

## **1. HEADING AND CAPTIONS**

The headings or captions contained within are intended solely for convenience and reference purposes and shall in no way be deemed to define, limit, or describe the scope or intent of the Contract or any provisions thereof.

## **2. CONTRACT TERM**

The term of the Contract will be five (5) years. The Contract shall take effect and commence upon the approval of the Contract by the Office of the New York State Comptroller ("OSC" or "Comptroller"), as applicable.

## **3. NOT-TO-EXCEED**

This Contract shall be a not to exceed contract, subject to any amendments made pursuant to the terms of this Contract.

## **4. MODIFICATION OF CONTRACT**

The Contract may be amended only by mutual written consent of the Parties and approval by the NYS Office of the Attorney General ("OAG") and NYS Office of the State Comptroller ("OSC"), if required.

## **5. EXECUTORY PROVISION/CONTRACT FORMATION**

Pursuant to State Finance Law, Section 112, as applicable, the Contract must first be approved by OSC before becoming effective.

## **6. INTEGRATION, MERGER, AND ORDER OF PRECEDENCE**

The Contract shall be comprised solely of the documents listed below in this section. This Contract constitutes the entire agreement between the Parties and while applicable laws and regulations pertain, no other statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid, and this Contract shall not be changed, modified, or altered in any manner except by an instrument in writing executed by both Parties as described above. In the event of an inconsistency or conflict in terms, precedence shall be given in the order indicated:

- Appendix A -Standard Clauses for New York State Contracts;
- Any Amendments to this Contract agreed to and executed in writing by the Parties and approved by OAG and OSC, as required;
- This Contract, including all of its exhibits, attachments, and appendices;
- ITS Request for Proposals No. C000742, including all of its appendices, attachments, exhibits, and any and all modifications and clarifications thereto;
- The Contractor's Proposal and any clarifications thereto that have been agreed to in writing by ITS.

All prior agreements, representations, statements, negotiations, and undertakings between the Parties are superseded.

## **7. CONTRACTOR RESPONSIBILITIES, QUALIFICATIONS, AND CHANGE IN STATUS**

Contractor must remain a "responsible" vendor, as defined by the State Finance Law, relevant case law and applicable guidelines, throughout the term of the Contract. Failure to do so may result in suspension or termination of the Contract.

Contractor must present evidence of its continuing legal authority to do business in NYS, its integrity, experience, ability, prior performance, and organizational and financial capacity, upon request by ITS.

ITS reserves the right to suspend any or all activities under the Contract at any time if it discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor will be given

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written notice outlining the particulars of such suspension and must comply with the terms of the suspension order. Contract activity may resume at such time as ITS issues a written notice lifting the suspension order.

In addition to the requirements of NYS Finance Law §138 (requiring the State's approval of Subcontractors and assignments, and/or conveyances), the Contractor shall notify ITS in writing of any substantial change in the ownership or financial viability of the Contractor, its affiliates, subsidiaries or divisions, or partners, immediately upon occurrence. "Substantial change" means: (i) sales, acquisitions, mergers or takeovers of the Contractor, its Affiliates, subsidiaries, divisions, or partners that result in a change in the controlling ownership or assets of such entity after the submission of the Bid; (ii) entry of an order for relief under Title 11 of the United States Code; (iii) the making of a general assignment for the benefit of creditors; (iv) the appointment of a receiver of Contractor's business or property or that of its Affiliates, subsidiaries or divisions, or partners; or action by Contractor, its Affiliates, subsidiaries or divisions, or partners under any State insolvency or similar law for the purposes of its bankruptcy, reorganization, or liquidation; or (v) court ordered liquidation of Contractor, its Affiliates, subsidiaries or divisions, or partners.

In addition to any other remedies available at law or equity, ITS shall have the right to cancel the Contract, in whole or in part, for cause, if it finds, in its sole judgment, that such substantial change adversely affects the delivery of services or is otherwise not in the best interests of the State.

The Contractor shall immediately notify ITS upon learning of any situation that can reasonably be expected to adversely affect the delivery of services under the Contract. If such notification is verbal, the Contractor shall follow such initial verbal notice with a written notice to ITS which shall include a description of the situation and a recommendation of a resolution within three (3) calendar days of Contractor's becoming aware of the situation.

### **8. INDEPENDENT CONTRACTOR**

Contractor is an independent contractor, and its Contractor Staff are not and shall not act as State employees in the performance of the Contract. Contractor and its Contractor Staff are not entitled to any of the benefits associated with employment by the State. The Contractor agrees, during the term of the Contract, to maintain at Contractor's expense those benefits to which its employees would otherwise be entitled by law, including health benefits, and all necessary insurance for its Contractor Staff, including worker's compensation, disability and unemployment insurance, and to provide ITS with certification of such insurance upon request. The Contractor remains responsible for all applicable federal, state, and local taxes, and all FICA contributions.

### **9. CONTRACTOR STAFF**

"Contractor Staff" includes all agents, employees, officers, partners, and subcontractors of the Contractor who shall perform services under the Contract or have access to "NYS Confidential Information," as this term is defined.

All Contractor Staff performing work under the Contract must meet or exceed the technical and training qualifications set forth in the solicitation and resulting contract, must comply with all security and administrative requirements of ITS, must adhere to all applicable State policies and procedures communicated to the Contractor, must possess the necessary qualifications, training, licenses, and permits as may be required within the jurisdiction where the services specified are to be provided or performed, and shall be legally entitled to work in such jurisdiction. All persons, corporations, or other legal entities that perform services under the Contract on behalf of Contractor shall, in performing the services, comply with all applicable Federal and State laws concerning employment in the United States. Contractor Staff may be required to execute a Nondisclosure Agreement, either before or upon arrival for work at a NYS Facility or, if in ITS's sole discretion, the Contractor's Staff will otherwise have access to critical State Networks, equipment, data, or information.

ITS, in its sole discretion, may require the Contractor to remove from interaction with the State, or may refuse access to State systems and NYS Facilities or require removal from any NYS Facility any Contractor Staff performing work under the Contract that ITS determines poses a security risk, has a work performance that ITS finds inadequate or unacceptable, or otherwise fails to meet ITS business requirements or expectations. The Contractor shall not assign the person to any aspect of the Contract or future work orders without ITS' consent. Such action by ITS shall not relieve the Contractor of the obligation to perform all work in compliance with the

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Contract terms.

For reasons of safety and public policy, the use of illegal drugs and/or alcoholic beverages by the Contractor or its agents, employees, partners or Subcontractors shall not be permitted while performing any phase of the technical support services for ITS under the Contract.

The State shall not be liable for any expense incurred by the Contractor or its agents, employees, partners or Subcontractors for any parking or towing fees or as a consequence of any traffic infraction or parking violations attributable to Contractor or its agents, employees, partners or Subcontractors.

### **10. SUBCONTRACTORS, AND CONTRACTOR OBLIGATIONS**

As described in the solicitation, Bidders were permitted to submit proposals that included subcontractors (defined as contractors to the prime Contractor that is signing the Contract, who, pursuant to a written contract with Contractor, agree to perform a portion of the Contract's work upon written approval by ITS). The successful Bidder receiving Contract award and signing the Contract is and remains the Prime Contractor and single point of contact for ITS for this engagement. The Contractor is responsible for meeting all Contract obligations set forth in the solicitation and Contract, including all appendices, attachments, and any subsequent amendments mutually agreed to in writing between the Parties. All subcontractors must be identified by Contractor and must be acceptable to ITS. The Contractor agrees not to subcontract any of its services without the prior written approval of ITS, which approval shall not be unreasonably withheld upon receipt of written request made by Contractor to ITS to subcontract. Contractor may identify a subcontractor proposed to perform certain Contract requirements, but such identification does not relieve the Contractor of any responsibility for performance under the Contract with ITS. Any subcontractor shall be clearly identified by Contractor and the nature and extent of its involvement in and/or proposed performance under the Contract shall be fully explained by the Contractor to ITS.

The Contractor shall provide to ITS a written copy of all subcontracts and third-party contracts related to the provision of services to ITS under the Contract upon request, and include a certification that it has fully disclosed all terms and conditions of such contracts and will disclose any amendments which occur subsequent to the original submission. Failure to provide such information shall constitute a breach of the Contract. Any waiver of breach as a result of Contractor's failure to furnish information required in this paragraph shall not be deemed a waiver of any subsequent breach. The Contractor may request ITS' approval to submit redacted copies of such subcontracts and third-party contracts from which trade secrets or proprietary information has been removed pursuant to the trade secret provisions of the Contract. No subcontract entered into by the Contractor shall relieve the Contractor of any liabilities or obligations in the solicitation or the resultant Contract. The Contractor accepts full responsibility for the actions of any Contractor Staff who carry out any of the provisions of the Contract. The Contractor is required to retain the requisite amount of legal control over its subcontractors such that the Contractor can remain the single point of contact for ITS and retain ultimate responsibility for all services performed under the Contract.

All Subcontracts shall be in writing and include, in such a manner that they will be binding upon each subcontractor with respect to work performed in connection with the Contract, provisions specifying:

- That the work performed by the subcontractor must be in accordance with the terms and conditions of the Contract including Appendix A – Standard Clauses for New York State Contracts and the solicitation;
- That nothing contained in such subcontract shall impair the rights of ITS or the State;
- That nothing contained in the subcontract shall create any contractual relationship between the subcontractor and ITS or the State;
- That the State and ITS shall have the same authority to audit the records of all subcontractors as it does those of the Contractor; and
- That subcontractor shall cooperate with any investigation, audit, litigation, or other inquiry related to the solicitation or the resulting Contract.
- That if at any time during performance under the Contract total compensation to a subcontractor exceeds or is expected to exceed \$100,000, that subcontractor is required to submit and certify to ITS a Vendor Responsibility Questionnaire.

Unless waived in writing by ITS, all subcontracts between the Contractor and subcontractors shall expressly name

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New York State, acting through ITS, as the sole intended third-party beneficiary of such subcontract. ITS reserves the right to review and approve or reject any subcontract, as well as any amendment to said subcontract(s), and this right shall not make ITS or New York State a party to any subcontract or create any right, claim, or interest in the subcontractor or proposed subcontractor against ITS. ITS reserves the right, at any time during the term of the Contract, to verify that the written subcontract between the Contractor and subcontractors is in compliance with all of the provisions of this Section and any subcontract provisions contained in the Contract.

The Contractor shall give ITS immediate notice in writing of the initiation of any legal action or suit which relates in any way to a subcontract with a subcontractor or which may affect the performance of the Contractor's duties under the Contract. Any subcontract shall not relieve the Contractor in any way of any responsibility, duty and/or obligation of the Contract.

ITS reserves the right to reject any proposed subcontractor or supplier if it determines that the company is not qualified or is not responsible.

### **11. BACKGROUND CHECKS / ONBOARDING**

All Contractor Staff shall, prior to the commencement of any services, whether on or off-site, comply with all State onboarding and security clearance requirements, including training, required for access to NYS Confidential Information (as defined in the Contract) or required for access to NYS Facilities (as also defined in the Contract), the preceding described, collectively, as "onboarding." This includes requirements related to the access to Regulated data, including any requirements of the State's public safety agencies, or those related to the Federal Bureau of Investigation Criminal Justice Information Services (CJIS) Security Policy (<https://www.fbi.gov/services/cjis/cjis-security-policy-resource-center>).

Contractor agrees that its Contractor Staff performing services on-site at NYS Facilities or those with logical access to NYS Confidential Information (i.e., log-in access) shall be required to undergo the same security clearances as those required of ITS employees. If not physically or virtually escorted, each Contractor Staff designated to work under the Contract with ITS shall submit identifying information to the State and be fingerprinted. ITS shall arrange for the scheduling of fingerprinting. Such fingerprints shall be submitted to the NYS Division of Criminal Justice Services for a state criminal history record check and, at ITS' discretion, to the Federal Bureau of Investigation for a national criminal history record check.

Contractor also agrees that its Contractor Staff performing services on-site at NYS Facilities may be required to comply with those health checks which NYS requires of its own employees working on-site including for example providing proof of vaccination against, and/or testing for, infectious disease such as COVID-19.

All expenses, including travel and lodging, associated with the onboarding and security clearance process including fingerprinting of Contractor Staff are the responsibility of the Contractor and are not reimbursable.

ITS shall make all suitability determinations on Contractor Staff. For purposes of this Section, a "suitability determination" is a determination that there are reasonable grounds to believe that an individual will likely be able to perform the Contract requirements without undue risk to the interests of the State. Failure of a security clearance or non-compliance with this Section will disqualify any Contractor Staff from performing any services on the Contract. If any Contractor Staff are removed from providing services under the Contract, they may be subject to all onboarding and security clearance requirements if they are returned to performing services under the Contract.

All Contractor Staff shall, at the termination of their providing services to ITS under the Contract, comply with all State off-boarding and security procedures, including return to ITS of any physical or logical access badges or other credentials that were issued by the State and required for their access to NYS Confidential Information or NYS Facilities.

### **12. COOPERATION WITH THIRD PARTIES**

Upon request by the State, the Contractor shall fully cooperate with any third party designated by the State such as, but not limited to, other contractors or subcontractors, including successor Contractors, retained by the State.

### **13. COOPERATION WITH INVESTIGATIONS, AUDITS, AND LEGAL PROCEEDINGS**

Upon request by ITS, the Contractor shall reasonably, to the extent required by law and without waiving any of its legal rights or remedies, cooperate with the State, including with OSC, in any investigation, audit, or other inquiry related to the solicitation or the resulting Contract or any related litigation, at no cost to the State. This provision shall survive the termination of the Contract.

### **14. RIGHT TO INSPECT**

The State, and any regulatory authority having jurisdiction over the State or ITS, has the right to review Contractor's and, if applicable, any subcontractor's procedures, practices and controls related to the security of NYS Confidential Information and information assets. Upon request, Contractor will make available for review the policies, procedures, practices, and documentation related to the protection of NYS Confidential Information and information assets, including but not limited to those related to information security governance, network security, risk and compliance management policies and procedures, personnel security background screening/checks and vetting procedures, secure systems/software development protocols, change/release management, testing, quality assurance, vulnerability management, secure disposal/sanitization, and documentation. Contractor may be asked to provide a recent independent audit report on security controls prior to awarding of the Contract or at any time during the Contract term. The State, and any regulatory authority having jurisdiction over the State or ITS, shall have the right to send its officers and employees to inspect Contractor's facilities and operations used to provide Contract services. On the basis of such inspection, the State may require Contractor to implement corrective measures where the Contractor is found to be noncompliant with Contract provisions. The State shall provide at least two (2) weeks' notice of its intention to exercise this audit right and will not use an independent third-party that is a competitor of Contractor. Such audit shall be conducted to ensure compliance with the requirements of the Contract.

### **15. WORK OUTSIDE THE SCOPE OF THE CONTRACT**

The Contractor must not perform work outside the scope of the Contract unless such work is authorized by a properly executed written amendment to the Contract, and if applicable, approved by the OSC. Work not so authorized shall not be compensated.

### **16. NOTICE**

All notices given pursuant to this Contract shall be in writing and shall be validly given when mailed by registered or certified mail, or hand delivered. In addition, a copy of the notice will be emailed to the recipient(s). Such notices shall be addressed as set forth below, or to such different addresses as the Parties may from time-to-time specify by written notice to the other Party. The Parties agree to mutually designate individuals as their respective representatives for purposes of this Contract.

For the NYS Office of Information Technology Services:

NYS Office of Information Technology Services  
Vendor Sourcing and Management Organization  
Empire State Plaza, PO Box 2062 Albany, NY 12220-0062  
[vsmo@its.ny.gov](mailto:vsmo@its.ny.gov)

With a copy to:

NYS Office of Information Technology Services  
Division of Legal Affairs, Bureau of House Counsel  
Empire State Plaza, PO Box 2062 Albany, NY 12220-0062  
[its.sm.dla@its.ny.gov](mailto:its.sm.dla@its.ny.gov)

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For Contractor:

[Name]  
[Title]  
[Street Address] [City, State, Zip code]  
Telephone Number: ( )

With a copy to, for Contractor:

[Name]  
[Title]  
[Street Address] [City, State, Zip code]  
Telephone Number: ( )

Additional individuals may be designated, in writing, by the Parties for purposes of communications related to administration/billing, problem resolution, and/or for dispute resolution.

### **17. HOURLY-BASED SERVICES CONTRACT PAYMENTS**

As required by the solicitation, Contractor has provided fully loaded pricing as part of its "Financial Proposal" which is inclusive of all direct and indirect costs, fees, profit and all overhead expenses, including but not limited to, all training, travel, meals, and lodging costs, parking fees, and other ancillary fees and costs including permits, licenses, and insurance. Such costs are not reimbursable by the State. Payments for services rendered shall be in accordance with the Contract. The State's payment obligations shall be governed by the provisions of the New York State Finance Law ("SFL"). Deliverable-based payments will be paid upon acceptance by ITS in writing. Payments for hourly-based services will also be paid monthly in arrears. ITS will not pay overtime rates for hours worked over 40 per week.

Contractor shall invoice ITS, monthly in arrears, for all Services rendered during the month for the benefit of ITS, with appropriate detailed invoices in a form agreed to and as directed by ITS. Invoices shall be due thirty (30) calendar days after the last day of the preceding month. Charges for Services rendered by Contractor's personnel shall be based on the personnel's hourly rate as provided in Contractor's Financial Proposal in response to the solicitation and for actual hours worked by the personnel. Notwithstanding the foregoing, for any Services rendered during the State's prior fiscal year (April 1 through March 31), any invoices for such Services must be submitted by May 15 of the State's current fiscal year. Failure to submit such invoices by May 15 will result in forfeiture of payment due to Contractor unless ITS provided written notification detailing otherwise. Invoices must include the Contract number. Payments shall be made in United States Dollars (\$ USD).

