

Attachment A
Amended and Restated Contract Terms and Conditions

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ARTICLE 1. DEFINITIONS AND CONSTRUCTION

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1.02 **Definitions.** The following defined terms shall have the meanings specified below:

- (1) "*Additional Fees*" shall mean the fees described in any Additional Services Addendum.
- (2) "*Additional Services*" shall mean any additional day-to-day processing services requested by Commonwealth of Vendor and related start-up activities resulting from the addition of a Commonwealth Agency by Commonwealth, to the extent such requested services are outside the scope of the Designated Services.
- (3) "*Additional Services Addendum*" shall mean, in the event that Commonwealth elects to have Vendor perform any Additional Services, the written addendum to this Agreement in respect of such Additional Services, executed by Commonwealth and Vendor and in a form to be agreed upon by the parties.
- (4) "*Additional Services Levels*" shall mean the service levels to be provided by Vendor for the Additional Services, as such service levels are specified in an Additional Services Addendum or otherwise established, in writing, by Commonwealth and Vendor.
- (5) "*Additional Services Proposal*" shall mean the proposal submitted by Vendor pursuant to *Section 3.02* and in response to Commonwealth's request for the performance of Additional Services.
- (6) *Intentionally left blank.*
- (7) "*BIO-DPH*" shall mean the Bureau of Infrastructure and Operations-Data Power House.
- (8) "*Benchmark*" shall mean each comparison measurement of the Benchmarking Process.
- (9) "*Benchmark Information*" shall mean the objective third party information that will be required to conduct or support the Benchmark, including information regarding system software, hardware, storage, application software, data storage devices and telecommunications.
- (10) "*Benchmark Results*" shall mean the final results of the Benchmarking

Process delivered by the Benchmarker in a written report including identification of the figures and supporting documentation.

- (11) "*Benchmark Review Period*" shall mean the 60-day period following receipt of the Benchmark Results during which Commonwealth, Vendor and the Management Committee shall review such Benchmark Results.
- (12) "*Benchmarker*" shall mean the organization selected by Commonwealth, which organization shall be subject to approval by Vendor.
- (13) "*Benchmarking Process*" shall mean the objective measurement and comparison process (utilizing baselines and industry standards agreed to by Commonwealth and Vendor) established by Commonwealth and Vendor.
- (14) "*Change Control Procedures*" shall mean the written procedures further described in *Article 13* for handling and implementing Changes.
- (15) "*Change(s)*" shall mean all changes to the Systems and the Services that would alter the functionality or technical environment of the Systems, the scope of the Services or the Service Levels, except the Additional Services.
- (16) "*Change Order*" shall mean a document issued to reflect Changes, other than Additional Services, that are authorized through the Change Control Procedures.
- (17) "*Commonwealth Agencies*" shall mean those agencies of Commonwealth set forth in *Exhibit 1.00*, as may be updated by adding or eliminating such Commonwealth Agencies from time to time during the Outsource Term in accordance with the Change Control Procedures.
- (18) "*Commonwealth Agents*" shall mean the agents and contractors of Commonwealth, except Vendor or any Vendor Agent.
- (19) "*Commonwealth Data*" shall mean all data and information submitted or made available to Vendor by Commonwealth, any Commonwealth Agency or any other entity acting on behalf of Commonwealth in connection with the Services during the Outsource Term.
- (20) "*Commonwealth Machines*" shall mean those machines and equipment owned or leased by Commonwealth and used in connection with the Services, consisting of those machines and equipment set forth in *Exhibit 3.09(CM)* and any replacements thereof and any upgrades and additions thereto.
- (21) "*Commonwealth Project Manager*" shall mean the Commonwealth

employee who is appointed by Commonwealth who will act as the primary point of contact for Vendor with respect to each party's obligations under this Agreement.

- (22) "*Commonwealth Proprietary Software*" shall mean the software owned by Commonwealth.
- (23) "*Commonwealth Satisfaction Survey*" shall mean any Commonwealth satisfaction survey conducted by Vendor in accordance with the procedures described in *Exhibit 7.02* or as otherwise agreed to by the parties.
- (24) "*Commonwealth Services Locations*" shall mean the services locations owned, leased or under the control of Commonwealth that are set forth in *Exhibit 8.01(CSL)*.
- (25) "*Commonwealth Software*" shall mean the Commonwealth Proprietary Software, the Commonwealth Third Party Software, and any related documentation in Commonwealth's possession on or after the Effective Date.
- (26) "*Commonwealth Third Party Software*" shall mean the software licensed or leased by Commonwealth from a third party as set forth or described in *Exhibit 3.10(CTPS)*.
- (27) "*Confidential Information*" of a party shall mean (1) with respect to Commonwealth, all Commonwealth Data and other information of Commonwealth or any Commonwealth Agency or any private individual, organization or public agency, in each case to the extent such information and documentation is not permitted to be disclosed to third parties under local, Commonwealth or Federal laws and regulations or pursuant to any policy adopted by Commonwealth or pursuant to the terms of any third-party agreement to which Commonwealth is a party and (2) with respect to Vendor, all Vendor Proprietary Software and all Vendor documentation and manuals not made available in the ordinary course of business (except those items developed by Vendor specifically to deliver Services to the Commonwealth pursuant to this Agreement), and any other information identified in writing by Vendor as confidential or proprietary to Vendor, its subcontractors or licensors.
- (28) "*Contract Year*" shall mean each 12-month period commencing on the Effective Date or any anniversary of the Effective Date during the Outsource Term.
- (29) "*Critical Services*" shall mean those Services set forth or described in *Exhibit 19.01*.

