and will not acquire any direct or indirect interest that would conflict in any manner or degree with its performance under this 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 this 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

¹⁶ Section 11.12(e) added to the UTCs.

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 this 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 or 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 this 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 this Agreement.

CONTRACTOR will not recruit or employ any HHSC professional or technical personnel who have

worked on projects relating to the subject matter of this Agreement, or who have had any influence on decisions affecting the subject matter of this Agreement, for two (2) years following the completion of this 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 and/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 a 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 this 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 hereby assigns to HHSC any and all claims for overcharges associated with this contract arising under the anti-trust laws of the United States, 15 U.S.C.A. Section 1, *et seq.* (1973), as amended, and the anti-trust laws of the State of Texas, TEX. BUS. & COMM. CODE ANN. Section 15.01, *et seq.* (1967), as amended.

Article 13. Representations and Warranties

Section 13.01 Authorization.

(a) The execution, delivery and performance of this 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 this Agreement and perform its obligations under this Agreement.

(b) CONTRACTOR has obtained all licenses, certifications, permits, and authorizations necessary to perform the Services under this Agreement and currently is in good standing with all regulatory agencies that regulate any or all aspects of CONTRACTOR's performance of this Agreement. CONTRACTOR will maintain all required certifications, licenses, permits, and authorizations during the term of this 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 this Agreement will be provided in a manner consistent with the standards of quality and integrity as outlined in this Agreement, the RFP, and CONTRACTOR's Proposal.

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

(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 this Agreement.

Section 13.04 Warranty of deliverables.

CONTRACTOR warrants that Deliverables developed and delivered under this 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 this Agreement without the express 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.

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 encourage 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 PRICES AGREED TO BY THE PARTIES OR OTHERWISE ADJUDICATED.

Article 16. Special Terms and Conditions

If checked, the following provisions apply to this contract.

Note: Section 16.08 Historically Underutilized Business Participation Requirements APPLIES IF HHSC determined that sub-contracting opportunities were probable for the procurement/contract.



Section 16.01 HIPAA.

(a) Definitions.

For purposes of this Section:

(1) **"Business Associate"** has the meaning given the term under 45 C.F.R. §160.103.

(2) **"HIPAA"** means the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (42 U.S.C. §§1320d—1320d-8).

(3) **"Protected Health Information"** has the meaning given the term in 45 C.F.R. §164.501, limited to the information created or received by CONTRACTOR from or on behalf of HHSC.

All terms used in this Section that are not otherwise defined in this Agreement have the same meaning as those terms in the Privacy Rule, 45 C.F.R. parts 160 and 164

(b) Background.

(1) Under the terms of this Agreement, HHSC may provide or make available to Contractor, or Contractor may create or receive on behalf of HHSC, certain HHSC Confidential Information that is and must be afforded special treatment and protection under HIPAA in conjunction with Services or Deliverables that are being provided to HHSC by Contractor.

(2) Contractor will have access to or receive from HHSC, or create or receive on behalf of HHSC, certain electronic Protected Health Information that must be safeguarded in accordance with this Agreement and the security rules adopted by the U.S. Department of Health and Human Services (HHS) under HIPAA, 45 C.F.R. §§ 164.302-.318.

(3) Contractor is a Business Associate of HHSC.

(4) The obligations of Contractor under this section are in addition to the duties of Contractor with respect to HHSC Confidential Information described elsewhere in this Agreement.

(c) *Uses and disclosures.*

Except as otherwise limited by this Agreement, CONTRACTOR may:

(1) Use or disclose Protected Health Information to perform the Services and accomplish the purposes of this Agreement, provided that:

(A) Such use or disclosure would not violate the Privacy Rule if the disclosure were made by HHSC; and

(B) Such use or disclosure is limited to the minimum necessary to accomplish the purposes of the use or disclosure;

(2) Use Protected Health Information for the proper management and administration of CONTRACTOR or to carry out Contractor's legal responsibilities;

(3) Disclose Protected Health Information for the proper management and administration of CONTRACTOR or to carry out Contractor's legal responsibilities if:

(A) Disclosure is required by law; or

(B) Contractor obtains assurances from the person to whom the information is disclosed that the person will:

(i) Maintain the confidentiality of the Protected Health Information;

(ii) Use or further disclose the information only as required by law or for the purpose for which it was disclosed to the person; and

(iii) Notify Contractor of any breaches of confidentiality of which the person is aware; and

(4) Use Protected Health Information to provide data aggregation services to HHSC, as that term is defined at 45 C.F.R. §164.501 and permitted by 45 C.F.R. §164.504(e)(2)(i)(B).