### **18. PRICE ESCALATION**

The pricing contained in the Contractor's Financial Proposal for hourly-based services in response to the solicitation shall remain fixed during the first two (2) years of the Contract Term. The Contractor's not-to-exceed hourly rates may be adjusted once annually thereafter in accordance with the methodology outlined below. The Contractor may be granted an increase in their not-to-exceed hourly rates, dependent upon fluctuations in CPI-U (Consumer Price Index – All Urban Consumers), as published by the U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. 20212. Any annual increase in the not-to-exceed hourly rates shall be the lesser of (a) a cap at 2%; or (b) a cap at the CPI-U (Consumer Price Index – All Urban Consumers) for the preceding twelve-month period that is published by the U.S. Department of Labor's Bureau of Labor Statistics on or about 90 days prior to the anniversary date of OSC's approval of the Contract.

The Contractor has the sole responsibility to request, in writing, not-to-exceed hourly rate(s) adjustment. This request must be received at the below address within three (3) months of the "base month." The 'base' month for



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determining adjustments will be the third month prior to the start date of the Contract. For example, if the Contract is approved by OSC in September 2022, the 'base' month will be June. The base month is fixed and will not be adjusted year to year. The adjustments will be based on the difference in the base month CPI for each applicable year and will become effective in the anniversary month. As long as the request is submitted and received within the required time frame, the adjustment will be processed using the base month CPI. Once approved or rejected, the Contractor will be notified in writing. Contractor shall not submit revised invoices until such notification, at which point an invoice may be submitted for any retroactive difference owed.

Requests must be sent to:  
NYS Office of Information Technology Services  
Vendor Sourcing and Management Organization  
Empire State Plaza  
P.O. Box 2062  
Albany, NY 12220-2062

Should the Contractor fail to submit their request, to the proper location, within three (3) months of the applicable base month date, Contractor shall be deemed to have waived their right to any increase in the not-to-exceed hourly rates.

### **19. ITEMIZATION, ELECTRONIC PAYMENT, AND ELECTRONIC INVOICING REQUIREMENTS**

**a. Itemization.** Contractor is apprised that its bills, documentation supporting charges in those bills, and all invoices paid under the Contract are subject to audit by auditors internal or external to ITS, and agrees to provide timely, complete, and accurate billing invoices to ITS in order to be eligible for payment. "Timely, complete, and accurate billing invoices" means invoices submitted to ITS in a timely manner as described below, containing all information and supporting documentation required by the Contract, ITS, and OSC with an itemization of each product or service. Contractor shall provide such itemization at a level of detail reasonably requested by ITS, including a breakdown with enough detail for ITS to be able to confirm that Contractor is abiding by the requirements of the Contract. Contractor shall cooperate with ITS' reasonable requests for greater detail as required.

**b. Electronic Payments.** Payment for invoices submitted by the Contractor shall be rendered electronically, unless payment by paper check is expressly authorized by ITS in its sole discretion, due to extenuating circumstances. Such electronic payment shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with OSC's procedures to authorize electronic payments. Authorization forms are available at OSC's website at [www.osc.state.ny.us/epay/index.htm](http://www.osc.state.ny.us/epay/index.htm), by e-mail at [epunit@osc.state.ny.us](mailto:epunit@osc.state.ny.us), or by telephone at 518-474-4032.

Contractor acknowledges that it will not be eligible for payment on any invoices submitted under the Contract if it does not comply with OSC's electronic payment procedures, except where ITS has expressly authorized payment by paper checks as set forth above.

**c. Electronic Invoicing.** Contractor acknowledges that, during the course of the Contract, New York State is likely to begin moving to an electronic invoicing system in order to decrease invoice processing time, increase transparency into invoice status for vendors, and to reduce manual labor associated with opening, sorting, and scanning mailed invoices. It is anticipated that, once enrolled in NYS' electronic invoicing system, vendors may submit electronic invoices through the NYS Statewide Financial System ("SFS") vendor portal, which may build this vendor data into an SFS voucher, match invoices with associated purchase orders and receipts, and route the invoice for approval and payment. Contractor agrees to reasonably cooperate with the application of such an electronic invoicing system to Contractor's invoicing of ITS, once such system is available for this purpose.

### **20. WARRANTIES AND GUARANTEES**

**a. Contract Deliverables.** Contractor warrants and represents that the services required by the Contract shall be performed or provided in accordance with all the terms and conditions, covenants, statements, and representations contained in the Contract. The Contractor warrants that it will perform services in good faith, in a professional

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manner in accordance with applicable professional standards, and that the services will conform in all material respects to the description of such services set forth herein and in any applicable Statements of Work ("SOW") or DEDs. The Contractor warrants that it will correct, at no charge to ITS or the State, services which fail to meet applicable professional standards and which result in obvious or patent errors in the progression of its work during the applicable warranty period. Contractor's failure to meet pre-defined service levels may result in a credit or chargeback in an amount pre-determined by the Parties.

**b. Workmanship Warranty.** Contractor warrants and represents that all services and Deliverables shall meet the completion criteria set forth in the Contract or any relevant SOW or DED, and that each of Contractor's services shall be performed in a professional and workmanlike manner in accordance with the highest applicable industry standards and according to its current description (including any completion criteria) contained in the Contract, an attachment, an SOW, or a DED. A claim that specific services provided by Contractor did not meet the "highest applicable professional standards" must be made by ITS within ninety (90) days after the date on which the breach occurred. For purposes of the Contract, "highest applicable industry standards" shall be defined as the degree of care, skill, efficiency, and diligence that a prudent person possessing technical expertise in the subject area and acting in a like capacity would exercise in similar circumstances.

In the event that there has been a breach of the foregoing warranty and the SOW or DED does not provide a specific remedy for the breach of that warranty, ITS' remedies under this warranty will be: (1) cure by Contractor within a reasonable time, not to exceed thirty (30) days, at no charge to ITS; and (2) if Contractor does not cure within the thirty (30) day period, ITS will be entitled to a refund of the amounts paid to Contractor for the service or part thereof that gave rise to the claim. This warranty is in addition to, and not in lieu of, any other warranty under the Contract or other remedies that may be provided in an SOW or DED under the Contract. In addition, the foregoing does not limit ITS' right to seek additional remedies against Contractor for any damage caused by Contractor to hardware or other products owned by the State (for example, damages incurred by ITS as a result of hardware being rendered unusable).

Additionally, for fixed price Deliverables, Contractor warrants that the Deliverable will be fit for use by ITS ("fitness for use warranty") for a thirty (30) day period from Deliverable acceptance by ITS, as "Deliverable Acceptance" is defined below in the Contract. The remedies available to ITS in the event that Contractor breaches this additional fitness for use warranty will be: (1) ITS will be entitled to return the fixed price Deliverable at no charge, including shipping, to Contractor; and (2) ITS will be entitled to a refund of all amounts paid to Contractor for the fixed price Deliverable. The Parties agree that custom programming may be provided to ITS pursuant to the terms of the Contract only if it is identified as a fixed price Deliverable.

The warranties stated above will not apply to the extent that there has been misuse, accident, modification, unsuitable physical or operating environment, operation in other than the specified operating environment, improper maintenance by ITS, or failure caused by a Deliverable for which Contractor is not responsible.

**c. Software Warranty; Conformance with Specifications.** Contractor warrants that each warranted software product, when used in the specified operating environment, will conform to its specifications. During the warranty period, Contractor shall provide defect-related program services without charge, for at least one year following the software's general availability.

If a software product does not function as warranted during the first year after ITS obtains its license and Contractor is unable to make it do so, ITS may return the software product and ITS' money will be refunded. To be eligible, ITS must have obtained its license while program services (regardless of the remaining duration) were available for it.

These warranties give ITS specific legal rights and ITS may also have other rights which vary from jurisdiction to jurisdiction. Some jurisdictions do not allow the exclusion or limitation of implied warranties, so the above exclusion or limitation may not apply to ITS. In that event such warranties are limited in duration to the warranty period, no warranties apply after that period. Nothing in the Contract affects any statutory rights of consumers that cannot be waived or limited by contract



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**d. Software Virus Warranty.** Contractor warrants that it has no knowledge of any viruses or other malware in the software product(s). If a virus or such other malware is discovered therein, Contractor shall replace such software with the same software not containing any known malware. Virus or malware are defined as any computer code, whether or not written or conceived by Contractor, which disrupts, disables, harms, or otherwise impedes in any manner the operation of the software product, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Contractor.

**d. Personnel Eligible for Employment.** Contractor warrants and represents that all personnel performing services under the Contract are qualified to provide services and eligible for employment in the United States and shall remain so throughout the term of the Contract. Contractor shall provide such proof of compliance as is required by ITS.

**e. Service Guarantee.** Contractor's failure to satisfy performance standards or requirements set forth below in the "Performance Requirement" section of the solicitation may result in a credit or chargeback in an amount as specified in the solicitation.

**f. Compliance with Laws.** Contractor warrants and represents that, throughout the term of the Contract and any extensions, Contractor shall meet or exceed all requirements of the Contract and any applicable laws, including but not limited to those related to insurance, and agrees to provide such proof as required by ITS.

Contractor warrants and represents that, throughout the term of the Contract and any extensions, and in the performance of obligations under the Contract, it will: (i) comply with all applicable laws, ordinances, rules, and regulations of any governmental entity; (ii) pay, at its sole expense, all applicable permits, licenses, tariffs, tolls, and fees; and (iii) give all notices required by any laws, ordinances, rules, and regulations of any governmental entity. Failure to do so may constitute grounds for ITS to terminate or suspend the Contract, in whole or in part, or to take any other action deemed necessary by ITS.

**g. Additional Warranties.** Where Contractor generally offers additional or more advantageous warranties than those set forth herein, Contractor shall offer or pass through any such warranties to the State.

**h. No Limitation of Rights.** The rights and remedies of the State provided in this clause are in addition to and do not limit any rights afforded to the State by any other clause of the Contract.

**i. Survival of Warranties.** All warranties contained in the Contract shall survive termination of the Contract.

**j. No Implied Warranties.** To the extent permitted by law, these warranties are exclusive and there are no other express or implied warranties or conditions, including warranties or conditions of merchantability and fitness for a particular purpose.

## **21. FEDERAL FUNDING and OPERATING CLAUSES**

**a. Federal Funding.** To the extent that any of the goods or services provided under the Contract may be funded in whole or in part by Federal funds, Contractor agrees to comply with all applicable Federal laws, rules and regulations required for the receipt and/or expenditure of such funds, including, but not limited to 2 CFR Part 200, relating to procurements by States and any Federal laws, rules and regulations specifying Federal government intellectual property rights.

**b. Governing Laws, Rules, and Regulations.** The services render by the Contractor must comply with the applicable provisions of Title IV-D of the Social Security Act and Farm Bill, the implementing regulations at 42 CFR 433, 7 CFR 277.18(h), and those laws, rules, and regulations set forth in Table 53 of the FNS Handbook 901, dated January 2020, as amended from time to time by the applicable Federal Agency. The regulations, as amended, and guidelines to these regulations applicable to implementing and operating eligibility and enrollment systems are to be considered part of the Contract.

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Systems and modules developed, installed, or improved with 90 percent match must include documentation of components and procedures such that the systems could be operated by a variety of contractors or other users.

**c. Debarment and Suspension.** The Contractor agrees to comply with the provisions of this section as set forth below:

As required by Executive Orders 12549 and 12689, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions, as defined at 34 CFR Part 85, Sections 85.105 and 85.110.

The applicant (i.e., “Offeror”) certifies that, as of the date of its Proposal submission, it and its principals:

- i. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
- ii. Have not within a three-year period preceding the date of its Proposal submission been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
- iii. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
- iv. Have not within a three-year period preceding the date of its Proposal submission had one or more public transactions (Federal, State, or local) terminated for cause or default.

Where the Offeror is unable to certify to any of the statements in this certification, he or she shall attach an explanation to its Proposal.

**d. Byrd Anti-Lobbying Amendment.** The Contractor agrees to comply with the provisions of this section as set forth below:

Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

The Byrd Anti-Lobbying Amendment prohibits the recipients of Federal contracts, grants, and loans from using appropriated funds for lobbying the Executive or Legislative branches of the Federal government in connection with a specific contract, grant, or loan. As required by Section 1352, Title 31 of the U.S. Code and implemented at 34 CFR Part 82 for persons entering into a grant or cooperative agreement over \$100,000, as defined at 34 CFR Part 82, Section 82.105 and 82.110, the applicant (i.e., “Offeror”) certifies that:

- i. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;
- ii. If any funds other than Federal appropriated funds have been paid or will be paid to any person for

## **AMENDED** Appendix C

influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this Federal grantor or cooperative agreement, the undersigned shall complete and submit Standard Form – LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions;

iii. The undersigned shall require that the language of this certification be include in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all sub-recipients shall certify and disclose accordingly.

**e. Clean Air Act.** The Contractor agrees to comply with the provisions of the Clean Air Act (42 U.S.C. 7401-7671q), as amended and the stipulations contained in the Clean Air Act, Section 7606, as set forth below:

i. No Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such a conviction has been corrected. For convictions arising under section 7413(c)(2), the condition giving rise to the conviction also shall be considered to include any substantive violation of this Act associated with the violation of 7413(c)(2). The Administrator may extend this prohibition to other facilities owned or operated by the convicted person.

ii. The Administrator shall establish procedures to provide all Federal agencies with the notification necessary for the purposes of subsection (a).

iii. In order to implement the purposes and policy of this Act to protect and enhance the quality of the Nation's air, the President shall, not more than 180 days after enactment of the Clean Air Amendments of 1970 cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this Act in such contracting or assistance activities, and (2) setting forth procedures, sanctions, penalties, and such other provisions, as the President determines necessary to carry out such requirement.

iv. The President may exempt any contract, loan, or grant from all or part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.

**f. Clean Water Act.** The Contractor agrees to comply with the provisions of the Federal Water Pollution Control Act (33 U.S.C. 1251-1387, as amended and the stipulations contained in The Clean Water Act, Section 1368, as set forth below:

i. No Federal agency may enter into any contract with any person who has been convicted of any offense under Section 1319(c) of this Act for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person. The prohibition in preceding sentence shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.

The Administrator shall establish procedures to provide all Federal agencies with the notification necessary for the purposes of subsection (a) of this section.

The President may exempt any contract, loan, or grant from all or part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.

The President shall annually report to the Congress on measures taken in compliance with the purpose and intent of this section, including, but not limited to, the progress and problems associated with such compliance.

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(1) No certification by a contractor, and no contract clause, may be required in the case of a contract for the acquisition of commercial items in order to implement a prohibition or requirement of this section or a prohibition or requirement issued in the implementation of this section.

(2) In paragraph (1), the term “commercial item” has the meaning given such term in section 103 of title 41.

**g. Americans with Disabilities Act and Rehabilitation Act.** The Contractor agrees to comply with the provisions of this section as set forth below:

Regulations implementing Title II of the Americans with Disabilities Act (42 U.S.C. 12131 et seq) prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by State and local governments, except public transportation services (28 CFR Part 35, Title II, Subtitle A).

Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794) mandates that no otherwise qualified individual with a disability shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (45 CFR Part 84). Federally funded programs and activities may not, in providing aids, benefits or services provide qualified handicapped individuals with an aid, benefit or service that is not as effective as that provided to others 45 CFR Part 84.4(b).

**h. Access to Systems and Records.** Pursuant to 45 CFR 75.364, the U.S. Department of Health and Human Services, U.S. Department of Agriculture, applicable inspector generals, the Comptroller General of the United States, and the federal pass-through entity, including any of their authorized representatives, reserve the right to access any documents, papers, or other records which are pertinent to any federal financial participation received as part of the Contract in order to make audits, examinations, excerpts, and transcriptions. This right also includes timely and reasonable access to the non-Federal entity’s personnel for the purpose of interview and discussion related to the documents. This right of access shall last as long as the records are retained.

Pursuant to 45 CFR 95.615, the applicable federal agencies reserve the right to access any system supported by federal financial participation, including pertinent staff, design developments, operation, and cost records of the Contractor and any subcontractor at such intervals as deemed necessary by the applicable federal agency to determine whether the conditions for approval are being met and to determine the efficiency, economy, and effectiveness of the system.

**i. Equal Employment Opportunity.** Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, “Equal Employment Opportunity” (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

**j. Davis-Bacon Act.** Contractor shall, to the extent applicable, comply with the Davis-Bacon Act, as amended (40 U.S.C. 3141-3148) which requires all construction contracts awarded by recipients of more than \$2000 to comply with the Act as supplemented by USDOL Regulations 29 CFR Part 5 requiring all Contractors to pay wages to laborers and mechanics at a rate not less than the minimum wage specified by the Federal Secretary of Labor, which wages shall be paid not less than once a week. The recipient shall place a copy of the federally specified wage (the "prevailing wage") in each solicitation and the award of a contract shall be conditioned upon acceptance of such a determination. The recipient must report all suspected/reported violations to the Federal awarding agency.

**k. Copeland “Anti-Kickback” Act.** The Contractor shall, to the extent applicable, comply with the "Anti-Kickback Act" (40 USC 3145, as supplemented by 29 CFR Part 3) which provides that all contracts/sub-grants greater than \$2,000 for construction or repair must have a provision requiring compliance with 18 USC 874 as supplemented by 29 CFR Part 3, which prohibit Contractors or sub-recipients from inducing by any means any person employed in construction, completion or repair of public work to give up any part of compensation to which they are otherwise

## **AMENDED** Appendix C

entitled and that the recipient shall report all suspected/reported violations to the Federal awarding agency.

**I. Rights to Inventions Made Under the Contract.** If the Federal award meets the definition of “funding agreement” under 37 CFR § 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.”

**m. Contract Work Hours and Safety Standards Act.** Contractor shall, to the extent applicable, comply with the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.) which requires, where applicable, that all construction contracts and other contracts involving employment of mechanics and laborers require compliance with 40 U.S.C. 3701 et seq. as supplemented by USDOL Regulations 29 CFR 5 when said contracts exceed \$100,000, which references require that work in excess of 40 hours/week be recompensed at a rate at least 50% greater than the basic pay rate and that no work be required in unsanitary, hazardous, or dangerous conditions. These requirements do not apply to the purchases of supplies, materials, or articles ordinarily available on the open market or contracts for transportation or transmission of intelligence.