- (29.1) "*CTC Time and Materials Services*" shall mean the services set forth in *Exhibit 3.01(CTC)*.
- (29.2) "*CTC Time and Materials Services Fees*" shall mean those hourly rates of Vendor applied to the CTC Time and Materials Services as set forth in *Exhibit 21.03*.
- (30) "*Designated Fees*" shall mean the fees for the Designated Services set forth in *Exhibit 21.01A*.
- (31) "*Designated Services Levels*" shall mean the service levels for the Designated Services as described in *Exhibit 6.03*, as may be adjusted from time to time by the parties.
- (32) "*Designated Services*" shall mean the services (1) set forth in *Exhibit 3.01* and (2) otherwise identified in this Agreement as being part of the Designated Services.
- (33) "*Developed Software*" shall mean any modifications or enhancements to the Commonwealth Software and any other software, documentation and manuals related thereto, in each case developed pursuant to this Agreement by Vendor, its subcontractors or their respective licensors.
- (34) "*Documentation*" shall mean all documentation, written materials, work papers, configurations and manuals (including the Management Procedures Manual) prepared by or on behalf of Vendor or any of the Vendor Agents pursuant to this Agreement.
- (35) "*Effective Date*" shall mean August 19, 1999.
- (36) "*Equipment*" means any machines or equipment used in the provision of the Services. Equipment includes Commonwealth Machines and Vendor Machines listed in *Exhibit 3.09(CM) Commonwealth Machines* or *Exhibit 3.09(VM) Vendor Machines*.
- (37) "*Fees*" shall mean the Designated Fees, the CTC Time and Materials Services Fees and the Additional Fees, collectively.
- (38) "*Force Majeure Event*" shall mean any failure or delay caused, directly or indirectly, by fire, flood, earthquake, elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, rebellions or revolutions in the United States, strikes, lockouts or other labor difficulties, court order, third party nonperformance (except the non-performing party's subcontractors or agents unless such non-performance is itself caused by a Force Majeure

Event), or any other similar cause beyond the reasonable control of such party and without the fault or negligence of such party.

- (39) *"Impact Study"* shall mean the investigation conducted by Vendor in response to a Change Order, including but not limited to research modeling, pricing, work flow analysis and other such activities as are necessary to provide BIO-DPH with a forecast of the affects or impact of the Change Order on the Services.
- (40) *"Improved Technology"* shall mean any new commercially available information processing technology developments, including new software and hardware developments, that could reasonably be expected to have a positive impact on the Services in terms of increased efficiency or reduced cost.
- (41) *"Outsource Term"* shall have the meaning ascribed thereto in *Article 2*.
- (42) *"Key Employee(s)"* shall mean the Vendor project staff members who are (1) assigned to the key positions identified in *Exhibit 12.03* or (2) identified, and agreed upon in writing, by the Commonwealth Project Manager and the Vendor Project Manager as important to the satisfactory provision of the Services by Vendor.
- (43) *"Machines"* shall mean the Commonwealth Machines and the Vendor Machines, collectively.
- (44) *"Management Committee"* shall have the meaning assigned in *Exhibit 13.00*.
- (45) *"Management Procedures Manual"* shall mean the management procedures manual prepared and delivered to Commonwealth by Vendor, in the form and scope agreed upon by Commonwealth and Vendor, which establishes the procedures pursuant to which policies of Commonwealth and Vendor will be adhered to during the Outsource Term.
- (46) *Intentionally left blank.*
- (47) *Intentionally left blank.*
- (48) *"Project Staff"* shall mean the individuals appointed by Vendor with suitable training and skills to provide the Services, including the Vendor Project Manager and each Vendor Services Location Manager.
- (49) *"Request for Services"* shall mean the request for a change to Services initiated by either the Commonwealth or Vendor which, if approved, will be

documented via a Change Order. A Request for Services initiated by Vendor will not lead to an Impact Study for which Vendor will receive compensation until Vendor receives notice from the Commonwealth authorizing an Impact Study.