(d) *Contractor's commitment and obligations.*

Contractor agrees that it will:

(1) Not use or disclose Protected Health Information provided by, made available by, or created or received on behalf of HHSC other than as permitted or required by this Agreement or as required by law;

(2) Establish and maintain appropriate safeguards to prevent any use or disclosure of Protected Health Information other than as provided for by this Agreement;

(3) Have procedures in place for mitigating, to the maximum extent practicable, any harmful effect of a use or disclosure of Protected Health Information that is contrary to this Agreement or the Privacy Rule;

(4) Immediately report to HHSC any use or disclosure of Protected Health Information not provided for or allowed by this Agreement of which Contractor becomes aware;

(5) Enter into a subcontract anytime Contractor proposes to provide or make available Protected Health Information to any subcontractor or agent. Such subcontract or agreement must:

(A) Contain the same terms, conditions, and restrictions on the use and disclosure of Protected Health Information and restrictions on the security of information as contained in this Agreement; and

(B) Be approved as to the form of the terms, conditions, and restrictions by HHSC prior to entering into any such agreement;

(6) Make Protected Health Information in a designated records set available to HHSC or, as directed by HHSC, to the subject of the Protected Health Information, in compliance with the requirements of 45 C.F.R. §164.524.

(7) Make Protected Health Information in a designated records set available for amendment and will incorporate any amendments to this information that HHSC directs or agrees to pursuant to 45 C.F.R. §164.526.

(8) Document and make available to HHSC the Protected Health Information required to provide an accounting of disclosures, in accordance with 45 C.F.R. §164.528.

(9) Make internal practices, books, and records relating to the use or disclosure of Protected Health Information received from, or created or received by the Contractor on behalf of HHSC, available to the Secretary of Health and Human Services or the Secretary's designee for purposes of determining compliance with the privacy regulations.

(10) Return, destroy, or continue to maintain appropriate safeguards for all Protected Health Information received from HHSC or created or received on behalf of HHSC once Contractor finishes providing Services or Deliverables under this Agreement:

(A) If Contractor destroys the information, it must certify to HHSC that the information has been destroyed;

(B) Contractor may not elect to destroy information that must be retained under federal or state law; and

(C) Contractor must maintain appropriate safeguards for the information as long as Contractor has such Protected Health Information;

(11) Develop and implement a system of sanctions for any Subcontractor or Contractor Personnel that violate this Agreement or the Privacy Rule.

(12) Implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the electronic Protected Health Information that it creates, receives, maintains, or transmits on behalf of HHSC as required by 45 C.F.R. §§ 164.302-.318.

(13) Immediately report to HHSC any security incident of which it becomes aware.

(14) Make internal practices, books, and records relating to the security of information received from or created or received by Contractor on behalf of HHSC available to the Secretary of Health and Human Services or the Secretary's designee for purposes of determining compliance with the security rules.

(15) Develop and implement a system of sanctions for any Subcontractor or Contractor Personnel that violate this Agreement or the security rules.

(e) *Ownership of Protected Health Information.*

(1) The Protected Health Information shall be and remain the property of HHSC.

(2) Contractor agrees it acquires no title or rights to the information, including any de-identified information, as a result of this Agreement.

(f) *Injunctive relief; survival of terms.*

(1) Notwithstanding any rights or remedies provided for in this Agreement, HHSC retains all rights to seek injunctive relief to prevent or stop the unauthorized use or disclosure of Protected Health Information or a violation of the security rules by Contractor or any Subcontractor, Contractor Personnel, or third party that received information from Contractor.

(2) The duties and obligations imposed on Contractor under this section of this Agreement will survive the expiration of the Agreement until all Protected Health Information provided by HHSC to Contractor, or created or received by Contractor on behalf of HHSC, is destroyed or returned to HHSC.



Section 16.02 Technology access.

(a) The CONTRACTOR expressly acknowledges that State funds may not be expended in connection with the purchase of an automated information system unless that system meets certain statutory requirements relating to accessibility by persons with visual impairments. Accordingly, the CONTRACTOR represents and warrants to HHSC that the technology provided to HHSC for purchase is capable, either by virtue of features included within the technology or because it is readily adaptable by use with other technology, of:

(1) Providing equivalent access for effective use by both visual and non-visual means;

(2) Presenting information, including prompts used for interactive communications, in formats intended for non-visual use; and

(3) Being integrated into networks for obtaining, retrieving, and disseminating information used by individuals who are not blind or visually impaired.

(b) For purposes of this Section, the phrase "equivalent access" means a substantially similar ability to communicate with or make use of the technology, either directly by features incorporated within the technology or by other reasonable means such as assistive devices or services that would constitute reasonable accommodations under the Americans with Disabilities Act or similar State or Federal laws. Examples of methods by which equivalent access may be provided include, but are not limited to, keyboard alternatives to mouse commands and other means of navigating graphical displays, and customizable display appearance.