## **22. INDEMNIFICATION and LIMITATION OF LIABILITY**

**a. Indemnification.** Contractor shall be fully liable for the actions of its agents, officers, employees, partners, or Subcontractors, and shall fully indemnify and save harmless the State from suits, actions, damages, and costs of every name and description relating to personal injury and damage to real or personal property caused by Contractor, its agents, officers, employees, partners, or Subcontractors, without limitation; provided however, that the Contractor shall not indemnify for that portion of any claim, loss, or damage arising hereunder due to the negligent act or negligent failure to act of the State.

Contractor shall indemnify and hold the State harmless from any loss or damage to the State resulting from the violation by the Contractor, its agents, officers, employees, partners and Subcontractors of State and ITS security procedures or policies or resulting from any criminal acts committed by Contractor’s officers, agents, employees, partners, and Subcontractors while providing services under the Contract.

This section is not subject to the limitation of liability provisions of the Contract.

**b. Indemnification for Intellectual Property Infringement.** Contractor shall indemnify, defend, and hold the State harmless, without limitation, from and against any and all damages, expenses (including reasonable attorneys’ fees and legal fees), claims, judgments, liabilities, and costs which may be assessed against the State in any action for infringement of a United States Letter Patent, or of any copyright, trademark, trade secret, or other third-party proprietary right in relation to the services, products, documentation, or Deliverables furnished or utilized by Contractor under the Contract, provided that the State shall give Contractor:

- (i) prompt written notice of any action, claim, or threat of infringement suit, or other suit;
- (ii) the opportunity to take over, settle or defend such action, claim, or suit at Contractor’s sole expense; and
- (iii) assistance in the defense of any such action at the expense of Contractor.

Where a dispute or claim arises relative to a real or anticipated infringement, the State may require Contractor, at its sole expense, to submit such information and documentation, including formal patent attorney opinions, as the State shall require. This paragraph shall not apply to that portion of any infringement claim which results from a material modification by the State, without Contractor’s approval, of any products, documentation, or Deliverables furnished or utilized by Contractor pursuant to the Contract.

If any products, documentation, or Deliverables are determined to be infringing, or Contractor suspects a product,



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documentation, or Deliverables may be infringing, Contractor will, at its expense, and with the State's prior written approval, either: (i) procure the right for the State to continue using the products, documentation, or Deliverables; (ii) replace the products, documentation, or Deliverables with a non-infringing equivalent; (iii) modify the products, documentation, or Deliverables to make it non-infringing; or (iv) direct the return of the products, documentation, or Deliverables and refund any monies paid by the State for the products, documentation, or Deliverables. These remedies shall be in addition to, not exclusive, of any other rights or remedies the State may have at law or equity.

Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, when it determines that there is an issue involving a significant public interest. This section is not subject to the limitation of liability provisions of the Contract.

**c. Limitation of Liability.** For all other claims against the Contractor where liability is not otherwise set forth in the Contract as being "without limitation," and regardless of the basis on which the claim is made, Contractor's liability under the Contract for direct damages shall be limited to the greater of the following: (i) \$2,000,000 (Two Million Dollars); or (ii) two (2) times the amounts paid to the Contractor under the Contract during the twelve (12) months of the Contract term which precedes the giving of notice of the claim by the State; or (iii) the amount for which the applicable insurance is stated in the "*Contractor's Insurance Requirements*" appendix to the Contract. For this purpose, amounts paid shall include, but not be limited to, payments made electronically, by check, by offset, or by the application of credits from the Contractor to the State.

Unless otherwise specifically enumerated herein, neither Party shall be liable for any incidental, punitive, consequential, indirect or special damages of any kind which may result directly or indirectly from the performance of the Contract, including, without limitation, damages resulting from loss of use or loss of profit by the State, the Contractor, or by others, however caused and regardless of the theory of liability even if such Party has been informed of the possibility of such damages.

The limitations of liabilities, disclaimers of warranties, exclusivity of remedies, and other limitations are an essential element of the bargain between the Parties (without which the transactions contemplated by the Contract would not occur) and will apply even if a remedy fails in its essential purpose.

**d. No Indemnification by the State.** The State does not agree to any indemnification provisions that require the State to indemnify or save harmless Contractor or third parties.

## **23. SUSPENSION OF WORK**

The State reserves the right to suspend any or all activities under the Contract, at any time, in the best interests of the State. In the event of such suspension, the Contractor will be given a formal written notice outlining the particulars of such suspension. Examples of the reasons for such suspension include but are not limited to, a budget freeze on State spending or declaration of emergency. Upon issuance of such notice, the Contractor shall comply with the suspension order. Contractor shall be paid for services performed prior to suspension in accordance with the Contract. Such suspension will be lifted upon written notice to Contractor.

Nothing in this paragraph shall diminish the State's right to terminate the Contract as provided in the Contract.

## **24. TERMINATION**

**a. For Convenience.** By written notice, the Contract may be terminated at any time by the State for convenience upon sixty (60) days written notice without penalty or other early termination charges due. Such termination of the Contract shall not affect any project or purchase order that has been issued under the Contract prior to the date of such termination. If the Contract is terminated pursuant to this paragraph, the State shall remain liable for all accrued but unpaid charges for hourly-based services incurred through the date of the termination. The State shall not be liable for any accrued but unpaid charges for Deliverables that have not been accepted by the State.

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**b. For Cause.** For a material breach that remains uncured for more than thirty (30) days from the date of written notice to the Contractor, the Contract may be terminated by the State at the Contractor's expense where Contractor becomes unable or incapable of performing, or meeting any requirements or qualifications set forth in the Contract, or for non-performance, or upon a determination that Contractor is non-responsible or for any of the other reasons stated in this section with the exception of termination for convenience. Such termination shall be upon written notice to the Contractor. In such event, the State may complete the contractual requirements in any manner it may deem advisable and pursue available legal or equitable remedies for breach.

**c. For Suspension or Delisting of Contractor's Securities.** If the Contractor's securities are suspended or delisted by the New York Stock Exchange or the NASDAQ, as applicable, if the Contractor ceases conducting business in the normal course, becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets or avails itself of or becomes subject to any proceeding under the Federal Bankruptcy Act or any statute of any state relating to insolvency or the protection of rights of creditors, the State, in its sole discretion, may terminate the Contract or exercise such other remedies as shall be available under the Contract, at law and/or equity.

**d. For Vendor Responsibility Related Findings.** ITS may, in its sole discretion, terminate the Contract if it finds at any time during the term of the Contract that the Contractor is non-responsible, or that any information provided in the Vendor Responsibility Questionnaire submitted with Contractor's bid was materially false or incomplete, or if the Contractor fails to timely or truthfully comply with ITS' request to update its Vendor Responsibility Questionnaire.

**e. Mitigation of Costs.** The Contractor shall not undertake any additional or new contractual obligations on or after the receipt of notice of termination without the prior written approval of the State. On or after the receipt of a notice of termination and during the termination notice period, as applicable, the Contractor shall take all commercially reasonable and prudent actions to close out unnecessary outstanding, existing obligations as economically as possible for the State.

## **25. DEFAULT**

**a.** If either Party breaches a material provision of the Contract, which breach remains uncured for a period of thirty (30) days after written notice thereof from the other Party specifying the breach (or if such breach cannot be completely cured within the thirty (30) day period, such longer period of time provided that the breaching Party proceeds with reasonable diligence to completely cure the breach) or if Contractor shall cease conducting business in the normal course, become insolvent, make a general assignment for the benefit of creditors, suffer or permit the appointment of a receiver for its business or assets or shall avail itself of or become subject to any proceeding under the Federal Bankruptcy Act or any statute of any state relating to insolvency or the protection of rights of creditors, then and in any such event, the other Party may, at its option, terminate the Contract upon ten (10) days written notice and exercise such other remedies as shall be available under the Contract, at law and/or equity.

**b.** No delay or omission to exercise any right, power or remedy accruing to either Party upon breach or default by the other under the Contract shall impair any such right, power or remedy, or shall be construed as a waiver of any such breach or default, or any similar breach or default thereafter occurring nor shall any waiver of a single breach or default be deemed a waiver of any subsequent breach or default. All waivers must be in writing.

**c.** If, due to default that remains uncured for the period provided herein, a third-party shall commence to perform Contractor's obligations under the Contract, the State shall thereafter be released from all obligations to Contractor hereunder, including any obligation to make payment to Contractor, provided however that the State shall continue to be obliged to pay for any and all services provided prior to any such date, and if any lump-sum payment has been made, the State shall be entitled to a pro-rata refund of such payment

## **26. ADDITIONAL TECHNOLOGY PROVISIONS**

**a. Ownership of and Title to Contract Deliverables.** Contractor acknowledges that it is commissioned by

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the State to perform the services detailed in the Contract that may include the development of intellectual property by Contractor, its Subcontractors, partners, employees, or agents for the State ("Custom Products"). Unless otherwise specified in writing in the Contract; upon the creation of such Custom Products, Contractor hereby conveys, assigns, and transfers to the State the sole and exclusive rights, title, and interest in the Custom Products whether preliminary, final, or otherwise: including all trademarks, copyrights, and/or rights to patent. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction, derivative works, reverse engineering, and/or marketing by or through the Contractor, its Subcontractors, partners, employees, or agents. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed in performing services under the Contract in the course of Contractor's business. The State may, by providing written notice thereof to the Contractor, elect in the alternative to take a non-exclusive perpetual license to Custom Products in lieu of taking exclusive ownership and title to such products. In such case, the State shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purpose(s) as stated in the Contract. Any property or material furnished or provided by the State to the Contractor hereunder is and will remain the property of the State.

**b. Ownership of and Title to Existing Software.** Title and ownership to existing software delivered by Contractor under the Contract that is normally commercially distributed by the Contractor or a third-party proprietary owner, whether or not embedded in, delivered with, or operating in conjunction with the provided Technology or Custom Products shall remain with Contractor or the third-party. Effective upon acceptance, such existing Technology shall be licensed to the State and must at a minimum grant the State a non-exclusive, perpetual, enterprise license to use, execute, reproduce, display, perform, adapt (unless Contractor advises the State as part of Contractor's proposal that adaptation will violate existing agreements or statutes and Contractor demonstrates such to the State's satisfaction) and distribute existing Technology to the State as stated in the Contract with all license rights necessary to fully effect the general business purposes stated in the Contract. With regards to third-party software license rights or third-party cloud access rights, the Contractor shall be responsible for obtaining these rights at its sole cost and expense.

**c. Federal Ownership Rights.** CMS, FNS, OCSE, and ACF each reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use for Federal Government purposes, such software, modifications, and documentation designed, developed, or installed with Federal funds pursuant to 7 CFR 277.18(I)(ii), 42 CFR 495.360, 45 CFR 95.617, and any successor or amended regulations.

## **27. FORCE MAJEURE**

In the event that either Party is unable to perform any of its obligations under the Contract because of natural disaster, any Act of God/Force of Nature, war, civil disturbance, court order, labor dispute, global pandemic, or any other acts beyond the reasonable control of either Party (hereinafter referred to as a "Force Majeure Event"), the Party that has been so affected shall immediately give notice to the other Party, and shall exercise every commercially reasonable effort to resume performance, and an extension of the time for performance shall be granted for a period to be agreed to in writing by the Parties. Any delay in performance by either Party resulting from a Force Majeure Event shall not be considered a breach or default under the Contract.

## **28. DISPUTE RESOLUTION**

The Parties agree to resolve any disputes arising under the Contract expeditiously through an escalation process by arranging for senior management representatives of the Parties meet within three (3) business days in response to a dispute that threatens the performance of a material portion of the Contract. During the dispute, Contractor shall continue to provide services according to the Contract until such dispute is resolved. Nothing in this paragraph shall diminish the State's right to terminate the Contract as provided in the Contract.

## **29. GENERAL PROVISION AS TO REMEDIES**

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**a.** Parties may exercise their rights and remedies at any time, in any order, to any extent, and as often as they choose, without regard to whether one right or remedy precedes, concurs with, or succeeds another right or remedy. A single or partial exercise of a right or remedy shall not preclude the further exercise of that right or remedy or the exercise of another right or remedy overtime time. No delay or omission in exercising a right or remedy (or delay, inaction, or waiver of any event of default) shall exhaust or impair the right or remedy, or constitute a waiver of, or acquiescence to, an event otherwise constituting a breach or default under the Contract.

**b.** In addition to any other remedies available to the State under the Contract and state and federal law for Contractor's default, the State may choose to exercise some or all the following:

- Suspend, in whole or in part, payments due to Contractor under the Contract;
- Pursue equitable remedies to compel Contractor to perform;
- Apply service credits against amounts due and owing by the State under the Contract;
- Require Contractor to cure deficient performance or perform the requirements of the Contract at no additional charge; and
- Retain such monies from amounts due Contractor, or may proceed against the performance and payment bond, if any, as may be necessary to satisfy any claim for damages, penalties, costs, and the like asserted by or against them.

### **30. INSURANCE**

Contractor must comply with the Insurance provisions set forth in Appendix C-1 - Contractor's Insurance Requirements annexed to the Contract and incorporated herein by reference.

### **31. TAXES**

**a.** ITS represents that the purchases on behalf of the State of New York are not subject to any state or local sales or use taxes, or to federal excise taxes.

**b.** Contractor remains liable and solely responsible without exemption for social security, unemployment insurance, workers' compensation and other taxes and obligations to which Contractor may be subject to by law.

**c.** Section 5-a of the New York Tax Law requires that any contract valued at more than \$100,000 entered into by a State Agency shall not be valid, effective, or binding against such State agency unless the Contractor certifies to the Department of Taxation and Finance that it is registered to collect New York State and local sales and compensating use taxes, if the Contractor made sales delivered by any means to locations within New York State of tangible personal property or taxable services having a cumulative value in of excess of \$300,000, measured over a specified period.

In addition, the Contractor must certify to the Department of Taxation and Finance that each affiliate and Subcontractor of such Contractor exceeding such sales threshold during a specified period is registered to collect New York State and local sales and compensating use taxes. For the purpose of this requirement, "affiliate" means a person or organization which, through stock ownership or any other affiliation, directly, indirectly, or constructively controls another person or organization, is controlled by another person or organization, or is, along with another person or organization, under the control of a common parent.

The Contractor also must certify to the procuring state entity that it filed the certification with the Department of Taxation and Finance and that the certification is correct and complete. Accordingly, in the event the value of the Contract exceeds \$100,000 and Contractor's sales delivered by any means to locations within New York State of tangible personal property or taxable services have a cumulative value in excess of \$300,000, measured over a specific period, the Contractor must file a properly completed Form ST-220-CA with ITS and a properly completed Form ST-220-TD with the Department of Taxation and Finance before the Contract may take effect.

In addition, after the Contract takes effect, the Contractor must file a properly completed Form ST-220-CA with ITS if the Contract's term is renewed. Further, a new Form ST-220-TD must be filed with the Department of Taxation and Finance if no ST-220-TD has been filed by the Contractor or if a previously filed Form ST-220-TD

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is no longer correct and complete. Further information about this requirement is available from the NYS Department of Taxation and Finance. Contractor agrees to cooperate fully with the State in administering these requirements.

Contractor agrees to cooperate fully with the State in administering these requirements.

### **32. OUTSTANDING TAX LIABILITIES**

Contractor warrants that there are no outstanding tax liabilities against the Contractor in favor of the State of New York, or if such liabilities exist, a payment schedule has been arranged for their speedy satisfaction before Contract execution.

### **33. SUPPLIER DIVERSITY**

Various New York State laws (including NYS Executive Law Articles 15-A and 17-B; 5 NYCRR 140-145 and 9 NYCRR Part 252; and NYS Executive Order 162), require NYS agencies to provide opportunities for maximum feasible participation in the performance of ITS contracts for NYS-certified minority- and women-owned business enterprises ("MWBEs"), NYS-certified Service-Disabled Veteran-Owned Businesses (SDVOBs), and the employment of minority group members and women. In addition to the requirements set forth below, Contractor agrees to comply with Federal affirmative action steps for subcontractor selection as required by 45 CFR 75.330(b)(6), and detailed by 45 CFR 75.330(b)(1-5).

- **MWBE and EEO:** Statutorily-required studies published in 2010 and 2016 found evidence of statistically significant disparities between the participation levels of MWBEs in State procurement and contracting versus the number of MWBEs ready, willing, and able to participate in such procurements. These studies' recommendations led to enactment and implementation of New York State Executive Law Article 15-A, which requires, among other things, that ITS establishes, in the performance of NYS contracts: goals for maximum feasible participation of NYS-certified MWBEs; and, equal employment opportunity (EEO) of minority group members and women.
- **EO-162 EEO and Job Title/Salary Requirements:** The January 9, 2017 NYS Executive Order No. 162 was created "*to ensure that workers are being provided equal opportunities to work on State contracts and are being paid similarly for performing the same work.*"
- **SDVOB:** Under Chapter 22 of the Laws of 2014, the NYS Service-Disabled Veteran-Owned Business Act was directed towards assisting service-disabled veterans in playing a greater role in the economy of NYS in order to promote and encourage the continuing economic development of service-disabled veteran-owned businesses.

As such, Contractor must continue to utilize small, minority and women owned businesses, provide opportunities for service-disabled veterans, and provide for the employment of minority group members and women in the performance of their contracts with NYS, consistent with current New York State law. These laws also require Contractor to document its actions, as described further, below.

#### **a. MWBE:**

*Note: Portions of the following provisions may not apply where the participation goals for that section are set at 0%.*

ITS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 ("MWBE Regulations") for all State contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing, or (2) in excess of \$100,000 for real property renovations and construction.

Contractor agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to



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ITS, to fully comply and cooperate with ITS' implementation of NYS Executive Law Article 15-A, which requirements include providing equal employment opportunities for minority group members and women, and contracting opportunities for certified minority and women-owned business enterprises.

Contractor's demonstration of "good faith efforts" pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by NYS Executive Law Article 15 (the "NYS Human Rights Law") or other applicable federal, state, or local laws.

Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility, and/or a breach of contract, leading to the withholding of funds or such other actions, liquidated damages pursuant to the terms of this section of the Contract, or enforcement proceedings as allowed by the Contract.

**MWBE Participation Goals:** For purposes of the Contract, ITS has established an overall goal of ~~15%~~ **30%** for Minority and Women-Owned Business Enterprises participation, broken down as 15% for Minority-Owned Business Enterprises ("MBE") participation and 15% for Women-Owned Business Enterprises ("WBE") participation (based on the current availability of qualified MBEs and WBEs).

For purposes of providing meaningful participation by MWBEs on the Contract by achieving the MWBE participation goals established herein, Contractor should reference the directory of NYS Certified MWBEs found at: <http://www.esd.ny.gov/mwbe.html>. Additionally, Contractor is encouraged to consult ITS using the contact information listed below, or the Division of Minority and Women's Business Development of the NYS Department of Economic Development ("DMWBD"), to discuss additional methods of maximizing participation by MWBEs on the Contract.

Where MWBE goals have been established herein, pursuant to 5 NYCRR §142.8 Contractor must document its "good faith efforts" to provide meaningful participation by MWBEs as Subcontractors or suppliers in the performance of the Contract. In accordance with Section 316-a of Article 15-A and 5 NYCRR §142.13, the Contractor acknowledges that if Contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such a finding constitutes a breach of contract and the Contractor shall be liable to ITS for liquidated or other appropriate damages, as set forth herein.

### **b. EEO:**

Contractor shall comply with the provisions of the NYS Human Rights Law, and all other State and Federal statutory and constitutional non-discrimination provisions. As such, Contractor and its Subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status, or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

Contractor agrees it is bound by certain provisions of NYS Executive Law Article 15-A and the MWBE Regulations promulgated by DMWBD. If any of the terms or provisions in this section conflict with applicable law or regulations, such laws and regulations shall supersede these requirements. In relation to the Contract, Contractor shall specifically comply with the following EEO provisions of Article 15-A:

- Contractor and its Subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
- Contractor and Subcontractors shall submit an EEO policy statement to ITS upon request. The EEO policy statement shall include, at minimum, language indicating that the Contractor or Subcontractor:

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- (a) will not discriminate against any employee or applicant for employment because of: race, creed, color, national origin, sex, age, disability, or marital status;
- (b) will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination; and
- (c) shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
- shall state in all solicitations or advertisements for employees that, in the performance of the Contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status.
- shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability, or marital status, and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein.

The Contractor will include the above three provisions in every Subcontract under the Contract in such a manner that the requirements of the subdivisions will be binding upon each Subcontractor as to work in connection with the Contract.

If Contractor and/or any Subcontractor does not have an existing EEO policy statement, they may complete one using the Sample MWBE and EEO Policy Statement form attached to the Contract as an Appendix ("*Sample M/WBE and EEO Policy Statement*"), or any updated version thereof provided by ITS.

### **c. NYS Executive Order 162:**

In compliance with NYS Executive Order 162 dated January 9, 2017 for state contracts with a value in excess of \$25,000 where any of the services are performed by individuals who are located in New York State, Contractor agrees to:

- provide to ITS, and supplement on a quarterly basis, equal employment opportunity information by reporting the job title and salary in gross wages of each employee of the Contractor who is performing work on the Contract, or, if the Contractor cannot identify the individuals working directly on the Contract, of each employee in the Contractor's entire workforce; and
- extend this quarterly reporting requirement to the Contractor's Subcontractors who work on the Contract with ITS, for the Subcontractor's employees. Salaries must be provided in United States Dollars (\$ USD). Failure to comply with the foregoing requirements may result in a finding of non-responsiveness, non-responsibility and/or a breach of the Contract, leading to the withholding of funds, suspension or termination of the Contract, or such other actions or enforcement proceedings as allowed by the Contract.

### **d. SDVOB:**

Article 17-B of the NYS Executive Law provides for more meaningful participation in public procurement by certified Service-Disabled Veteran-Owned Businesses ("SDVOBs"), thereby further integrating such businesses into New York State's economy. ITS recognizes the need to promote the employment of service-disabled veterans and to ensure that certified service-disabled veteran-owned businesses have opportunities for maximum feasible participation in the performance of ITS contracts. In recognition of the service and

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sacrifices made by service-disabled veterans and in recognition of their economic activity in doing business in New York State, Contractor is strongly encouraged and expected to consider SDVOBs in the fulfillment of the requirements of the Contract. Such participation may be as Subcontractors or suppliers, as protégés, or in other partnering or supporting roles.

For purposes of the Contract, ITS conducted a comprehensive search and determined whether the Contract might offer sufficient opportunities to set specific goals for participation by SDVOBs as Subcontractors, service providers, and suppliers to Contractor. To the extent the Contract sets specific SDVOB participation goals, then the following provisions apply to the Contract:

**SDVOB Participation Goals:** ITS has established an overall goal of ~~7%~~ **6%** for SDVOB participation for the Contract, based on the current availability of qualified SDVOBs.

Where SDVOB goals have been established herein, Contractor must document its “good faith efforts” to provide meaningful participation by SDVOBs as Subcontractors or suppliers in the performance of the Contract. For purposes of providing meaningful participation by SDVOBs, Contractor should reference the directory of NYS Certified SDVOBs found at: <https://ogs.ny.gov/veterans>. Contractor is encouraged to contact the NYS Office of General Services’ Division of Service-Disabled Veteran’s Business Development at 518-474-2015 or at [veteransdevelopment@ogs.ny.gov](mailto:veteransdevelopment@ogs.ny.gov) to discuss methods of maximizing participation by SDVOBs on its contracts.

### **e. Documentation:**

The various NYS laws and regulations described above have very specific provisions pertaining to the requirement for Contractors to document to a NYS agency's satisfaction their supplier diversity efforts. The *process* for doing so changes, however, as the State improves its online tools. Recently, NYS-ESD's Division of Minority and Women's Business Development (DMWBD), which directs NYS agency supplier diversity efforts, has created an online system for vendors to report some of their required supplier diversity filings to, the NYS Contract System, or "NYSCS". Over time, DMWBD has been migrating the filing of various supplier diversity forms to this online system. For example, DMWBD has recently required vendors to now file their EO-162 reports through NYSCS, rather than using the PDF form that had been used previously.

As such, while the below provisions describe the various forms and timing required by NYS' supplier diversity laws, Contractor acknowledges that during the term of the Contract more and more supplier diversity information will be migrating to being filed online through the New York State Contract System, and references to, for example, PDF versions of the forms below may become *examples* of the information to be submitted as new capabilities for filing online through NYSCS become available. The sites where Contractor can obtain required supplier diversity forms currently include:

- For initial MWBE, EEO, and EO-162 forms, either: <https://its.ny.gov/procurement#eeo-and-mwbe-supplier-diversity-program> or through the NYSCS (<https://ny.newnycontracts.com/>) .
- For SDVOB forms, at: <https://its.ny.gov/procurement#sdvob-supplier-diversity-program>.

Contractor is responsible for obtaining all required forms referenced herein, and, to the extent that Contractor is unable to locate such forms for reasons including that ITS might have updated its website locations or the form is now being filed online through NYSCS, for reaching out with any questions to an ITS contact using the contact information below to obtain copies of or access to the forms:

**NYS Office of Information Technology Services  
Finance - Vendor Sourcing and Management Organization  
Empire State Plaza, PO Box 2062  
Albany, New York 12220-0062  
Telephone Number: (518) 473-9341**

**Email Address:** [supplierdiversity@its.ny.gov](mailto:supplierdiversity@its.ny.gov)

**Supplier Diversity Forms Required to be Filed at the Start of the Contract:**

**1. Start of the Contract MWBE Forms:**

- a) ***MWBE Utilization Form MWBE-100:*** If the Contract contains MWBE goals, then Contractor represents and warrants that Contractor has filed with ITS a complete MWBE Utilization Plan ITS Form MWBE-100 either prior to, or at the time of, the execution of the Contract. A "*complete*" Utilization Plan is one in which each item of requested information on the form such as MWBE contact information inclusive of name, phone number, email address, and mailing address is fully provided by Contractor for the MWBEs listed. Contractor agrees to use such MWBE Utilization Plan for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in this section. Any modifications or changes to the MWBE Utilization Plan after the Contract award and during the term of the Contract must be reported on a revised MWBE Utilization Plan submitted to ITS for approval using the processes described below concerning "*Forms Required to be Submitted to NYS During the Term of the Contract.*"
- b) ***MWBE Request for Waiver/Certification of Good Faith Efforts (ITS Form MWBE-104):*** Alternatively, if the Contractor, after making good faith efforts, is unable to comply with the Contract's MWBE goals, the Contractor may submit to ITS a Request for Waiver ITS Form MWBE-104 documenting good faith efforts by the Contractor to meet such goals. If the documentation included with the waiver request is complete, ITS shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.
- c) ***Required Letter Notice to Identified MWBEs:*** To the extent the Contract has MWBE goals, and the Contractor is submitting to ITS an MWBE Utilization Form MWBE-100, then upon final award of the Contract or completion of the procurement's restricted period, and prior to the commencement of the Contract, the Contractor must email a letter in the form of the sample language below to each and every MWBE firm that Contractor has identified on its approved MWBE-100 Utilization Plan. The Contractor is required to simultaneously provide a copy of each such e-mailed letter to ITS at [supplierdiversity@its.ny.gov](mailto:supplierdiversity@its.ny.gov). Also, to the extent Contractor's utilization plans change or additional certified MWBE Subcontractors are added, Contractor must send such an e-mail letter, again copying ITS, to each additional MWBE vendor added to the utilization plan for the contract:

*Dear [Enter name of NYS certified MWBE Firm]:*

*Please be advised that you have been listed as an MWBE subcontractor on a utilization plan submitted by our company [enter name of awarded prime Contractor] who has been tentatively awarded the following contract with the NYS Office of Information Technology Services (ITS): [enter name and number of Contract awarded].*

*Being listed on our utilization plan does not guarantee your engagement on this contract. Such concerns are managed by the selected vendor along with ITS. Please be in contact with [enter name of awarded prime Contractor] to discuss potential next steps.*

*Should you have any MWBE questions or other questions regarding this contract, please reach out to the NYS Office of Information Technology Services (ITS) and its MWBE liaison using the following contact information:*

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*NYS Office of Information Technology Services  
Finance - Vendor Sourcing and Management Organization  
Empire State Plaza, PO Box 2062  
Albany, New York 12220-0062*

*Telephone Number:* (518) 473-9341

*Contract questions, in general:* [contracts@its.ny.gov](mailto:contracts@its.ny.gov)

*MWBE questions, specifically:* [supplierdiversity@its.ny.gov](mailto:supplierdiversity@its.ny.gov)

*Sincerely,*

*[enter signature]*

**2. Start of the Contract EEO Forms:**

***EEO Staffing Plan (ITS Form EEO-100):*** To ensure compliance with this Section, the Contractor shall file with ITS at or before the beginning of the Contract a completed staffing plan to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories. Contractors shall complete the EEO Staffing Plan ITS Form EEO-100 and submit it to ITS as part of their bid or proposal or within a reasonable time of the execution of the Contract.

**3. Start of the Contract NYS Executive Order 162 Forms:**

***EO 162 Workforce Utilization Report:*** To ensure compliance with this Section, the Contractor shall submit file with ITS at or before the beginning of the Contract a completed NYS Executive Order 162 Workforce Utilization Report to supplement the equal employment opportunity information Contractor has provided to ITS under the Contract by reporting the job title and salary in gross wages of each employee of the Contractor who is performing work on the Contract, or, if the Contractor cannot identify the individuals working directly on the Contract, of each employee in the Contractor's entire workforce.

**4. Start of the Contract SDVOB Forms:**

- a) SDVOB Utilization Plan (Form SDVOB-100):** In accordance with 9 NYCRR § 252.2(i), Contractor is required to complete and file with ITS with its bid or at the beginning of the Contract an SDVOB Utilization Plan on Form SDVOB 100, listing the SDVOBs that the Contractor intends to use to perform the Contract, a description of the work that the Contractor intends the SDVOB to perform in order to meet the goals on the Contract, the estimated dollar amounts to be paid to each SDVOB, or, if not known, an estimate of the percentage of Contract work each SDVOB will perform. By signing the SDVOB Utilization Plan, Contractor acknowledges that making false representations or providing information showing a lack of good faith as part of, or in conjunction with, the submission of an SDVOB Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of the Contract for cause, loss of eligibility to submit future bids, and/or withholding of payments.

Any modifications or changes Contractor wishes to make during the term of the Contract to the SDVOB Utilization Plan after the Contract award and during the term of the Contract must be reported on a revised SDVOB Utilization Plan submitted to NYS for approval using the processes described below concerning "*Forms Required to be Submitted to NYS During*



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*the Term of the Contract.*" ITS will review the updated SDVOB Utilization Plan submitted by Contractor and advise Contractor of ITS' acceptance thereof, or, if not accepted, ITS shall issue Contractor a notice of deficiency within 20 days of receipt.

Contractor certifies that it will follow the original, or any revised and ITS-accepted, SDVOB Utilization Plan that it has submitted to ITS for the performance of SDVOBs on the Contract pursuant to the prescribed SDVOB participation goals set forth above or as further agreed to by the Parties.

If ITS issues to Contractor a notice of SDVOB utilization deficiency, Contractor agrees that it shall respond to ITS' notice of deficiency within seven (7) business days of receipt, by submitting to ITS a written remedy in response to the notice of deficiency. If the written remedy that Contractor submits to ITS is not timely, or is found by ITS to be inadequate, ITS shall notify the Contractor and direct the Contractor to submit to ITS, within five (5) business days of notification by ITS, a request for a partial or total waiver of SDVOB participation goals using the Request for Waiver Form SDVOB-200, as described below.

- b) SDVOB Request for Waiver (Form SDVOB-200):** Alternatively, in accordance with 9 NYCRR § 252.2(m), if Contractor finds it is unable to meet the Contract's SDVOB participation goals but is able to document its good faith efforts to do so, then Contractor may file with ITS an SDVOB Request for Waiver on Form SDVOB-200 requesting a partial or total waiver of the SDVOB participation goals, accompanied by supporting documentation.

To ensure it understands the process correctly, prior to Contractor submitting to ITS a request for a partial or total waiver of SDVOB participation goals, Contractor shall discuss same with the ITS supplier diversity contacts listed in this Supplier Diversity section of the Contract.

Contractor may submit the request for waiver at any time during the Contract, including at the same time it submits its SDVOB Utilization Plan, but no later than prior to the submission of a request for final payment on the Contract. If the documentation included with the Contractor's waiver request is complete, ITS shall evaluate the request, and shall issue the Contractor a written notice of acceptance or denial within twenty (20) days of receipt.

If ITS, upon review of the Contractor's submitted SDVOB Utilization Plan (Form SDVOB-100) and Quarterly SDVOB Compliance Reports (modified versions of Form SDVOB-101) determines that Contractor is failing or refusing to comply with the participation goals, and no waiver has been issued in regards to such noncompliance, then ITS may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven business days of receipt. Such response may include a request for partial or total waiver of SDVOB participation goals.

In accordance with 9 NYCRR § 252.2(n), Contractors must document their SDVOB required good faith efforts toward utilizing SDVOBs on the Contract. This documentation shall be filed by Contractor with ITS using a SDVOB Request for Waiver form (Form SDVOB-200). As described on the form, evidence of required good faith efforts shall include, but not be limited to, the following:

- Copies of Contractor's solicitations to SDVOBs, and any responses thereto.
- Explanation of the specific reasons Contractor chose not to use each SDVOB that responded to Contractor's solicitation to them.

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- Dates of meetings attended by Contractor, if any, that were scheduled by ITS with certified SDVOBs whom ITS determined were capable of fulfilling the SDVOB goals set in the Contract.
- Information describing the specific steps the Contractor had undertaken to reasonably structure its bid and the scope of work it is performing under the Contract, for the purpose of subcontracting with, or obtaining supplies from, certified SDVOBs.
- Other information Contractor deems relevant to its waiver request.

### **ii. Forms Required to be Submitted to NYS During the Term of the Contract:**

1. ***Periodic MWBE Compliance Update Reports:*** For submitting MWBE forms, New York State has created an online system, the "New York State Contract System"("NYSCS"). The primary Internet link may be found here: <https://ny.newnycontracts.com/>. Rather than submitting MWBE update forms directly to ITS, once a contract has been awarded and during the term of the Contract, Contractor is responsible for updating and providing notice to ITS using the online NYSCS, on a cadence as required by that online system, periodic MWBE Compliance Reports using the NYSCS's equivalent of ITS Form MWBE-102, in order to document the progress made during the term of the Contract towards achievement of the MWBE goals of the Contract. For more information, Contractor may go to: <https://ny.newnycontracts.com>.
2. ***Quarterly EO 162 and EEO Workforce Utilization Report:*** DMWBD has combined into a *single* form the two forms previously required for reporting Contractor compliance with NYS Executive Order 162, and Workforce Employment Utilization. Once a contract has been awarded, during the term of Contract Contractor is responsible for submitting this combined form, the EO 162 and EEO Workforce Utilization Report, through the NYSCS system in order to show:
  - a) any changes to the EEO Staffing Plan (ITS Form EEO-100) that the Contractor previously submitted to ITS at the beginning of the Contract, now reporting the *actual* workforce utilized in the performance of the Contract by the specified categories listed including ethnic background, gender, and Federal occupational categories.

Separate forms shall be completed by Contractor and any Subcontractor performing work on the Contract. In limited instances, Contractor may not be able to separate out the workforce utilized in the performance of the Contract from Contractor's and/or Subcontractor's total workforce. When the workforce to be utilized on the Contract *cannot* be separated out from Contractor's and/or Subcontractor's total workforce, Contractor shall still submit this form but indicate that the information provided is Contractor's total workforce during the subject time frame, not limited to work specifically under the Contract.
  - b) any changes to the NYS Executive Order 162 report that Contractor had submitted at the beginning of the Contract, now reporting the *actual* job title and salary in gross wages of each employee of the Contractor who is performing work on the Contract, or, if the Contractor cannot identify the individuals working directly on the Contract, of each employee in the Contractor's entire workforce.