- (50) "*Report(s)*" shall mean those data center and other operational data and reports (1) set forth, or otherwise described in *Exhibit 18.02* and (2) as Commonwealth may request from time to time during the Outsource Term pursuant to the Change Control Procedures.
- (51) "*Retained Third Party Resources*" shall mean agreements to which Commonwealth is a party for the information technology assets and services used by Vendor in connection with the provision of the Services, to the extent such agreements are retained by Commonwealth.
- (52) "*Retained Third Party Resources Invoices*" shall mean the third party invoices pertaining to the Retained Third Party Resources.
- (53) "*Services Levels*" shall mean the Designated Services Levels and the Additional Services Levels, collectively.
- (54) "*Services Locations*" shall mean the Commonwealth Services Locations and the Vendor Services Locations and such other locations agreed upon by the parties as listed in *Exhibit 8.01(CSL) Commonwealth Service Locations, and Exhibit 8.01(VSL) Vendor Service Locations*.
- (55) "*Services*" shall mean the Designated Services, the Transformation Services and the Additional Services, collectively.
- (56) "*Software*" shall mean the Commonwealth Software and the Vendor Software, collectively as listed in *Exhibit 3.10(CTPS) Commonwealth Third Party Software and Exhibit 3.10(VTPS) Vendor Third Party Software*.
- (57) "*Systems*" shall mean the Software and the Machines, collectively.
- (58) "*Termination Assistance Services*" shall mean (1) the cooperation of Vendor with Commonwealth, upon request by Commonwealth, in effecting the orderly transfer of the Services to a third party or the resumption of the Services by Commonwealth, and (2) the performance by Vendor of such services as may be requested by Commonwealth in connection with the transfer of the Services to a third party or the resumption of the Services by Commonwealth.
- (59) "*Time and Materials Services Hourly Rates*" shall mean those hourly rates of Vendor set forth in *Exhibit 21.02*.

- (60) *"Transformation Acceptance Test"* shall mean any of the acceptance tests described in the Transformation Plan.
- (61) *Intentionally left blank.*
- (62) *"Transformation Plan"* shall mean the plan for the Transformation of the Designated Services as directed and established in accordance with *Exhibit 4.01*.
- (63) *"Transformation Services"* shall mean the services required to be performed by Vendor as set forth in the Transformation Plan and *Section 3.05* of this Agreement.
- (64) *"Vendor Agents"* shall mean the agents and subcontractors of Vendor.
- (65) *"Vendor Machines"* shall mean those machines and equipment owned or leased by Vendor or any of the Vendor Agents and used in connection with the Services, consisting of those machines and equipment set forth in *Exhibit 3.09(VM)* and any replacements thereof and any upgrades and additions thereto.
- (66) *"Vendor Project Manager"* shall mean the Vendor employee who is appointed by Vendor who will act as the primary point of contact for Commonwealth with respect to each party's obligations under this Agreement.
- (67) *"Vendor Proprietary Software"* shall mean the software, tools and related documentation owned by Vendor or any of the Vendor Agents which is used in connection with the Services.
- (68) *"Vendor Services Location Manager"* shall mean an employee of Vendor appointed by Vendor to manage a Vendor Services Location.
- (69) *"Vendor Services Locations"* shall mean the service locations owned, leased or under the control of Vendor or its subcontractors that are set forth in *Exhibit 8.01(VSL)*.
- (70) *"Vendor Software"* shall mean the Vendor Proprietary Software and the Vendor Third Party Software, collectively.
- (71) *"Vendor Third Party Software"* shall mean the software licensed or leased by Vendor or any of the Vendor's Agents from a third party as described in *Exhibit 3.10(VTPS)*.

- (72) *"Vendor Tools"* shall mean all tool kits owned or licensed by Vendor or Vendor Agents and used by Vendor or any of the Vendor Agents to provide the Services.

1.03 **References.** In this Agreement and the Exhibits and in all instances except those when the context requires otherwise:

- (1) the Exhibits to this Agreement are, by this reference, incorporated into and made a part of this Agreement and all references to and mentions of this Agreement shall include the Exhibits so incorporated into this Agreement;
- (2) references to and mentions of Commonwealth and Vendor include their respective legal successors and persons and entities to whom, by operation of law, the rights and duties of Commonwealth and Vendor, respectively, have passed;
- (3) references to any federal or state law or statute shall include, as of any particular point in time, that law or statute in changed or supplemented form or to a newly adopted law, regulation or statute replacing a previous law, regulation or statute; and
- (4) references to and mentions of the word "including" or the phrase "e.g." in this Agreement shall mean "including, without limitation."

1.04 **Headings.** The article and section headings and the table of contents are for reference and convenience only and shall not be considered in the interpretation of this Agreement.

1.05 **Interpretation of Documents** In the event of a conflict between this Agreement and any Additional Services Addendum, the terms of the Additional Services Addendum shall prevail. In the event of a conflict between an Exhibit to this Agreement and the body of the Agreement itself, the terms of the body of this Agreement shall prevail.

ARTICLE 2. OUTSOURCE TERM. The term of this AMOA will continue to run generally from the Existing Contract Effective Date until the expiry of the term of the AMOA. Unless earlier terminated in accordance with the terms of this AMOA, the term of this AMOA will continue until December 31, 2014 according to the following rules:

- (1) The Existing Contract shall be amended and restated in its entirety as of, and this AMOA shall take effect from, the Amendment Effective Date, such that:
 - (a) the terms and conditions of the Existing Contract in the form existing immediately prior to the Amendment Effective Date shall be effective and enforceable with respect to events, acts and omissions occurring between the Existing Contract Effective Date and immediately prior to the Amendment Effective Date.
 - (b) the terms and conditions of this AMOA shall be effective and enforceable

with respect to events, acts and omissions occurring from and including the Amendment Effective Date.