(c) In addition, all technological solutions offered by the CONTRACTOR must comply with the requirements of Texas Government Code §531.0162. This includes, but is not limited to providing technological solutions that meet federal accessibility standards for persons with disabilities, as applicable.



Section 16.03 Member records.

CONTRACTOR and any subcontractor shall not transfer an identifiable Member record, including a patient record, to another entity or person without written consent from the Member or someone authorized to act on his or her behalf; however, HHSC may require CONTRACTOR, or any subcontractor, to transfer a Member record to another agency or to HHSC if the transfer is necessary to protect either the

confidentiality of the record or the health and welfare of the Member.

If at any time during the Initial Term, this Agreement is terminated, HHSC may require the transfer of Member records, upon written notice to CONTRACTOR, to another entity that agrees to continue performance of the Agreement, as consistent with federal and state laws and applicable releases.

The term "Member Record" for this Section 16.03 means only those administrative, enrollment, case management and other such records maintained by CONTRACTOR and is not intended to include patient records maintained by participating network providers.

☐ **Section 16.04 Financial/performance audits.**

(a) The State of 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 vendor used by HHSC in HHSC's operation of a part of the State Medicaid program. "Medicaid vendor" 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 thirty (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 thirty (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 the "Financial Report Requirements" portion of Section 6 of this RFP. 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 16.05 Audit software.**

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

☐ **Section 16.06 Ownership and licenses.**

(a) *Custom Software.*

The Parties agree that any Deliverable, including without limitation 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, the 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, without limitation, the Custom Software and associated Documentation on Final Acceptance or as otherwise provided in the Agreement.

(2) CONTRACTOR will furnish such 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 such Deliverable 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 agrees to assign, and hereby assigns, all right, title,

and interest in and to Deliverables, including without limitation all copyrights, inventions, patents, trade secrets, and other proprietary rights therein (including renewals thereof) to HHSC.

(3) CONTRACTOR will, at the expense of HHSC, assist HHSC or its nominees 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 and/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 and/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 CFR 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 16.07 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 ten (10) calendar days after the Agreement is awarded:

(A) Standard Worker's Compensation Insurance coverage;

(B) Automobile Liability; and

(C) Comprehensive 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 Comprehensive 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.

(3) CONTRACTOR is responsible for any and 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 authorized by applicable law to conduct business 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. CONTRACTOR will submit evidence of insurance prior to Agreement award. The failure of HHSC to obtain such 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 thirty (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 Worker's Compensation coverage in the amounts required by Texas law. CONTRACTOR will also require subcontractors to carry Comprehensive Liability Insurance including Bodily Injury coverage or \$100,000.00 per occurrence and Property Damage Coverage of \$25,000.00 per occurrence. CONTRACTOR may provide the coverage for any or all subcontractors, and, if so, the evidence of insurance submitted will so stipulate.

(5) The Parties expressly 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 agree that insurer will waive their rights of subrogation against HHSC.

(7) CONTRACTOR expressly 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 such additional protection.

Section 16.08 Cooperation and Consent¹⁷

Each Party will cooperate with the other Party in good faith in the performance of its respective activities contemplated by this Agreement in order that the purposes of this Agreement may be accomplished in a proper, timely, and efficient manner.

Section 16.09 No Third-Party Beneficiary

Except as otherwise provided in Sections 4.06 and 4.09 of this Agreement, and any other provision of this Agreement that expressly confers third-party beneficiary status on a person or entity, nothing contained in this Agreement is intended or shall be construed to confer upon any person or entity (other than the Parties hereto) any rights, benefits or remedies of any kind or character whatsoever, and no person or entity shall be deemed a third-party beneficiary under or by reason of this Agreement.

Section 16.10 Neutral Construction

Parties have negotiated this Agreement and all of the terms and conditions contained in this Agreement at arms' length, and each Party has had the opportunity to be represented by counsel during such negotiations. No term, condition, or provision contained in this Agreement shall be construed against any Party or in favor of any Party

(1) because such Party or such Party's counsel drafted, revised, commented upon, or did not comment upon, such term, condition, or provision; or

(2) because of any presumption as to any inequality of bargaining power between or among the Parties.

Section 16.11 Covenant of Further Assurances

HHSC and the CONTRACTOR covenant and agree that, subsequent to the execution and delivery

¹⁷ Sections 16.08 through 16.12 were added to the UTCs.

of this Agreement and without any additional consideration, HHSC and the CONTRACTOR will execute and deliver any further legal instruments and perform any acts that are or may become reasonably necessary to effectuate the purposes of this Agreement.

Section 16.12 Entire Agreement

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, whether written or oral, between the Parties with respect to the subject matter hereof.



Section 16.13 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 16.08(b)(4)**.

(4) Contractor shall 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 T.A.C., Part 1, Chapter 20, Subchapter C), and subject to remedies for Breach.