Examples of the Quarterly EO 162 and EEO Workforce Utilization Report may be currently found at: <https://its.ny.gov/eo162-eeo-workforce-utilization-report-contracts-prior-412021>. Contact the ITS supplier diversity contacts listed in this Supplier Diversity section of the

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Contract for more information.

- iii. ***Periodic SDVOB Compliance Update Reports:*** Contractor shall attempt to utilize, in good faith, the SDVOBs identified within its initial SDVOB Utilization Plan, during the performance of the Contract. In accordance with 9 NYCRR § 252.2(q), Contractor is required to submit SDVOB Contractor Compliance Update Reports during the term of the Contract on a periodic basis as determined by the Contract, reflecting and documenting progress made by Contractor towards achieving the Contract SDVOB participation goals. ITS currently requires this reporting be submitted on a quarterly basis, using ITS' periodic SDVOB Compliance Update Report currently found at: <https://its.ny.gov/service-disabled-veteran-owned-business-sdvob-supplier-diversity-program>. Contact the ITS supplier diversity contacts listed in this Supplier Diversity section of the Contract for more information.

**f. Compliance with the Contract's Supplier Diversity Provisions:**

1. **Notice of Deficiency.** If ITS, upon review of the initial MWBE Utilization Plan and updated Periodic MWBE Contractor Compliance Reports determines that Contractor is failing or refusing to comply with the participation goals and no waiver has been issued in regards to such non-compliance, ITS may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE participation goals.
2. **Disqualification as Non-Responsive.** ITS may disqualify a Bidder or Contractor as being non-responsive if they fail to meet the requirements of the Contract under the following circumstances:
  - a) **MWBE:** If such Bidder or Contractor fails to submit to ITS a required initial MWBE Utilization Plan or, through the NYSCS, required updated Periodic MWBE Contractor Compliance Reports;
  - b) **EEO:** If such Bidder or Contractor fails to submit to ITS a required initial EEO Workforce Employment Utilization Plan, or, required updated Quarterly EO 162 and EEO Workforce Utilization Reports;
  - c) **EO-162:** If such Bidder or Contractor fails to submit to ITS a required initial Executive Order 162 Workforce Utilization Report or, required updated Quarterly EO 162 and EEO Workforce Utilization Reports;
  - d) **SDVOB:** If such Bidder or Contractor fails to submit to ITS a required initial SDVOB Utilization Plan or, required updated Periodic SDVOB Contractor Compliance Update Reports;
  - e) If such Bidder or Contractor fails to submit a written remedy to any ITS notice of deficiency;
  - f) If, when such is required, such Bidder or Contractor fails to submit to ITS a request for waiver; or
  - g) If ITS determines that such Bidder or Contractor has failed to document good faith efforts.
3. **MWBE Breach of Contract:** Contractor further agrees that a failure to submit and/or use such initial MWBE Utilization Plan, or Plan as updated by Contractor through the NYSCS, shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a

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material breach, ITS shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsiveness.

4. **MWBE Liquidated Damages:** In accordance with 5 NYCRR §142.13, Contractor acknowledges that if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such finding constitutes a breach of Contract and ITS may withhold payment from the Contractor as liquidated damages. Such liquidated damages shall be calculated as an amount equaling the difference between:

- a) All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and
- b) All sums actually paid to MWBEs for work performed or materials supplied under the Contract.

In the event a determination has been made which requires the payment of liquidated damages and such identified sums have not been withheld by ITS, Contractor shall pay such liquidated damages to ITS within sixty (60) days after they are assessed by ITS unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the NYS Division of Minority and Woman Business Development pursuant to Subdivision 8 of Section 313 of the Executive Law, in which event the liquidated damages shall be payable if the Director renders a decision in favor of ITS.

5. **SDVOB Breach of Contract:** Contractor agrees that its failure to use SDVOBs as agreed in the initial Utilization Plan that Contractor submitted to ITS, or Plan as updated by Contractor through the NYSCS, or any of the following deficiencies by Contractor, shall constitute a material breach of the terms of the Contract and may be grounds for cancellation of the Contract by ITS:

- a) Contractor's failure to submit, or to timely submit, to ITS an SDVOB Utilization Plan;
- b) Contractor's failure to submit, or to timely submit, through the NYSCS a periodic SDVOB Contractor Compliance Update Report;
- c) Contractor's failure to submit, or to timely submit, to ITS a written remedy to an ITS notice of SDVOB utilization deficiency;
- d) Contractor's failure to submit, or to timely submit, to ITS, a Request for Waiver of SDVOB participation goals; or
- e) Contractor's failure to document, or to timely document, to ITS Contractor's good faith efforts toward utilizing SDVOBs on the Contract.

6. **SDVOB Damages:** Upon the occurrence of such a material SDVOB breach by Contractor, ITS shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsibility, and, if Contractor is found to have willfully and intentionally failed to comply with the SDVOB participation goals set forth in the Contract, then in accordance with 9 NYCRR § 252.2(s), Contractor shall pay damages to ITS calculated by ITS based on ITS' actual cost incurred relative to ITS' expenses for personnel, supplies, and overhead related to establish, monitoring, and reviewing certified SDVOB enterprise programmatic goals.

**34. ENCOURAGING USE OF NEW YORK STATE BUSINESSES IN CONTRACT PERFORMANCE**

New York State businesses in general have a substantial presence in State contracts and strongly contribute to the economies of the state and the nation. In recognition of their economic activity and leadership in doing business in New York State, Contractors are strongly encouraged and expected to consider New York State businesses in the fulfillment of the requirements of the Contract. Such partnering may be as Subcontractors, suppliers, protégés or other supporting roles.

Contractor understands that ITS expects Contractor to the maximum extent practical and consistent with legal requirements to use responsible and responsive New York State businesses in purchasing commodities that are of equal quality and functionality and in utilizing services and technology.

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The Legislature has determined that utilizing New York State businesses in State contracts will help create more private sector jobs, rebuild New York's infrastructure, maximize economic activity to the mutual benefit of the Contractor and its New York State business partners, and that New York State businesses will promote the Contractor's optimal performance under the Contract, thereby fully benefiting the public-sector programs that are supported by associated procurements.

Public procurements can drive and improve the State's economic engine through promotion of the use of New York businesses by its contractors. The State therefore expects Contractors to provide maximum assistance to New York businesses in their use of the Contract, so that the potential participation by all kinds of New York businesses will deliver great value to the State and its taxpayers.

### **35. STATE FINANCE LAW SECTION 139-I REQUIREMENT FOR CONTRACTS OF \$1,000,000 OR MORE**

It is the policy of ITS to promote the participation by New York state business enterprises and residents in procurement contracts estimated to be \$1,000,000 or more in compliance with State Finance Law § 139-i. After the Contract is awarded, for procurement contracts in the amount of \$1,000,000 or more, Contractor will be required to notify New York State business enterprises and residents of subcontracting and employment opportunities in compliance with New York State Finance Law Section 139-i. Contractor must document its efforts by showing that it has (i) solicited bids in a timely and adequate manner from New York State Business Enterprises including certified minority and women-owned businesses, (ii) contacted the New York State Department of Economic Development to obtain listings of New York State Business Enterprises, (iii) placed notices for subcontractors and suppliers in newspapers, journals or other trade publications distributed in New York State, or (iv) participated in Bidder outreach conferences. If the Contractor determines that New York State Business Enterprises are not available to participate on the contract as subcontractors or suppliers, the Contractor shall provide a statement indicating the method by which such determination was made. If the Contractor does not intend to use subcontractors, the Contractor shall provide a statement verifying such. Contractor shall also provide notification to New York state residents of employment opportunities through listing any such positions with the community services division of the State's Department of Labor, or providing for such notification in such manner as is consistent with existing collective bargaining contracts or agreements.

Bidders located in a foreign country are notified that the State may assign or otherwise transfer offset credits created by any procurement contract of \$1,000,000 or more, directly or indirectly, to third parties located in New York State, and that Bidders shall be obligated to cooperate with the State in any and all respects in making such assignment or transfer, including, but not limited to, executing any and all documents deemed by the State to be necessary or desirable to effectuate such assignment or transfer, and using their best efforts to obtain the recognition and accession to such assignment or transfer by any applicable foreign government.

### **36. ETHICS COMPLIANCE**

**a. Ethics.** Contractor, its agents, employees, officers, partners, and subcontractors (if any) shall comply with the requirements of the NYS Public Officers Law ("POL") § 73 and § 74, and other State codes, rules and regulations establishing ethical standards for the conduct of business with New York State. Failure to comply with these provisions may result in termination of the Contract and/or other civil or criminal proceedings as required by law.



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The Contractor and its subcontractors shall not engage any person who is, or has been at any time, in the employ of the State to perform services in violation of the provisions of the POL, other laws applicable to the service of State employees, and the rules, regulations, opinions, guidelines or policies promulgated or issued by the New York State Joint Commission on Public Ethics, or its predecessors (collectively, the "Ethics Requirements"). The Contractor certifies that all of its employees and those of its subcontractors who are former employees of the State and who are assigned to perform services under the Contract shall be assigned in accordance with all Ethics Requirements. During the Term, no person who is employed by the Contractor or its subcontractors and who is disqualified from providing services under the Contract pursuant to any Ethics Requirements may share in any net revenues of the Contractor or its subcontractors derived from the Contract. The Contractor has a continuing obligation during the Term to identify and provide ITS with notice of those employees of the Contractor and its subcontractors who are former employees of the State that will be assigned to perform services under the Contract, and make sure that such employees comply with all applicable laws and prohibitions. ITS may request that the Contractor provide it with whatever information ITS deems appropriate about each such person's engagement, work cooperatively with ITS to solicit advice from the New York State Joint Commission on Public Ethics, and, if deemed appropriate by ITS, instruct any such person to seek the opinion of the New York State Joint Commission on Public Ethics. ITS shall have the right to withdraw or withhold approval of any subcontractor if utilizing such subcontractor for any work performed hereunder would be in conflict with any of the Ethics Requirements. ITS shall have the right to terminate the Contract at any time if any work performed hereunder is in conflict with any of the Ethics Requirements.

**b. Conflict(s) of Interest Disclosures.** The Contractor must disclose any existing or contemplated relationship with any other person or entity, including relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers of the Contractor or former officers and employees of the State and their affiliates, in connection with the Contractor's rendering of services enumerated in the RFP and Contract. If a conflict does or might exist, Contractor must describe how it would eliminate or prevent it, and indicate what procedures will be followed to detect, notify ITS of, and resolve any such conflicts.

The Contractor must disclose whether it, or any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries, have been the subject of any investigation or disciplinary action by the New York State Joint Commission on Public Ethics or its predecessor State entities (collectively, "Commission"), and if so, provide to ITS a brief description indicating how such matter before the Commission was resolved or whether it remains unresolved.

Contractor, by entering into the Contract, certifies that performance under the Contract does not and will not create a conflict of interest as defined under the Public Officers Law of the State of New York, including any implementing regulations, State or ITS policies, applicable court precedent, or applicable Federal laws, regulations, rules, and guidelines including 45 CFR parts 75.112 and 75.327(b)&(c). A conflict of interest may include any situation that may have or appear to impair Contractor's ability to provide objective and impartial information, advice, or counsel, or create an unfair competitive advantage for the Contractor or its subcontractors. Contractor further acknowledges that by entering into the Contract that it may be precluded from bidding on other ITS solicitations where Contractor prepares and furnishes specifications to be used in a competitive solicitation pursuant to SFL § 163-a and any applicable Federal laws, rules, and regulations.

### **37. SUMMARY OF POLICY AND PROHIBITIONS ON PROCUREMENT LOBBYING**

Pursuant to State Finance Law §§139-j and 139-k, the RFP that resulted in this Contract included and imposed certain restrictions on communications between ITS and Bidders during the procurement process. Bidders were restricted from making contact, from the earliest notice of intent to solicit offers/bids through final award and approval of the Contract by ITS and, if applicable, OSC ("restricted period"), to other than designated staff unless it was a contact included among certain statutory exceptions set forth in State Finance Law §139-j(3)(a). As noted in the RFP, certain findings of non-responsibility can result in rejection of the Contract award and in the event of two findings within a four-year period, the Bidder shall be debarred from obtaining governmental Procurement Contracts. This Contract is subject to termination in the event any such findings are made. Further information about these requirements can be found on the OGS website: [http://www.ogs.ny.gov/aboutOgs/regulations/defaultSFL\\_139j-k.asp](http://www.ogs.ny.gov/aboutOgs/regulations/defaultSFL_139j-k.asp).

### **38. MOST FAVORABLE TERMS**

Contractor agrees that all fees, pricing, terms, and warranties provided by the Contractor under the Contract are substantially similar to the best equivalent terms being offered by the Contractor to any entity similarly situated. If during the term of the Contract, the Contractor enters into an arrangement with any similarly situated entity, Contractor hereby agrees to amend the Contract to provide the same to ITS.

### **39. TRANSFER OR ASSIGNMENT OF CONTRACT**

ITS may transfer or assign the Contract to another New York State agency or entity at its sole discretion by informing Contractor in writing of such a transfer or assignment. Contractor shall execute any documents required to accomplish the transfer or assignment of the Contract. Contractor shall comply with any instructions from ITS to accomplish the transfer/assignment of the Contract at no additional cost to the State.

### **40. WAIVER OF BREACH**

No term or provision of the Contract shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. No consent by a Party to, or waiver of, a breach under the Contract shall constitute consent to, a waiver of, or excuse for any other, different or subsequent breach. The rights, duties and remedies set forth in the Contract shall be in addition to, and not in limitation of, rights and obligations otherwise available at law or equity.

### **41. ACCESSIBILITY**

**a. Web Accessibility, Branding, and Universal Web Navigation.** Any web-based information and applications development, or programming delivered pursuant to the Contract will conform and comply with New York State Enterprise IT Policy NYS-P08-005 ("*Accessibility of Web-Based Information and Applications*" - see <https://its.ny.gov/tables/technologypolicyindex>) as such policy may be amended, modified or superseded, which requires that State Agency web-based information and applications are accessible to persons with disabilities. Web-based information and applications must conform to New York State Enterprise IT Policy NYS-P08-005 as determined by quality assurance testing. Such quality assurance testing will be conducted by Contractor and the results of such testing must be satisfactory to ITS before web-based information and applications will be considered a qualified Deliverable under the Contract.

Any public facing web-based information and applications development, or programming delivered pursuant to the Contract will comply with New York State Information Technology Standard, NYS-S16-001 ("*New York Universal Web Navigation*" - see: <https://its.ny.gov/tables/technologypolicyindex>) and NYS Branding Guidelines as such policy and standard may be amended, modified or superseded, which requires that State Agency web-based information and applications are accessible to persons with disabilities.

**b. Language Access for Individuals with Limited English Proficiency.** NYS Executive Order 26 (EO-26), as amended, directs executive New York State agencies that provide direct public services to offer language assistance services (translation and interpretation) to people of Limited English Proficiency (LEP).

Such State agencies provide interpretation services between the agency and an individual in the individual's primary language with respect to the provision of services or benefits.

Such State agencies must also provide translation of vital documents in the ten (10) most common non-English languages spoken by LEP individuals in the State of New York, based on the United States census data and relevant to services offered by each of such agencies. According to the NYS Language Access Policy (<https://www.ny.gov/language-access-policy>), effective as of August 1, 2021, the top ten (10) languages are Spanish, Chinese (Mandarin & Cantonese), Russian, Bengali, Yiddish, Haitian-Creole, Korean, Italian, Arabic, and

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Polish. Some agencies may choose to add additional languages based on their experience, population served, and other requirements.

To the extent determined applicable by ITS, the Contract must ensure that any solution procured or service provided under the Contract must comply with EO-26, as amended, for the term of the Contract. The Contractor shall additionally comply with other applicable federal, state, or local language access laws, rules, regulations, or requirements as needed to provide meaningful access to programs and services for individuals with LEP. These include, but are not limited to, Title VI of the Civil Rights Act 42 U.S.C. 2000(d) et seq., 45 CFR Part 80, and 7 CFR Part 15.

### **42. SEVERABILITY**

In the event that one or more of the provisions of the Contract shall for any reason be declared unenforceable by a court of competent jurisdiction under the laws or regulations in force, such provision(s) shall have no effect on the validity of the remainder of the Contract, which shall then be construed as if such unenforceable provision(s) was never contained in the Contract.

### **43. PIGGYBACKING**

Contractor acknowledges and agrees that, pursuant to State Finance Law § 163(10)(e), the New York State Office of General Services may authorize and approve purchases from contracts let by ITS to other New York State agencies, the United States Government or any other state, with the concurrence of the Office of the State Comptroller and under appropriate circumstances.

### **44. NYS FINANCE LAW §163(4)(g) COMPLIANCE: EMPLOYEE INFORMATION REQUIRED TO BE REPORTED FOR CERTAIN CONSULTANT CONTRACTORS AND SERVICE CONTRACTORS**

Chapter 10 of the Laws of 2006 amended the Civil Service Law and the State Finance Law, relative to maintaining certain information concerning Contract Employees working under State Agency service and consulting Contracts. New York State agency consultant Contracts are defined at State Finance Law §163(14)(d) as contracts "*entered into by a state agency for analysis, evaluation, research, training, data processing, computer programming, engineering, environmental health and mental health services, accounting, auditing, paralegal, legal, or similar services*" ("covered consultant Contract" or "covered consultant services"). The amendments also require that certain Contract employee information be provided to the New York State agency awarding such Contracts, Office of State Comptroller (OSC), NYS Division of the Budget (DOB), and NYS Department of Civil Service (CS).