ARTICLE 3. SERVICES

3.01 Designated Services. Commencing as of the Effective Date and continuing throughout the Outsource Term, Vendor shall provide to Commonwealth the Designated Services. BIO-DPH shall be the single point of contact for all issues, communications and other matters relating to the Services on behalf of Commonwealth and the Commonwealth Agencies. Vendor shall provide the Designated Services in a manner consistent with the terms of this Agreement. Services provided under this Agreement are not exclusive to Vendor. Subject to the provisions of Exhibit 21.01B, Committed Initial Baseline Fees and the termination payment terms set forth in Section 28.07, if applicable, Commonwealth may in-source or re-source any or all of the Services.

3.02 Additional Services. Commonwealth may from time to time request that Vendor perform Additional Services outside the scope of the Change Control Procedures. Vendor shall notify Commonwealth within a reasonable time period after receipt of Commonwealth's request, as to whether Vendor is able to perform such Additional Services. If Vendor is able to perform such Additional Services, Vendor shall promptly provide Commonwealth with an Additional Services Proposal in respect of such Additional Services containing, at a minimum, (1) the time frame for delivery or performance of the Additional Services, (2) if applicable, a description of the scope and functionality of such Additional Services, (3) the fees to be charged to Commonwealth in respect of such Additional Services, (4) to the extent applicable, an estimate of the computing, communications, human resources, hardware, software and run-time requirements necessary to develop, implement and provide such Additional Services, (5) the effect, if any, that such Additional Services will have on the Services Levels, and (6) to the extent applicable, the Services Levels in respect of such Additional Services. In the event Commonwealth elects to have Vendor perform the Additional Services, Commonwealth and Vendor shall execute an Additional Services Addendum in respect of such Additional Services. Vendor shall not begin performing any Additional Services until an Additional Services Addendum has been executed by both Commonwealth and Vendor.

3.03 Variable Services. Subject to *Article 21*, Vendor or Commonwealth shall submit a Request for Services to increase the amount of the Services provided under this Agreement according to Commonwealth's increase in demand for the Services. If approved by Commonwealth, the parties shall implement the Change Control Procedures to revise the then-current headroom ranges for such Services and to revise the Fees as applicable.

3.04 Changes to the Services. Except as may be necessary on an emergency basis to maintain the continuity of the Services or in the event of a declared disaster, Vendor shall not, without Commonwealth's written consent, modify (1) the composition of the Services, (2) the manner in which the Services are to be provided or delivered if such modification would have an adverse effect on the operations of Commonwealth, or (3) the applicable Services Levels.

3.05 Transformation Plan Vendor and Commonwealth will each perform their respective

obligations described in the High Level Transformation Plan and Critical Transformation Milestone Schedule in accordance with, and as set forth in, Exhibit 4.01A and 4.01B of the Agreement. Vendor acknowledges that the performance of all functions and services necessary to accomplish the Transformation Services is to be undertaken without causing a material disruption of the Services and the operations and capabilities of Commonwealth, including those operations and capabilities relating to any of the Commonwealth Agencies. The Commonwealth Project Manager and the Vendor Project Manager shall meet weekly until completion of the activities contemplated in the Transformation Plan in order to review the status of the Transformation Services.

3.06 Equipment. Vendor shall provide the Designated Services using the Equipment. Commonwealth shall provide Vendor with the required access and authorization to use the Commonwealth Machines.

3.07 Replacement and Upgrades of the Equipment.

- (1) As part of the Designated Services, Vendor shall, upon notice to and written concurrence by Commonwealth, replace or upgrade the Equipment as set forth in the refresh schedule in *Exhibit 3.07*. All other replacements and upgrades shall be addressed through the Change Control Procedure. Commonwealth agencies will work closely with BIO-DPH and Vendor to accurately plan for any additional just-in-time technology refresh and upgrade deployment as may be necessary for Vendor to perform the Services in accordance with the Services Levels while meeting new or increased demands of the agencies. In the case of all such replacement or upgrades, Vendor shall provide advance notice via the Change Control Procedure, reasonable under the circumstances to Commonwealth, and such replacement or upgrade shall be subject to Commonwealth's approval, including, without limitation, the approval of the contemplated implementation schedule and cost. . If Commonwealth withholds its approval of such replacement, upgrade or contemplated schedule, the Vendor Project Manager and the Commonwealth Project Manager, in good faith and subject to the Change Control Procedures, will determine the appropriate adjustments to the Services Levels. Vendor acknowledges that all such replacements and upgrades shall consist of the then current technology; that is, Vendor will not extend use of then obsolete technology by increasing its capacity with additional hardware capacity if newer, proven technology is then available. Notwithstanding the foregoing provisions of this Section 3.07(1), the Parties acknowledge that no refresh or upgrading is required by Vendor to maintain Service Levels up to the maximum volumes stated in Exhibit 3.03 (headroom).
- (2) In addition to the foregoing obligations of Vendor under this *Section 3.07*. Vendor shall provide Commonwealth with information regarding additional Improved Technology for Commonwealth's evaluation in connection with the Services, to the extent then known to Vendor, and shall meet with Commonwealth at least two times during each Contract Year to inform Commonwealth of any Improved Technology Vendor is developing or information processing trends and directions of which Vendor is aware. Upon the existence of any such additional Improved

Technology that the parties believe would materially improve the performance, or reduce the cost, of the Services, (other than the required upgrades and replacements provided for above), the parties will meet and discuss in good faith the terms upon which such Improved Technology may be implemented into the Services. The parties acknowledge their intent, in such discussions, to develop terms for such implementation that will result in an equal sharing by the parties of the net economic benefit that is expected to result therefrom with the Designated Fees adjusted accordingly (after taking into account Vendor's cost of the related hardware, software and implementation efforts). Upon any such projected reduction of the cost of the Services, the parties, working together in good faith, shall revise the Fees accordingly.

3.08 Shared Environment. Vendor acknowledges that Commonwealth encourages Vendor to provide the Services in a shared data processing environment, if such environment will materially reduce Commonwealth's costs under this Agreement and can be accomplished within the confidentiality and physical security constraints imposed upon Vendor elsewhere in this Agreement. Accordingly, upon the migration of any of Commonwealth's data processing to a Vendor Services Location, Vendor may provide the related Services from such Vendor Services Location in a shared data processing environment if Vendor reasonably believes such environment will materially reduce Commonwealth's costs under this Agreement and if such shared environment and Vendor's use thereof to provide the Services otherwise comports with the terms of this Agreement. Commonwealth reserves to itself the right of prior approval of any third party proposed by Vendor to share such data processing environment, such approval not to be unreasonably withheld. Vendor acknowledges that Commonwealth will be entitled to withhold its approval of any such third party if, among other things, there is no or insufficient economic benefit to Commonwealth from the proposed sharing arrangement or if any federal or state confidentiality issues are not resolved to the satisfaction of the applicable federal or state governmental entity. In all cases, any sharing of the data processing environment under this *Section 3.08* shall consist only of the sharing of the applicable Vendor Services Location. No sharing by Vendor of any Equipment or any related hardware or network equipment is permitted hereunder. Vendor acknowledges that none of the Fees under this Agreement anticipate a shared data processing environment.

3.09 Machine Maintenance. As part of the Designated Services, Vendor shall provide to Commonwealth maintenance and support services in respect of the Equipment and shall, at its own cost and expense, maintain and support the Vendor Machines as necessary for Vendor to perform the Services in accordance with the Services Levels. All costs and expenses incurred in connection with the provision of maintenance and support services in respect of the Equipment (including third party maintenance fees) shall be the responsibility of Vendor.

3.10 Commonwealth Third Party Software. As part of the Designated Services, Vendor shall have operational responsibility for the Commonwealth Third Party Software for which Commonwealth has a valid license and current maintenance agreement and shall be responsible for applying upgrades, enhancements and "fixes" as provided and directed by the applicable agency. Except for Commonwealth Third Party Software listed in the operational and financial

responsibility section of Exhibit 3.10(CTPS), Commonwealth shall have financial responsibility for any third party license, upgrade, maintenance and support fees therefore, except that Vendor shall be responsible for any third-party consulting fees in connection with the installation or implementation of any software upgrade, revision or replacement required by Vendor. As part of the Designated Services, Vendor shall have financial, administration, operational and maintenance responsibility for all Vendor Software and for Commonwealth Third Party Software listed in the operational and financial responsibility section of Exhibit 3.10(CTPS).

3.11 Software Maintenance. Commonwealth will continue to support and maintain the Commonwealth Proprietary Software as necessary for Vendor's performance of the Services.

3.12 Help Desk. As part of the Designated Services, Vendor shall provide telephone support (e.g., a "help desk") to Commonwealth in accordance with the procedures set forth in *Exhibit 3.12* to assist the appropriate end-users in determining, tracking and resolving questions regarding the Services. In general, Vendor will provide telephone support hereunder to and through such existing telephone support infrastructure maintained by Commonwealth and the Commonwealth Agencies.

3.13 Remote Access Capabilities. As part of the Designated Services, Vendor shall provide remote access capabilities for use by authorized personnel of the Commonwealth Agencies. All such remote access capabilities shall meet or exceed all Commonwealth technology and security standards as set forth on *Exhibit 8.02*.

3.14 Data Security. Commonwealth will retain administration of logical and data access security, and Vendor will host Commonwealth security applications software utilized by the Commonwealth in managing logical and data access security, and will not implement configurations that would prevent Commonwealth from managing logical and data access security. As part of the Designated Services, Vendor shall implement and maintain the Commonwealth's safeguards against the disclosure, destruction, loss or alteration of the Commonwealth Data in the possession of Vendor in accordance with the terms of this Agreement and with Commonwealth's other security policies and procedures provided, in writing, to Vendor. In any event, Vendor, as part of the Services, is required to meet or exceed the most stringent of any applicable federal or state law, statute, rule or regulation applicable to Vendor's and/or Vendor's Agents possession of, or access to, any Commonwealth Data (which includes Section 8.02, herein). Any changes or additions to any such Commonwealth or Commonwealth Agency security policies or procedure first provided to Vendor after the Effective Date or any changes to any applicable federal or state law, statute, rule or regulation after the Effective Date which result in a material additional cost to Vendor shall be implemented by Vendor, but shall be subject to the Change Control Procedures. To the degree such changes apply to other Vendor customers, for any Vendor Service Locations, Equipment or Software used by Vendor to serve multiple customers, Vendor will mitigate the Commonwealth's economic exposure to additional cost by equitably spreading the additional cost of compliance to its multiple customers. All of Vendor's activities relating to the safeguarding of Commonwealth Data shall be subject to periodic review and monitoring by Commonwealth, the Commonwealth Agencies and related Federal agencies, and Vendor shall cooperate fully with all such reviews and monitoring. In addition to, and not in limitation of, any restrictions set forth