Contractor shall comply with all ITS requests and requirements related to reporting under §163(4)(g) of the New York State Finance Law. Furthermore, all Subcontracts entered into by Contractor for purposes of performing the Contract shall contain a provision whereby its Subcontractors agree to comply with ITS requests and requirements related to reporting under §163(4)(g) of the New York State Finance Law. Reports and forms filed by Contractor pursuant to this section shall be available for public inspection and copying under the provisions of the Freedom of Information Law (FOIL).

To meet these new requirements, the Contractor agrees to complete:

- **Form A - Contractor's Planned Employment Form, if required.** Note: State Agencies are required to furnish this information but may require a Contractor to submit the information as part of its bid response.
- **Form B - Contractor's Annual Employment Report.** Throughout the term of the Contract by May 15<sup>th</sup> of each year the Contractor agrees to report the following information to the State Agency awarding the Contract, or if the Contractor has provided Contract employees pursuant to an OGS centralized Contract, such report must be made to the State Agency purchasing from such Contract. For each covered consultant Contract in effect at any time between the preceding April 1<sup>st</sup> through March 31<sup>st</sup> fiscal year or for the period of time such Contract was in effect during such prior State fiscal year, the Contractor reports the:

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- Total number of employees employed to provide the consultant services, by employment category.
- Total number of hours worked by such employees.
- Total compensation paid to all employees that performed consultant services under such Contract.\*

\* NOTE: The information to be reported is applicable only to those of Contractor's employees who are directly providing services or directly performing covered consultant services. However, such information shall also be provided relative to employees of Subcontractors who perform any part of the service Contract or any part of the covered consultant Contract. This information does not have to be collected and reported in circumstances where there is ancillary involvement of a Contractor's or Subcontractor's employee in a clerical, support, organizational or other administrative capacity.

Contractor agrees to simultaneously report such information to ITS, CS and OSC as designated below:

Reports are preferred in email format to: [Supplierdiversity@its.ny.gov](mailto:Supplierdiversity@its.ny.gov); [SubmitformB@cs.ny.gov](mailto:SubmitformB@cs.ny.gov); [CDMOST@osc.ny.gov](mailto:CDMOST@osc.ny.gov)

If mailed, please submit Form B to:

<b>NYS Office of Information Technology Services Vendor Sourcing and Management Organization</b> Empire State Plaza PO Box 2062 Albany, New York 12220-0062	<b>NYS Department of Civil Service</b> Alfred E. Smith State Office Building Albany, New York 12239 Attn: Executive Office	<b>NYS Office of the State Comptroller</b> 110 State Street - 11th Floor Albany, New York 12236 Attn: Consultant Reporting
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Contractor is advised herein and understands that this information is available for public inspection and copying pursuant to §87 of the New York State Public Officers Law (Freedom of Information Law). In the event individual Employee names or social security numbers are set forth on a document, the State Agency making such disclosure is obligated to redact both the name and social security number prior to disclosure.

Contractor may find further information in OSC's Guide to Financial Operations section concerning "*Consultant Disclosure Legislation*", regarding the Contractor Consultant Law requirements and report Forms A and B at: <http://osc.state.ny.us/agencies/guide/MyWebHelp/>

**INSTRUCTIONS FOR COMPLETING FORM A AND B:**

Form A and Form B should be completed for Contracts for consulting services in accordance with OSC's policy and the following:

**Form A** - Contractor's Planned Employment Form (available from and submitted to the using Agency, if necessary.)

**Form B** - Contractor's Annual Employment Report (to be completed by May 15th of each year for each consultant Contract in effect at any time between the preceding April 1st through March 31st fiscal year and submitted to the CS, OSC and procuring Agency.)

**Scope of Contract:** choose a general classification of the single category that best fits the predominate nature of the services provided under the Contract.

**Employment Category:** enter the specific occupation(s), as listed in the O\*NET occupational classification system, which best describes the Employees providing services under the Contract.

(Note: Access the O\*NET database, which is available through the US Department of Labor's Employment and

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Training Administration, on-line at [online.onetcenter.org](http://online.onetcenter.org) to find a list of occupations.)

**Number of Employees:** enter the total number of Contractor's or Subcontractor's employees in the employment category employed to provide services under the Contract during the report period, including part-time employees and employees of Subcontractors.

**Number of Hours:** enter the total number of hours worked during the report period by these employees in the employment category.

**Amount Payable under the Contract:** enter the total amount paid by the State to the Contractor under the Contract, for work by the employees in the employment category, for services provided during the report period.

### **45. DELIVERABLE ACCEPTANCE**

Contractor will deliver completed work products and services ("Deliverables") to the designated ITS approver who has been authorized to accept Deliverables, using the "Deliverable Acceptance Form" attached to the RFP. Deliverables must meet Contract and, where applicable, DED requirements. The ITS approver will accept or reject the Deliverable. Deliverables will not be automatically accepted in the event of New York State failure to act. If the ITS approver rejects a Deliverable, the cause for rejection and all defects to be addressed will be documented by ITS and provided to the Contractor and the Contractor will correct all identified deficiencies, and resubmit the Deliverable for acceptance. There shall be no verbal acceptance or acceptance by default of a Deliverable.

### **46. CHANGE REQUEST**

At any time during the term of the Contract, the State may make changes, subtractions or additions in any of the Services within the general scope of work set forth in the Contract, consistent with pricing established under the terms of the Contract. Such changes will be subject to the unit costs itemized in the Contract or such other costs as may be mutually agreed between the Parties. All such changes shall be made and executed by both Parties using a change request form as agreed to by the Parties, and shall otherwise be in accordance with the terms and conditions of the Contract. If any such change causes an increase or decrease in pricing or the time required for the performance of the Contract, an equitable adjustment of the Contract amount and/or time of performance will be made on mutual agreement of the Parties, subject to the approval of OSC and any applicable control agency, if required.

### **47. REGISTRATION WITH NYS DEPARTMENT OF STATE**

Prior to being awarded a Contract and throughout the duration of the resulting Contract, Contractor shall be registered with the NYS Department of State as an entity authorized to conduct business in New York State, or have filed an application for authority to do business in New York State with the New York State Secretary of State at the time of submitting a response to the RFP. Such application must have been approved prior to awarding a contract as a result of the RFP. (For details concerning this requirement, refer to information available at <http://www.dos.ny.gov/corps/index.html> and [http://www.dos.ny.gov/cnsl/do\\_bus.html](http://www.dos.ny.gov/cnsl/do_bus.html). To register with the Secretary of State, contact: <http://www.dos.ny.gov/corps/contact.html>). Contractor understands and agrees that by entering into the Contract, and by its registration with the NYS Department of State as an entity authorized to conduct business in New York State, this constitutes consent to the general jurisdiction of New York courts.

Contractor must provide to ITS the Contractor's Federal Employer Identification Number (F.E.I.N.) and/or its Department of State Registration Number or Application Number. The Contractor must notify the State immediately in the event that there is any change in the above corporate status.

### **48. NEW YORK STATE VENDOR FILE REGISTRATION WITH OSC**

Prior to being awarded a Contract and throughout the duration of the resulting Contract, the Contractor must be registered in the New York State Vendor File (Vendor File) administered by the OSC. This is a central registry for all vendors who do business with New York State Agencies and the registration must be initiated by a State Agency.



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Following the initial registration, a unique New York State ten-digit vendor identification number (Vendor ID) will be assigned to Contractor for use on all future transactions with New York State. Additionally, the Vendor File enables vendors to use the Vendor Self-Service application to manage certain vendor information in one central location for all transactions related to the State of New York. For more information on the Vendor File please visit the following website: [http://www.osc.state.ny.us/vendor\\_management/](http://www.osc.state.ny.us/vendor_management/).

### **49. EXTRANEOUS TERMS**

Bidders were required by the RFP to submit responses conforming to the terms set forth therein, and were notified by the RFP that extraneous terms or material deviations (including additional, inconsistent, conflicting or alternative terms) might render their response non-responsive and result in rejection of the response. For the Contract, unless ITS has agreed in writing otherwise, extraneous terms that the Bidder submitted on standard, pre-printed forms (including but not limited to: product literature, order forms, license agreements, contracts or other documents) that were attached or referenced with responses are not part of the Contract, but deemed included for informational or promotional purposes only.

Proposed extraneous term were required by the RFP to: have been specifically enumerated in writing by the Contractor; to have specified the particular RFP section that Contractor had proposed to modify and the reasons why the change would be in the best interest of the State; to have been submitted during the Question and Answer period during the RFP's Calendar of Events Question and Answer time period using the "*Vendor Questions and Extraneous Terms Form*" attached to the RFP; and to have been expressly accepted by ITS in writing.

### **50. NONDISCLOSURE & CONFIDENTIALITY**

Contractor shall maintain the security, nondisclosure, and confidentiality of all information in accordance with the following clauses in the performance of its activities under the Contract. Contractor shall ensure that its agents, employees, officers, partners, and subcontractors, if any, are fully aware of the obligations arising under the Contract and shall take all commercially reasonable steps to ensure their compliance to prevent unauthorized use, access, or disclosure of NYS Confidential Information. Failure by Contractor or its agents, employees, officers, partners, or subcontractors to fully comply with these requirements shall be deemed a failure to meet Contractor's obligations under the Contract and may result in ITS suspending, canceling, and/or terminating the Contract for cause or to pursue any other legal or equitable remedies available.

**a. Definitions.** "*New York State ('NYS') Facilities*": As used in the Contract, the term "*NYS Facilities*" shall mean any real property, tangible personal property, or electronic or virtual systems, or any part(s) or component(s) thereof, used in the conduct of New York State's business operations, including, but not limited to, physical office or computing space, computer(s) or computer systems, telecommunications or network infrastructure (e.g., utility closet(s), conduits, hubs, switches, routers), and supporting NYS Facilities and systems (e.g., mechanical, power, cooling, security, fire protection, water), regardless of owner.

"*New York State ('NYS') Confidential Information*": For purposes of the Contract, any information that ITS or the State, regardless of form or medium of disclosure (e.g., verbal, hard copy, or electronic) or source of information (e.g., ITS, other state agencies, electronic systems, federal government, or third-party contractors) provides to the Contractor, its agents, employees, officers, partners, and subcontractors or which Contractor, its agents, employees, officers, partners, and subcontractors obtains, discovers, derives, or otherwise becomes aware of as a result of Contractor's performance other than:

- (a) information that is previously rightfully known to the receiving Party without restriction on disclosure;
- (b) information that is or becomes, from no act or failure to act on the part of the receiving Party, generally known in the relevant industry or is in the public domain; and
- (c) information that is independently developed by Contractor without use of NYS Confidential Information.

"*Contractor*": For purposes of the Contract, obligations of the Contractor who is a Party to the Contract with ITS and refers to collectively, as well, Contractor's agents, employees, officers, partners, or subcontractors.

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*“State.”* For purposes of the Contract shall be interpreted to including New York State executive agencies (e.g., ITS, DTF, OTDA, DOH).

*“Information Security Incident.”* For purposes of the Contract shall mean any allegation or suspicion held by or brought to the attention of a State employee or Contractor involving inappropriate or unauthorized access to, or disclosure of, NYS Confidential Information or NYS Facilities.

**b. Data Ownership, Non-Disclosure, and Confidentiality.** NYS Confidential Information is owned exclusively by New York State, will remain the property of the State throughout its use under the Contract, and shall not be released to any third-party by Contractor unless as required by applicable law or a court of competent jurisdiction, or unless Contractor has first obtained explicit written permission from a duly authorized individual employed by the State. Contractor is permitted to use NYS Confidential Information solely for the purposes set forth in the solicitation and the Contract, and for no other purpose. At no time shall the Contractor access, use, or disclose any NYS Confidential Information (including, but not limited to, personal, financial, health, or criminal history record information or other sensitive criminal justice information) for any other purpose. Further, NYS Confidential Information must be fully accessible to the State during the term of the Contract and at the Contract's conclusion.

The Contractor is strictly prohibited from releasing or using NYS Confidential Information for any purposes other than those purposes defined herein or authorized in writing by the State. Contractor agrees that NYS Confidential Information shall not be distributed, used, repurposed, transmitted, exchanged, or shared across other applications, environments, or business units of the Contractor or otherwise passed to other contractors, agents, subcontractors, or any other interested parties, except as expressly and specifically agreed to in writing by the State. Contractor shall indemnify and hold ITS and the State harmless from any loss or damage to the State resulting from the disclosure by the Contractor of such NYS Confidential Information, in accordance with the terms and conditions of the Contract. Contractor, including Contractor's agents, employees, officers, partners, or subcontractors, may be required to execute all nondisclosure agreements identified in the solicitation, either before or upon arrival at NYS Facilities or, if in the State's sole discretion, Contractor will otherwise have access to critical State networks, equipment, or NYS Confidential Information.

**c. Compliance with NYS Information Security Policies and Procedures.** Contractor warrants, covenants, and represents that it shall comply fully with all security procedures of the State communicated to it in the performance of the Contract, including NYS Information Security policies and standards located at <https://its.ny.gov/ciso/policies/security>. At the State's discretion, it may, at any time during the term of the Contract, request that Contractor provide documentation validating its adherence to these security policies and standards. Contractor must deliver such documentation within thirty (30) days of a request by the State or as mutually agreed to, in writing, by the Parties.

Contractor, to the extent the following meets or exceeds the NYS Information Security policies and standards described above, shall use industry standard security measures, including standard encryption protocols, to protect and guard the availability and security of all NYS Confidential Information, and adhere to all the State's security policies. Contractor shall be strictly prohibited from using NYS Confidential Information in any fashion other than that defined herein. There may be instances whereby the State will communicate security procedures necessitated by the State's operations. Contractor will use reasonable efforts to implement same. In the event Contractor does not implement or communicates that it cannot or will not implement such security procedures, the Parties will reasonably work to resolve such dispute pursuant to the Contract's Dispute Resolution process to the extent such dispute does not adversely impact the State's legal obligations.

Contractor warrants that its Contractor Staff members are properly informed and trained regarding industry standard security measures, NYS Information Security policies and standards, and are prohibited from disclosing NYS Confidential Information to any persons without a need to know. To the extent applicable, Contractor will work cooperatively with the State so that software applications accessed by members of the public or others are accessed by the single sign-on service provided by New York State Directory Services or such other service chosen by ITS.

**d. Accessing NYS Facilities.** Contractor may access State information technology system(s) and NYS Facilities

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solely at the State's request, and for any work associated with the Contract. In the event Contractor accesses NYS Facilities, Contractor will comply fully with all security procedures of the State concerning such access communicated to it in the performance of the Contract or any amendments hereof. Contractor agrees that it will adopt procedures to ensure the integrity and security of any NYS Confidential Information which is known to Contractor. Those procedures include, for each prospective and current agent, employee, officer, partner, or subcontractor of Contractor designated to work under the Contract or under any amendments hereof, that they are required:

(i) if entering enter NYS Facilities through physical means, to be required to undergo the same security clearances as are required of those workforce members of ITS who physically access NYS Facilities including, upon request by ITS, submitting identifying information and being fingerprinted on-site at Contractor's expense. ITS shall arrange for the scheduling of such fingerprinting activities on State premises; or

(ii) if using or entering NYS Facilities through electronic, telecommunications, information technology, or any other virtual means to be required to undergo the same security clearances as are required of those workforce members of ITS who access NYS Facilities including, upon request by the State, submitting identifying information and being fingerprinted at Contractor's location at Contractor's expense. Contractor shall arrange for the scheduling of such fingerprinting activities at a law enforcement agency in Contractor's locale, and in accordance with law in the jurisdiction in which such fingerprinting takes place, either:

A. submit those fingerprints to a local law enforcement or criminal justice agency for the purpose of obtaining a criminal history record report, and, at ITS' discretion, to the Federal Bureau of Investigation for a national criminal history record check, and report to ITS the substance of the criminal record of any of the fingerprinted individuals; or,

B. mail those fingerprints to ITS for ITS to submit them for the purpose of obtaining a criminal history record report(s).

**e. Protection and Transmission of NYS Confidential Information.** Contractor shall use appropriate means to preserve and protect NYS Confidential Information. This includes, but is not limited to, use of stable storage media, regular data backups and archiving, password protection of volumes, and data encryption. Consistent with the NYS Encryption Standard at: <https://its.ny.gov/tables/technologypolicyindex>, to the extent doing so is applicable based on the specific services provided by Contractor to ITS under the Contract, the Contractor must encrypt NYS Confidential Information at rest, on file storage, on database storage, or on back-up media, and in transit in accordance with Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, and guidelines. The Contractor must provide the ability to encrypt data in motion and at rest in compliance with state or federal law. Contractor must use secure means (HTTPS) for all electronic transmission or exchange of system, user, and application data with the State, with encryption at rest specifically using, at minimum, the latest FIPS approved cryptographic modules, and the secure means used for electronic transmission or exchange of system, user and application data with the State shall be HTTPS, TLS version 1.2 or higher.

Contractor agrees that to the extent it has been authorized in writing to use such storage, any and all NYS Confidential Information will only be stored, processed, and maintained solely on designated target devices, and that no NYS Confidential Information at any time will be processed on or transferred to any portable computing device or any portable storage medium.

Contractor shall also comply fully with all requirements of the Contract pertaining to security requirements specific to the services Contractor is providing to the State under the Contract. In addition to the specific security provisions required herein, Contractor shall also use, to the extent the following meets or exceeds NYS Information Security polices and standards, commercially reasonable best efforts to address and remediate any vulnerabilities associated with the types of application development or configuration services it is providing under the Contract which appear on the CWE/SANS list of the "TOP 25 Most Dangerous Programming Errors" (<http://www.sans.org/top25errors/>). When a vulnerability scan is being conducted as required by applicable NYS Information Security policies and standards, and reveals software application vulnerabilities or any other security risks attendant to a provided solution, Contractor is responsible for ensuring those vulnerabilities and risks are remediated to ITS' reasonable

satisfaction.

**f. Physical Transport of NYS Confidential Information.** To the extent the State agrees under the Contract that Contractor may physically transport any NYS Confidential Information, such physical transport may only occur upon the written direction and approval of the State and must comply with all applicable Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, and guidelines. This includes, but is not limited to, transport between the Contractor's offices, to and from subcontractors, and to the State.