elsewhere in this Agreement, Vendor shall have operational access to the Commonwealth Data only on an as-needed basis. In the event Vendor or any of Vendor's Agents discover or are notified of a breach or potential breach of security involving any of the Commonwealth Data, Vendor shall immediately (1) notify the Commonwealth Project Manager of the same and (2) if the Commonwealth Data was in the possession of Vendor or any of the Vendor Agents, Vendor shall investigate the breach or potential breach. In addition, at Commonwealth's request, Vendor shall (1) promptly provide Commonwealth Data security reports to Commonwealth in a form to be agreed upon by Commonwealth and Vendor and (2) cooperate with any efforts by Commonwealth to investigate or prosecute any breach of security of the Commonwealth Data. In the event of any breach by Vendor or any of the Vendor Agents involving any of the Commonwealth Data, Vendor shall be assessed a credit against Fees due for Designated Service provided during the period of breach of security, at Commonwealth's option and in addition to, and not in limitation of, any other remedy that may then be available to Commonwealth, of not more than \$10,000 per occurrence and \$1,000,000 in the aggregate during any contract year. For greater certainty, the total of credits applied pursuant to the provisions set out above in this *Section 3.14* and the provisions set out in *Section 8.02* shall not exceed, in the aggregate, \$1,000,000 in any Contract Year. For purposes hereof, multiple breaches arising out of a single event or a series of related events will constitute a single "occurrence".

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3.16 Vendor Licenses and Permits. As part of the Services, Vendor is responsible for obtaining, and has financial responsibility for, all necessary licenses, consents, approvals, permits and authorizations required by legislative enactments and regulations that are legally required to be obtained in order for Vendor to perform the Services. Commonwealth shall reasonably cooperate with and assist Vendor in obtaining any such licenses, consents, approvals, permits and authorizations. Notwithstanding the foregoing, Commonwealth will retain responsibility for obtaining, and the financial responsibility for, all necessary licenses, consents, approvals, permits and authorizations necessary to enable Vendor and its subcontractors to use the Commonwealth Software to the extent necessary for Vendor's performance of the Services and with Vendor's cooperation as further described in *Article 17*, and Vendor will cooperate, and will cause the Vendor Agents to cooperate, in good faith and at no additional cost to Commonwealth, in obtaining such licenses, consents, approvals, permits and authorizations.

3.17 Changes in Law and Regulations. Each party shall identify, and notify the other party of, any changes in applicable legislative enactments and regulatory requirements that may directly or indirectly relate to Vendor's performance of the Services. Vendor and Commonwealth shall work together to identify any impact of such changes upon Commonwealth's use, or Vendor's delivery, of the Services. Vendor shall be responsible for any fines and penalties arising from its noncompliance with any such identified legislative enactments or regulatory requirements relating to the business of providing outsourcing services and shall not be responsible for any fines and penalties assessed against Commonwealth by federal governmental entities from Commonwealth's noncompliance with any federal legislative enactments or federal regulatory requirements relating to Commonwealth's operations that does not result from Vendor's actions or inactions under this Agreement. As part of the Services, Vendor shall, if possible, perform the Services regardless of

changes in legislative enactments or regulatory requirements. If such changes prevent Vendor from performing any of its obligations under this Agreement or increase Vendor's costs in connection therewith, Vendor shall provide prompt written notice thereof to Commonwealth and, if possible, will develop and implement a suitable workaround until such time as Vendor can fully perform its obligations under this Agreement without such workaround. Vendor shall bear any costs relating to any legislative enactments and regulatory requirements relating to its business, and Commonwealth shall bear all reasonable costs incurred by Vendor relating to legislative enactments and regulatory requirements that require modification of the Designated Services by Vendor. If the parties are unable to agree as to the allocation of such costs, the changes and costs that are the subject of this *Section 3.17* shall be subject to the Change Control Procedures.

3.18 Technical Architecture and Product Standards. As part of the Designated Services, Vendor shall suggest to Commonwealth information management technical architecture and product standards to be in effect at the Vendor Services Locations during the Outsource Term and the parties shall work together in good faith to develop information management technical architecture and product standards that are mutually acceptable to the parties and consistent with the Services Levels then in effect.

3.19 Commonwealth Provided Information. Commonwealth warrants that it shall have the right to use and disclose to Vendor all Machines, software, documentation, interfaces, data or specifications supplied by Commonwealth to Vendor.

ARTICLE 4. TRANSFORMATION PLAN IMPLEMENTATION

4.01 Transformation. Vendor shall perform its responsibilities pursuant to Exhibit 4.01 without causing any material (i) interruption, (ii) disruption, or (iii) degradation to the delivery of the Services or to the operations of any Commonwealth Agencies. Until the completion of the activities contemplated in the Transformation Plan, the Commonwealth Project Manager and the Vendor Project Manager shall meet as frequently as is necessary (or as is requested by either such project manager) to review the status of the activities contemplated in the Transformation Plan and to keep each other fully informed of any problems or delays encountered in connection with the performance of such activities.

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ARTICLE 6. SERVICES LEVELS

6.01 Designated Services Levels. Vendor shall provide the Designated Services at the Designated Services Levels.

6.02 Additional Services Levels. Vendor shall provide the Additional Services at the applicable Additional Services Levels.

6.03 Adjustment of Services Levels. Commonwealth or Vendor may, upon issuance of a Change Order to the other party, initiate negotiations to review and, subject to the Change Control

Procedures, adjust any Services Level which such party in good faith believes is inappropriate as documented in the Change Order.

6.04 Failure to Perform Services in Accordance with Services Levels. As part of the Designated Services, upon Vendor's receipt of a written notice from Commonwealth of Vendor's failure to provide the Services or a portion thereof in accordance with the applicable Services Levels or upon Vendor's knowledge that it has failed to provide the Services or a portion thereof in accordance with the Services Levels, Vendor shall initiate, perform and complete an analysis of the cause of such failure and provide to Commonwealth a written report detailing the cause of, and procedure for correcting, such failure, together with reasonable evidence that such procedure has been implemented or is in the process of being implemented by Vendor. In the case of any such failure by Vendor, Vendor shall deliver its preliminary report as promptly as is reasonably possible under the circumstances but, in any event, within four (4) hours after its receipt of Commonwealth's notice or its becoming aware of the failure, as the case may be. If, in the case of any failure by Vendor to provide the Services or a portion thereof in accordance with the applicable Services Levels, Commonwealth, in its sole discretion, classifies in writing the correction of the failure as a low priority to Commonwealth, then the foregoing four-hour period shall be extended to fourteen (14) days. Commonwealth reserves to itself the right at any time to reclassify in writing any corrective action theretofore classified as a low priority to Commonwealth. If, concurrently with or prior to Vendor's delivery to Commonwealth of the foregoing report Vendor does not correct such failure, Vendor shall include in such report its anticipated schedule for such correction and, unless Commonwealth shall then be classifying the correction of such failure as a low priority to Commonwealth, Vendor shall thereafter (1) make such correction the highest priority within its outsourcing organization until such correction is complete, and (2) provide any temporary "workaround" corrections available. In all cases, Vendor shall update its report to Commonwealth as necessary to ensure that Commonwealth is consistently and fully informed at all times as to Vendor's corrective actions and the anticipated schedule for the completion thereof.

ARTICLE 7. COMMONWEALTH SATISFACTION AND BENCHMARKING

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7.02 On-going Commonwealth Satisfaction Surveys.

- (1) As part of the Designated Services, Vendor shall conduct enterprise-wide Commonwealth Satisfaction Surveys, which surveys shall be conducted annually until completion of the Transformation. Upon completion of the Transformation, Vendor shall conduct the Commonwealth Satisfaction Surveys semi-annually for two years and annually thereafter.
- (2) Vendor shall cause increasing measured Commonwealth satisfaction to be a key performance incentive for compensation for key Vendor executives assigned to the Commonwealth account, including the Key Employees.

7.03 Benchmark Overview. Prior to the expiration of the second anniversary of the

Amendment Effective Date, Commonwealth and Vendor shall establish the details of the Benchmarking Process intended to ensure that Vendor provides Commonwealth with technology and Services Levels equal to or greater than other organizations receiving similar services. The parties acknowledge and agree that the benchmarking process is intended to assist Commonwealth in making decisions necessary to balance the desire for then-current technology against the cost and uncertain performance of newly evolving technology.

7.04 Benchmark. The Benchmark shall be conducted by the Benchmark. In the event (1) the Benchmark is no longer providing the services required to conduct the Benchmarking, (2) Commonwealth and Vendor agree in writing that the Benchmark should be replaced, or (3) Commonwealth and Vendor determine that another Benchmark would be needed to take advantage of another system or methodology utilized by such Benchmark to conduct the Benchmarking, Commonwealth and Vendor shall promptly commence a search to select, and shall select, a replacement Benchmark. If Commonwealth and Vendor are unable to agree as to a replacement Benchmark, Commonwealth shall select a replacement Benchmark, subject to Vendor's approval thereof, in writing, such approval not to be unreasonably withheld, delayed or conditioned. The fees and expenses charged by the Benchmark (including any replacement Benchmark) and any other out-of-pocket costs and expenses incurred by Commonwealth and Vendor related to the Benchmarking Process shall be paid by Commonwealth. Vendor acknowledges and agrees that it shall be compensated, in full, for its participation in the Benchmarking through Commonwealth's payment of the Designated Fees to the extent such participation can be provided by or through the Project Staff without adversely affecting Vendor's achievement of the Services Levels.

7.05 Benchmark. If Commonwealth undertakes the Benchmarking, Commonwealth and Vendor, in good faith, shall attempt to agree upon the period during which the Benchmarking shall be conducted. If the parties are unable to so agree, Commonwealth shall specify the relevant period, subject to Vendor's approval thereof, in writing, such approval not to be unreasonably withheld, delayed or conditioned.