**g. Data Storage, Access, and Location - Off Shore Restrictions.** Contractor agrees that: (a) all NYS Confidential Information shall remain within and may not be stored, or accessed from, outside of the Continental United States (CONUS) and (b) unless expressly agreed to in writing by a State authorized signatory adhering to established State practices, Contractor shall not have remote access into NYS Facilities.

All access to NYS Confidential Information and NYS Facilities, physical or virtual, must be conducted within CONUS and have adequate security systems in place to protect against the unauthorized access to NYS Confidential Information stored therein or NYS Facilities. The Contractor shall not send or permit to be sent to any location outside of the CONUS any NYS Confidential Information related to the Contract.

To the extent support by Contractor requires replication of a set of conditions such as a software crash event, Contractor shall replicate that set of conditions in its own environment when providing support, while communicating with State technical personnel. For software development activities, such as patches, updates, or adding new functionality, Contractor shall conduct that software development within its own Development, Quality Assurance, and Production Environments, and, when ready, shall package and provide it through an agreed-to Internet-based location, from which State technical personnel will download such software, and install and test it in the State's information technology environment. Contractor must provide the results of vulnerability scans conducted on the code prior to the State accepting changed in the code.

Upon prior written approval of ITS, to the extent Contractor requires access to State system or application audit logs for support and troubleshooting, Contractor will maintain such logs only within CONUS, will take the strictest measures to ensure such logs do not contain NYS Confidential Information including production data, and will maintain such logs in a secure environment subject to audits by the State.

**h. Separation of Duties / Access Controls.** The Contractor must ensure that all NYS Confidential Information that it holds under the Contract is stored in a controlled access environment to ensure data security and integrity that adheres to all applicable Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, and guidelines. Contractor will provide the State a list of the physical locations where Contractor has stored any NYS Confidential Information at any given time and will update that list if the physical location changes. All Contractor facilities must have adequate security systems in place to protect against the unauthorized access to such facilities and data stored therein. Access into and within such facilities must be restricted by Contractor through an access control system that requires positive identification of authorized individuals as well as maintains a log of all accesses (e.g., date and time of the event, type of event, user identity, component of the information system, outcome of the event). The Contractor shall have a formal procedure in place for granting computer system access to NYS Confidential Information and to track access. Contractor access to NYS Confidential Information for any types of projects outside of those approved by ITS are prohibited.

ITS requires the Contractor to follow security best practices by adhering to the principle of least privilege and adhering to separation of job duties, and limiting Contractor Staff knowledge of NYS Confidential Information to that which is absolutely needed to perform job duties. Upon request, Contractor will provide documentation to the State clearly defining the security roles and access levels for each of its staff working with NYS Confidential Information with a level of specificity objectively reasonable to and approved by the State. Only those individuals who have successfully completed all security clearance and background check requirements, including training, shall have access to NYS Confidential Information.

## **51. INFORMATION RELEASES**

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**a. Press Releases.** Contractor agrees that no brochure, news/media/press release, public announcement, memorandum or other information of any kind regarding the Contract, or relating to its activities under the Contract, shall be disseminated in any way to the public, nor shall any presentation be given regarding the Contract or those Contractor activities without the prior written approval of ITS, which written approval shall not be unreasonably withheld or delayed provided, however, that Contractor shall be authorized to provide copies of the Contract and answer any questions relating thereto to any State or Federal regulators or, in connection with its financial activities, to financial institutions for any private or public offering.

**b. Public Information, and the NYS Freedom of Information Law (FOIL).** Disclosure by the State of items related to the Contract shall be permitted consistent with the laws of the State of New York and specifically the NYS Freedom of Information Law (FOIL) contained in Section 87 of the NYS Public Officers Law. The State shall take reasonable steps to protect from public disclosure any records or portions thereof relating to the Contract that are otherwise exempt from disclosure under that statute. Information constituting trade secrets or critical infrastructure information, for purposes of FOIL, must be clearly marked and identified as such by the Contractor upon submission to the State.

If the Contractor intends to request an exemption from disclosure under FOIL for trade secret materials or critical infrastructure information, the Contractor shall, at the time of submission, request the exemption in writing and provide an explanation of: (i) why the disclosure of the identified information would cause substantial injury to the competitive position of the Contractor; or (ii) why the information constitutes critical infrastructure information which should be exempted from disclosure pursuant to §87(2) of FOIL. Acceptance of the identified information by the State does not constitute a determination that the information is exempt from disclosure under FOIL.

Determinations as to whether the materials or information may be withheld from disclosure will be made in accordance with FOIL at the time a request for such information is received by the State. Contractor represents and warrants that it understands that requests to exempt the entirety of Contractor's materials from disclosure under FOIL has generally not been found to be meritorious.

**c. Requests to Release NYS Confidential Information to Third Parties.** Except where expressly prohibited by law, Contractor shall immediately notify and provide to the State a copy of any request, subpoena, warrant, judicial or court order, administrative order, or arbitral order of an executive or administrative agency or other governmental authority of competent jurisdiction (a "Demand") that it receives and which relates to or requires production of NYS Confidential Information that Contractor is processing or storing on the State's behalf. If Contractor is required to produce NYS Confidential Information in response to a Demand, Contractor will provide the State with the NYS Confidential Information in its possession that it plans to produce in response to the Demand prior to production of such NYS Confidential Information. Where the Contractor is not required by law to produce or release the requested information, the written approval of the State is required prior to any such disclosure being made. Notice of such the Demand shall be sent to:

**ITS:**

ITS General Counsel  
Empire State Plaza  
Swan Street Building, Core 4  
Albany, New York 12223  
(518) 473-5115  
[its.sm.dla@its.ny.gov](mailto:its.sm.dla@its.ny.gov)

Except as otherwise required by law, Contractor shall provide the State reasonable time to assert its rights with respect to the withholding of such NYS Confidential Information from production. If the State is required to produce NYS Confidential Information in response to a Demand, Contractor will, at the State's request and unless expressly prohibited by law, produce to the State any NYS Confidential Information in its possession that may be responsive to the Demand and shall provide assistance as is reasonably required for the State to respond to the Demand in a timely manner. This assistance may include Contractor upon request disclosing to the State Contractor's processes for responding to subpoenas, service of process, and other legal requests and a description of Contractor Staff roles and responsibilities related to electronic discovery, litigation holds, discovery searches,



and expert testimonies.

ITS acknowledges that Contractor has no responsibility under the Contract to interact directly with the entity making the Demand. The Parties agree that the State's execution of the Contract does not constitute consent to the release or production of NYS Confidential Information.

## **52. BREACHES OF NYS CONFIDENTIAL INFORMATION**

**a. Compliance with the NYS Information Security Breach and Notification Act (ISBNA).** In accordance with the Information Security Breach and Notification Act (ISBNA) (NYS General Business Law, §889-aa and §889-bb; NYS Technology Law, §208), Contractor shall be responsible for complying with the provisions of the ISBNA and the following terms contained herein with respect to any Private Information (as defined in ISBNA) received by Contractor under the Contract that is within the control of the Contractor either on the State's information technology systems or the Contractor's information technology systems (System). In the event of a breach of the

security of the System (as defined by ISBNA) Contractor shall immediately commence an investigation, in cooperation with the State, to determine the scope of the breach and restore the security of the System to prevent any further breaches. Contractor shall also notify the State of any breach of the security of the System immediately following discovery of such breach. Notice of such breach will be sent to:

**ITS:**

ITS General Counsel  
Empire State Plaza  
Swan Street Building, Core 4  
Albany, New York 12223  
(518) 473-5115  
[its.sm.dla@its.ny.gov](mailto:its.sm.dla@its.ny.gov)

Except as otherwise instructed by the State, Contractor shall, to the fullest extent possible, first consult with and receive authorization from ITS and OTDA prior to notifying any individuals, the Department of State (DOS), the NYS Division of State Police, the NYS Office of the Attorney General (OAG), or any consumer reporting agencies of a breach of the security of the System or concerning any determination to delay notification due to law enforcement investigations.

Nothing herein shall in any way impair the authority of the OAG to bring an action against Contractor to enforce the provisions of ISBNA or limit Contractor's liability for any violations of the ISBNA or any other applicable statutes, rules, or regulations. In the event that the Contractor is advised by a law enforcement agency pursuant to GBL §899-aa(4) to delay the notice under GBL §899-aa(3), the Contractor shall provide the notice under GBL §899-aa(3) to the State not more than twenty-four hours after the Contractor has been advised by the law enforcement agency that notice under GBL §899-aa(3) can be provided.

In accordance with ISBNA, Contractor is responsible for complying with the following terms with respect to any Private Information (as defined in the ISBNA) received by or on behalf of the State under the Contract. Contractor:

- Shall supply ITS with a copy of its breach notification policy, which shall be modified to be in compliance with this provision.
- Must encrypt any database fields and backup tapes that contain Private Information, as set forth in the ISBNA.
- Must ensure that the State's Private Information is encrypted in transit to/from Contractor's systems.
- In general, Contractor must ensure that Private Information is not displayed to users on computer screens or in printed reports; however, specific users who are authorized to view the private data elements and who have been properly authenticated may view/receive such data.

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- Must monitor for breaches of security to any of its systems that store or process the State's Private Information.
- Shall take all steps as set forth in ISBNA to ensure Private Information shall not be released without authorization from the State.
- In the event a security breach occurs as defined by ISBNA, notify the ITS Chief Information Security Officer (CISO) by telephone within four (4) hours of becoming aware of the breach and commence an investigation in cooperation with the State to determine the scope and cause of the breach, and to prevent the future recurrence of such security breaches.
- Coordinate all communication regarding the data breach with the ITS CISO and the State.
- Take immediate and necessary steps needed to restore the information security system to prevent further breaches, and take corrective action in the timeframe required by the State. If Contractor is unable to complete the corrective action within the required timeframe, in addition to any other remedies available, the State may contract with a third-party to provide the required services until corrective actions and services resume in a manner acceptable to the State, or until the State has completed a new procurement for a replacement service system. The Contractor will be responsible for the cost of these services during this period.

Contractor shall be responsible for providing all notices required by the ISBNA and for all costs associated with providing said notices.

The State reserves the right to require commercially standard credit monitoring for any and all individuals affected by the data breach at the sole expense of the Contractor for a period to be determined by the State, but not less than twelve (12) months, which shall begin thirty (30) days following the notice of offer from the Contractor of such credit monitoring to those affected individuals, which shall be within a reasonable time following the identification of such affected individuals. The State reserves the right to require notice by regular or electronic mail.

**b. Non-ISBNA Breaches.** In addition to any responsibilities of Contractor under the Contract for reporting breaches of Private Information under ISBNA, Contractor must immediately report to ITS *any* breaches, Information Security Incidents, or unauthorized uses or disclosures of any NYS Confidential Information whether it consists of Personal Information or otherwise. Notice of such breaches or incidents shall be sent to:

**ITS:**

ITS General Counsel  
Empire State Plaza  
Swan Street Building, Core 4  
Albany, New York 12223  
(518) 473-5115  
[its.sm.dla@its.ny.gov](mailto:its.sm.dla@its.ny.gov)

Contractor shall ensure that the Contractor Staff charged with carrying out services under the Contract are aware of Contractor's obligations to the State hereunder. Contractor's Staff browsing, viewing, altering, appending, or modifying the NYS Confidential Information in violation of Contractor's own security policies shall be deemed to have breached the security of the system for the purposes of the Contract.

**c. Preventing Unfair Advantage - Contractor Internal Breaches.** Contractor further represents and warrants that it is aware that New York State procurement laws require a "level playing field" prohibiting an unfair advantage to any particular vendors on State IT procurements. Contractor acknowledges that to the extent it performs any configuration services under the Contract, Contractor's personnel may become aware of NYS Confidential Information consisting of data elements that are collected from government agencies regarding IT planning and potential future purchasing, and that even without actual government agencies' data, knowing exactly what is

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collected could give the impression of an unfair advantage to Contractor for future state IT procurements. Contractor shall use its most stringent commercially reasonable best efforts to create a "firewall" between those of its Contractor Staff and its business units which are permitted to perform services under the Contract and all other personnel and business units of Contractor including those involved in seeking state IT procurements to ensure NYS Confidential Information is not divulged to any of Contractor's personnel who are not strictly needed to perform services under the Contract and approved by ITS to do so. Any divulging of such NYS Confidential Information to Contractor's personnel who are not strictly needed to perform services under the Contract and approved by the State to do so shall be deemed a security breach under the Contract. In addition to any other remedies available to the State for such security breach, Contractor understands that if such security breaches occur Contractor may be deemed a non-responsible vendor under the State's procurement laws and forbidden from contracting on any New York State procurements related to any of the NYS Confidential Information which was breached.

### **53. DATA TRANSPARENCY, ACCESSIBILITY, MIGRATION, and DESTRUCTION AT END OF CONTRACT**

**a. Data Migration.** Contractor shall ensure that the services it performs and the solutions it designs under the Contract are performed in such a way so as to ensure easy migration of any NYS Confidential Information held by Contractor as required by the State. This may include:

- Contractor keeping NYS Confidential Information, including State policy and profile information, separate from processes of any software itself and maintaining that information in a format that allows the State to easily transfer it to an alternative application platform;
- Contractor making its Application Programming Interfaces (APIs) available to the State; and
- Contractor reformatting data and/or applications at Contractor's own expense in order to easily allow the State to switch to alternative software providers or move the NYS Confidential Information back in-house at the State.

**b. Data Return and Destruction - In General.** During any period of suspension of services or of the Contract, the Contractor will not take any action to intentionally erase any NYS Confidential Information.

At the expiration or termination of the Contract, the Contractor shall implement an orderly return of State assets and the subsequent secure disposal of State assets. The State shall be entitled to any post-termination assistance generally made available by Contractor with respect to the services it provides unless a unique alternative data retrieval arrangement has been established between the Parties in writing.

At the State's option, the Contractor must provide the State with a copy of the NYS Confidential Information, including metadata and attachments, in a mutually agreed upon, commercially standard format at no additional charges to the State, and give the State continued access to NYS Confidential Information for no less than ninety (90) days beyond the expiration or termination of the Contract. Thereafter, except for data required to be maintained by Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, or guidelines or the Contract, Contractor shall destroy NYS Confidential Information from its systems and wipe all its data storage devices to eliminate any and all NYS Confidential Information from Contractor's systems. The sanitization process must be in compliance the NYS Security Standard, NYS-S13-003, available at <https://its.ny.gov/sanitization-secure-disposal-standard>, and, where required, other sanitization and disposal standards. If immediate purging of all data storage components is not possible, the Contractor will certify that any NYS Confidential Information remaining in any storage component will be safeguarded to prevent unauthorized disclosures until such purging is possible. Contractor must then certify to the State, in writing, that it has complied with the provisions of this paragraph including providing any supporting documentation as required. The State may withhold payment to Contractor if NYS Confidential Information is not released to the State in accordance with the preceding sections.

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**c. Data Return and Destruction - Regulated Data.** New York State considers the protection of sensitive data and NYS Confidential Information and business systems to be of the utmost importance. The NYS Confidential Information collected and maintained by State and local government agencies is protected by a myriad of Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, and guidelines. Access to and use of NYS Confidential Information is limited to authorized government employees and legally designated agents, for authorized purposes only.

The "PRIMARY SECURITY AND PRIVACY MANDATES" appendix to the solicitation and Contract reflects several significant Federal and State laws, rules, regulations, policies, standards, and guidelines that providers doing business with the State must be aware of and comply with if applicable to the services being provided. Links to further guidance are included in that appendix. The list is intentionally US-centric, and is not intended to be all-inclusive. Further, since Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, and guidelines and industry guidelines change, consulting definitive sources to ensure a clear understanding of compliance requirements is critical. Many NYS agencies may have additional program compliance requirements that must be considered in addressing compliance. (e.g., DMV Privacy Act, Public Service Law, etc.).

To the extent that Contractor has access to Local, State, or Federal government regulated data pursuant to their responsibilities under the Contract, Contractor agrees that it will abide by the requirements of those Federal, State, and Local laws, rules, regulations, ordinances, policies, standards, and guidelines, and will require in writing its agents, employees, officers, partners, or subcontractors to similarly abide by any such requirements including the execution of any documents or agreements required to be executed, certifying their compliance with same.

Contractor must, in accordance with applicable law and the instructions of the State: maintain such regulated data for the time period required by applicable law, rule, regulation, ordinance, policy, standard, or guideline; exercise due care for the protection of data; and maintain appropriate data integrity safeguards against the deletion or alteration of such data. In the event that any regulated data is lost or destroyed because of any act or omission of the Contractor or any non-compliance with the obligations of the Contract, then Contractor shall, at its own expense, use its best efforts in accordance with industry standards to reconstruct such data as soon as feasible. In such event, Contractor shall reimburse the State for any costs incurred by the State in correcting, recreating, restoring, or reprocessing such data or in providing assistance therewith.

In the event that it becomes necessary for Contractor to receive NYS Confidential Information which Local, State, or Federal laws, rules, regulations, ordinances, policies, standards, and guidelines prohibit from disclosure, Contractor hereby agrees to return or destroy, adhering to the standards outlined in the above section, all such NYS Confidential Information that has been received from the State when the purpose that necessitated its receipt by Contractor has been completed. In addition, Contractor agrees, after termination of the Contract, not to retain any NYS Confidential Information which Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, and guidelines prohibit from disclosure.

Notwithstanding the foregoing, if the return or destruction of the regulated data or NYS Confidential Information is not feasible, Contractor agrees to extend the protections of the Contract for as long as necessary to protect the regulated data or NYS Confidential Information and to limit any further use or disclosure of that regulated data, or NYS Confidential Information. If Contractor elects to destroy the regulated data or NYS Confidential Information, it shall use reasonable efforts to achieve the same and notify the State accordingly. Contractor agrees that it will use all appropriate safeguards to prevent any unauthorized use or unauthorized disclosure of NYS Confidential Information which Local, State, and Federal laws, rules, regulations, ordinances, policies, standards, and guidelines prohibit from disclosure.

**d. Data Retention.** Notwithstanding any other obligation under the Contract Contractor agrees that it will preserve NYS Confidential Information in a manner that complies with all applicable federal, state and local laws, rules, regulations, and policies for the purposes of ensuring applicable data records retention obligations are met.

## **54. AUDITS OF CONTRACTOR'S SECURITY CONTROLS**

Contractor may be asked to provide recent independent audit reports on its security and compliance controls before and during the term of the Contract. The State and any regulatory authority having jurisdiction over the State shall have the right to send its officers and employees into the offices and plants of the Contractor for inspection and audit of the facilities and operations used by Contractor in the performance of any work under the Contract. On the basis of such inspection, Contractor may be required by the State to implement specific additional security and compliance measures in cases where the Contractor is found to be noncompliant with Contract safeguards. The State shall provide at least two (2) weeks' notice of its intention to exercise this audit right and will not use an independent third-party that is a competitor of Contractor. Such audit shall be conducted to ensure compliance with the requirements of the Contract.

## **55. COMPLIANCE WITH HIPAA (HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996), HI-TECH (HEALTH INFORMATION TECHNOLOGY FOR ECONOMIC AND CLINICAL HEALTH ACT OF 2009), AND OTHER HEALTH INFORMATION PRIVACY AND SECURITY LAWS**

### **Definitions:**

The following terms used in this Section shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information (PHI), Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

**(a) Business Associate.** "Business Associate" shall generally have the same meaning as the term "business associate" at 45 CFR 160.103, and in this Section may refer to Contractor or its Subcontractor(s), to the extent Contractor or its Subcontractor(s) create, receive, maintain, or transmit protected health information on behalf of ITS.

**(b) Covered Entity.** By entering into the Contract, ITS does not affirm that it necessarily meets the definition of a "Covered Entity" or a "Business Associate" under the HIPAA statute, and rather affirms that ITS may in a given instance be acting as a "conduit" or in another capacity providing services to other entities, some of which themselves may be covered entities. But to the extent ITS is deemed to be covered by HIPAA or HI-TECH, the Parties agree the term "Covered Entity" in this Section shall generally have the same meaning as the term "covered entity" at 45 CFR 160.103.

**(c) HIPAA Rules.** "HIPAA Rules" shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164.

**(d) "Medicaid Confidential Data" (MCD)** includes all information about a Medicaid recipient or applicant, including enrollment information, eligibility data and protected health information. The NYS Department of Health (DOH) is the Single State Agency responsible for the administration of the New York State Medicaid program in New York State, including ensuring the security and confidentiality of MCD data.

### **HIPAA Protected Health Information Obligations and Activities of Contractor**

To the extent Contractor or its Subcontractor(s) create, receive, maintain, or transmit protected health information on behalf of ITS pursuant to their responsibilities under the Contract, Contractor agrees that it is subject to, will abide by, and will require in writing its Subcontractors to similarly abide by, the following requirements applicable to Business Associates under HIPAA, agreeing to:

**(a)** Not use or disclose protected health information other than as permitted or required by the Contract or as required by law;



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**(b)** Use appropriate safeguards, and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by the Contract;

**(c)** Report to ITS within ten (10) business days or fewer any use or disclosure of protected health information not provided for by the Contract of which it becomes aware. In no event shall Contractor exceed the timeframe for reporting to ITS breaches of unsecured protected health information as required at 45 CFR 164.410, and any security incident of which it becomes aware. Contractor shall provide ITS all information reasonably requested by ITS concerning any breach. Contractor shall also provide the following information to ITS upon first instance of the notification of breach: the identification of each individual whose unsecured protected health information has been, or is reasonably believed by Contractor, to have been, accessed, acquired, used, or disclosed during the breach.

**(d)** In accordance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any Subcontractors that create, receive, maintain, or transmit protected health information on behalf of Contractor agree in writing to the same restrictions, conditions, and requirements that apply to Contractor with respect to such information;

**(e)** Make available protected health information in a designated record set to ITS, in a manner to be prescribed by ITS within a reasonable timeframe not to exceed fifteen (15) days, absent extenuating circumstances, as necessary to satisfy obligations which ITS or the entities it provides services to reasonably believe applicable to them under 45 CFR 164.524. In the event Contractor or its Subcontractor(s) receive any request for such protected health information directly from an individual, Contractor shall refer such request to ITS within a reasonable timeframe not to exceed ten (10) business days.

**(f)** Make any amendment(s) to protected health information in a designated record set as directed by ITS pursuant to 45 CFR 164.526, or take other measures as necessary to satisfy obligations that ITS reasonably believes it has under 45 CFR 164.526, in the manner as prescribed by ITS and within twenty (20) business days of such request. In the event Contractor or its Subcontractor(s) receive any request to amend a data set directly from an individual, Contractor shall refer such request to ITS within a reasonable timeframe not to exceed ten (10) business days;

**(g)** Maintain and make available the information required to provide an accounting of disclosures to ITS as necessary to satisfy obligations that ITS reasonably believes it has under 45 CFR 164.528, in the manner as prescribed by ITS and within ten (10) business days of such request. In the event Contractor or its Subcontractor(s) receive any request for an accounting of disclosures directly from an individual, Contractor shall refer such request to ITS within a reasonable timeframe not to exceed ten (10) business days;

**(h)** To the extent Contractor or its Subcontractor(s) are to carry out one or more of obligation(s) ITS may have under Subpart E of 45 CFR Part 164, in performing such obligations, comply with the requirements of Subpart E that apply to ITS; and

**(i)** Make either Contractor's or its Subcontractor(s)', or both's, internal practices, books, and records available to the Secretary of the Department of Health and Human Services and to ITS, for purposes of determining compliance with the HIPAA and HI-TECH Rules.

### **Permitted Uses and Disclosures of Protected Health Information by Contractor and its Subcontractor(s)**

**(a)** Contractor and its Subcontractor(s) may only use or disclose protected health information as necessary to perform the services set forth in the Contract, provided however, that if de-identified information can be used in lieu of individually identifiable health information with the same effect, Contractor and its Subcontractor(s) shall use de-identified information in their performance of the Contract in accordance with 45 CFR 164.514(a)-(c).

**(b)** Contractor and its Subcontractor(s) may use or disclose protected health information as required by law.

**(c)** Contractor and its Subcontractor(s) agrees to make only those uses, disclosures and requests for protected health information that are consistent with the minimum necessary policies and procedures of ITS or the entit(ies) for

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whom ITS provides services which entail the creation, reception, maintenance, or transmittal of protected health information.

(d) Contractor and its Subcontractor(s) may not use or disclose protected health information in a manner that would violate Subpart E of 45 CFR Part 164 except as may be provided for in the Contract or for the proper management and administration of Contractor or its Subcontractor(s), including the carrying out of the Contractor's or its Subcontractor(s)' legal responsibilities.

### **Other Health Information Obligations and Activities of Contractor**

Contractor or its Subcontractor(s) may not disclose other types of health information protected by federal, State or local law including but not limited to personally identifiable mental health information protected under NYS Mental Hygiene Law §33.16, other personally identifiable health information or HIV information protected under NYS Health Law sections §18 or Article 27-F, or substance abuse information protected under federal regulations 42 CFR Part 2.

Contractor or its Subcontractor(s) may not disclose Medicaid Confidential Data without the prior written approval of the New York State Department of Health (DOH), either directly or as provided to Contractor or its Subcontractor(s) through ITS. If contacted by DOH, while also informing ITS, Contractor or its Subcontractor(s) shall reasonably work with DOH to identify any individuals who may have inappropriately or unlawfully accessed Medicaid Confidential Data.

Contractor agrees to ensure that Contractor and any agent, including a Subcontractor, to whom Contractor provides Medicaid Confidential Data, agrees to the same restrictions and conditions that apply throughout the Contract. Further, Contractor agrees to state in any such agreement, contract or document that the party to whom Contractor is providing the Medicaid Confidential Data may not further disclose it without the prior written approval of the New York State Department of Health. Contractor agrees to include the notices preceding, as well as references to statutory and regulatory citations set forth above, in any agreement, contract or document that Contractor enters into that involves Medicaid Confidential Data.

The federal Center for Medicare and Medicaid Services (CMS) requires that all contracts and/or agreements executed between the Department of Health and any second party that will receive Medicaid Confidential Data must include contract language that will bind such Parties to ensure that contractor(s) abide by the regulations and laws that govern the protection of individual, Medicaid confidential level data.

Medicaid Confidential Data includes all information about a recipient or applicant, including enrollment information, eligibility data and protected health information.

Contractor must comply with the following State and federal laws and regulations:

- Section 367b(4) of the NY Social Services Law
- New York State Social Services Law Section 369 (4)
- NYS Mental Hygiene Law §33.16,
- Article 27-F of the New York Public Health Law & 18 NYCRR 360-8.1
- Social Security Act, 42 USC 1396a (a)(7)
- Federal regulations at 42 CFR 431.302, 42 C.F.R. Part 2
- The Health Insurance Portability and Accountability act (HIPAA), at 45 CFR Parts 160 and 164

Please note that Medicaid Confidential Data released to Contractor may contain AIDS/HIV related NYS Confidential Information as defined in Section 2780(7) of the New York Public Health Law. As required by New York Public Health Law Section 2782(5), the following notice is provided to Contractor:

*“This information has been disclosed to you from confidential records which are protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. Any unauthorized further disclosure in violation of*

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*state law may result in a fine or jail sentence or both. A general authorization for the release of medical or other information is NOT sufficient authorization for the release for further disclosure."*

### **Alcohol and Substance Abuse Related Confidentiality Restrictions:**

Alcohol and substance abuse information is confidential pursuant to 42 C.F.R. Part 2. General authorizations are ineffective to obtain the release of such data. The federal regulations provide for a specific release for such data.

### **Term and Termination**

**(a) Termination for cause under HIPAA or HI-TECH.** The Term of this Section shall be as described elsewhere in the "Term" section of the Contract. Among the other reasons for which ITS may terminate the Contract prior to the end of its Term date for cause, ITS may terminate the Contract if ITS determines the Contractor or its Subcontractor(s) have violated a material term of this HIPAA and HI-TECH Compliance Section of the Contract, and Contractor or its Subcontractor(s) have not cured the breach or ended the violation within any time that has been specified by ITS.

**(b) Contractor's and its Subcontractor(s)' Obligations Upon Termination.** Upon termination of the Contract for any reason, Contractor and its Subcontractor(s) shall return to ITS, transfer to another of ITS' contractors as directed by ITS, or, if agreed to by ITS on an individual case-by-case basis, destroy all protected health information received from ITS, or created, maintained, or received by the Contractor and its Subcontractor(s) on behalf of ITS, that the Contractor and its Subcontractor(s) still maintain in any form. Contractor and its Subcontractor(s) shall retain no copies of the protected health information. Contractor understands and agrees and will require of its Subcontractor(s) in writing that Contractor and its Subcontractor(s) are required to receive written approval from ITS prior to the return, transfer or destruction of any protected health information.

**(c) Survival.** Contractor's and its Subcontractor(s)' obligations under this HIPAA and HI-TECH Compliance section of the Contract shall survive the termination of the Contract.

### **Miscellaneous**

**(a) Regulatory References.** A reference in the Contract to a section in the HIPAA or HI-TECH Rules means the section as in effect or as amended.

**(b) Amendment.** The Parties agree to take such action as is necessary to amend the Contract from time to time as is necessary for compliance with the requirements of the HIPAA or HI-TECH Rules and any other applicable law.

**(c) Interpretation.** Any ambiguity in the Contract shall be interpreted to permit compliance with the HIPAA or HI-TECH Rules.

**(d) Sub-contractors.** Contractor shall require any Subcontractors that it uses that create, receive, maintain, or transmit protected health information on behalf of ITS under the Contract to conform to these HIPAA and HI-TECH Compliance requirements in addition to any other security, privacy or applicable terms of the Contract.

## **56. SAFEGUARDING FEDERAL TAX INFORMATION**

### **I. PERFORMANCE**

In performance of the Contract, the Contractor agrees to comply with and assume responsibility for compliance by Contractor Staff with the following requirements:

- (1) All work will be performed under the supervision of the Contractor.
- (2) The Contractor and Contractor Staff to be authorized access to Federal Tax Information (FTI) must meet the background check requirements defined in IRS Publication 1075. The Contractor will maintain a list of Contractor

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Staff authorized access to FTI. Such list will be provided to ITS and, upon request, to the IRS.

(3) FTI made available in any format shall be used only for the purpose of carrying out the provisions of the Contract. FTI in any format shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of the Contract. Inspection by or disclosure of FTI to anyone other than the Contractor or Contractor Staff authorized is prohibited.

(4) All FTI will be accounted for upon receipt and properly stored before, during, and after processing. In addition, any related output and products will be given the same level of protection as required for the source material.

(5) The Contractor will certify that the FTI processed during the performance of the Contract will be completely purged from all physical and electronic data storage with no output to be retained by the Contractor at the time the work is completed. If immediate purging of physical and electronic data storage is not possible, the Contractor will certify that any FTI in physical or electronic storage will remain safeguarded to prevent unauthorized disclosures.

(6) Any spoilage or any intermediate hard copy printout that may result during the processing of FTI will be given to ITS. When this is not possible, the Contractor will be responsible for the destruction of the spoilage or any intermediate hard copy printouts and will provide ITS with a statement containing the date of destruction, description of material destroyed, and the destruction method.

(7) All computer systems receiving, processing, storing, or transmitting FTI must meet the requirements defined in IRS Publication 1075. To meet functional and assurance requirements, the security features of the environment must provide for the managerial, operational, and technical controls. All security features must be available and activated to protect against unauthorized use of and access to FTI.

(8) No work involving FTI furnished under the Contract will be subcontracted without prior written approval of the IRS.

(9) Contractor will ensure that the terms of FTI safeguards described herein are included, without modification, in any approved subcontract for work involving FTI.

(10) To the extent the terms, provisions, duties, requirements, and obligations of the Contract apply to performing services with FTI, the Contractor shall assume toward the subcontractor all obligations, duties and responsibilities that ITS under the Contract assumes toward the Contractor, and the subcontractor shall assume toward the Contractor all the same obligations, duties and responsibilities which the Contractor assumes toward ITS under the Contract.

(11) In addition to the subcontractor's obligations and duties under an approved subcontract, the terms and conditions of the Contract apply to the subcontractor, and the subcontractor is bound and obligated to the Contractor hereunder by the same terms and conditions by which the contractor is bound and obligated to ITS under the Contract.

(13) ITS will have the right to void the Contract if the Contractor fails to meet the terms of FTI safeguards described herein.

## **II. CRIMINAL/CIVIL SANCTIONS**

(1) Each Contractor Staff of a Contractor to whom FTI is or may be disclosed shall be notified in writing that FTI disclosed to such Contractor Staff can be used only for a purpose and to the extent authorized herein, and that further disclosure of any FTI for a purpose not authorized herein constitutes a felony punishable upon conviction by a fine of as much as \$5,000 or imprisonment for as long as 5 years, or both, together with the costs of prosecution.

(2) Each Contractor Staff of a Contractor to whom FTI is or may be accessible shall be notified in writing that FTI accessible to such Contractor Staff may be accessed only for a purpose and to the extent authorized herein, and

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that access/inspection of FTI without an official need-to-know for a purpose not authorized herein constitutes a criminal misdemeanor punishable upon conviction by a fine of as much as \$1,000 or imprisonment for as long as 1 year, or both, together with the costs of prosecution.

(3) Each Contractor Staff of a Contractor to whom FTI is or may be disclosed shall be notified in writing that any such unauthorized access, inspection or disclosure of FTI may also result in an award of civil damages against the Contractor Staff in an amount equal to the sum of the greater of \$1,000 for each unauthorized access, inspection, or disclosure, or the sum of actual damages sustained as a result of such unauthorized access, inspection, or disclosure, plus in the case of a willful unauthorized access, inspection, or disclosure or an unauthorized access/inspection or disclosure which is the result of gross negligence, punitive damages, plus the cost of the action. These penalties are prescribed by IRC sections 7213, 7213A and 7431 and set forth at 26 CFR 301.6103(n)-1.

(4) Additionally, it is incumbent upon the Contractor to inform its Contractor Staff of the penalties for improper disclosure imposed by the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, 5 U.S.C. 552a(i)(1), which is made applicable to contractors by 5 U.S.C. 552a(m)(1), provides that any officer or employee of a contractor, who by virtue of their employment or official position, has possession of or access to agency records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

(5) Granting a contractor access to FTI must be preceded by certifying that each Contractor Staff understands ITS's security policies and procedures for safeguarding FTI. The Contractor and Contractor Staff must maintain their authorization to access FTI through annual recertification of their understanding of ITS's security policy and procedures for safeguarding FTI. The initial certification and recertifications must be documented and placed in the ITS's files for review. As part of the certification and at least annually afterwards, the Contractor and each Contractor Staff must be advised of the provisions of IRC sections 7213, 7213A, and 7431 (see Exhibit 4, *Sanctions for Unauthorized Disclosure*, and Exhibit 5, *Civil Damages for Unauthorized Disclosure*). The training on ITS's security policies and procedures provided before the initial certification and annually thereafter must also cover the incident response policy and procedure for reporting unauthorized disclosures and data breaches (See Section 10). For the initial certification and the annual recertifications, the Contractor and each Contractor Staff must sign, either with ink or electronic signature, a confidentiality statement certifying their understanding of the security requirements.

### **III. INSPECTION**

The IRS and ITS, with 24 hour notice, shall have the right to send its inspectors into the offices and plants of the Contractor to inspect facilities and operations performing any work with FTI under the Contract for compliance with requirements defined in IRS Publication 1075. The IRS' right of inspection shall include the use of manual and/or automated scanning tools to perform compliance and vulnerability assessments of information technology (IT) assets that access, store, process, or transmit FTI. Based on the inspection, corrective actions may be required in cases where the Contractor is found to be noncompliant with FTI safeguard requirements.

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