7.06 Benchmark Information. Commonwealth and Vendor shall jointly determine the Benchmark Information with appropriate input from the Benchmark. Commonwealth and Vendor shall (1) review the Benchmark Information, and (2) schedule a meeting to address any issues either party may have with the Benchmark Information. Vendor shall provide the Benchmark Information at no additional cost to Commonwealth; provided, however, that if Commonwealth wishes the Benchmark to use information which Vendor does not otherwise have access to in the course of its business, Commonwealth shall provide such information at its own cost and Vendor may use such information but, unless Commonwealth expressly agrees otherwise in writing, only in connection with providing the Services.

7.07 Benchmarking Results. Within thirty (30) days after the completion of Benchmarking, the Benchmark shall deliver the Benchmark Results to the Commonwealth Project Manager and the Vendor Project Manager for distribution to the members of the Management Committee.

7.08 **Benchmark Results Review Period and Adjustments.** The members of the Management Committee shall utilize the Benchmark Review Period to review such Benchmark Results, and the Management Committee shall meet during the Benchmark Review Period to collectively assess the Benchmark Results.

7.09 **Disputes of Benchmark Results.** Either Commonwealth or Vendor may in good faith dispute the Benchmark Results, in writing, prior to the expiration of the Benchmark Review Period. Any such notice of dispute issued by either party shall include a description of the nature of such dispute in sufficient detail so as to enable the Benchmark and the other party to assess the motive and merit of the dispute. Within ten (10) days after receipt of such notice, the parties shall cause the Benchmark to issue a written response addressing the dispute, and if such dispute requires a change to any of the Benchmark Results, the Benchmark shall be directed to issue revised Benchmark Results. Upon issuing such revised Benchmark Results, Commonwealth and Vendor, as applicable, shall have another Benchmark Review Period to review the revised Benchmark Results in accordance with *Section 7.08*. In the event either party disputes the revised Benchmark Results within the second Benchmark Review Period or if the parties are unable to agree as to the need for revised Benchmark Results, original Benchmark Results or the revised Benchmark Results, as the case may be, shall be subject to the dispute resolution procedures set forth in *Article 32*.

7.10 **Benchmarking: Price Protection.** In addition to the Benchmarking provided for in this Article 7, no earlier than sixty (60) days after the end of Year 2 of this Amendment, and no more frequently than biennially thereafter, the Commonwealth may engage a Benchmark, in accordance with the provisions of this Article 7 for the purpose of assessing the extent to which the prices paid for the Services hereunder are comparable to prices of a comparable reference group of clients for Designated Services. This Benchmarking Price Protection process shall be an objective measurement and comparison process utilizing baseline methods and industry standards. The parties acknowledge and agree that this Benchmarking Price Protection process is intended to assure the Commonwealth that pricing and pricing models employed in this engagement are consistent with the reference group throughout the later years of the Agreement, as it may be extended or renewed.

7.11 **Benchmark: Pricing Adjustments.** If the results of a Benchmarking Price Protection analysis, as reflected in written Benchmarking Results delivered to Vendor, reveal that amounts to be paid under the terms of the Agreement for Designated Services exceed by a factor of 15% or more than the average of amounts paid by the reference group for comparable services (the "Market Rate"), the Commonwealth may elect to renegotiate those prices. When notified of the Commonwealth's intent to renegotiate the prices, the Vendor shall, as soon as practical following notification of the Commonwealth's intent, negotiate in good faith with Commonwealth for the adjustment and reduction of fees for the Services. If an agreement is reached for a pricing adjustment such agreement will be effective as of the date of delivery of the Benchmarking (Price Protection) Results. If the parties are unable to agree to a pricing adjustment within 60 days after delivery of the Benchmarking (Price Protection) Results, the matter shall be submitted to the various dispute resolution procedures contained in Article 32 of the Agreement. If the dispute resolution procedure results in a pricing adjustment, that

adjustment will be effective as of the date of delivery of the Benchmarking (Price Protection) Results.

ARTICLE 8. SERVICES LOCATIONS

8.01 **Services Locations.** The Services shall be provided from and to the Services Locations. Vendor shall not (1) provide the Services from a location other than a Services Location or (2) use any Commonwealth Services Location to provide services to a third party without Commonwealth's consent. Authorized representatives of Commonwealth, Commonwealth Agents and agents of the Federal government shall be permitted access to any Vendor Services Location, subject to the terms of *Section 8.02*.

8.02 **Security Procedures.** As part of the Designated Services, Vendor shall maintain and enforce environmental and physical security standards and procedures at each of the Vendor Services Locations and shall comply with environmental and physical security procedures as described on *Exhibit 8.02* and pursuant to the physical security and environmental chapters of the Management Procedures Manual, which compliance will be confirmed by Vendor's SAS 70 Type II report which will be delivered to the Commonwealth. If the Commonwealth requests any changes to environmental and security standards after the Amendment Effective Date and such changes would subject Vendor to material additional costs, those changes will be addressed through the Change Control Procedures. In addition, each Vendor Services Location must meet a minimum of Class C2 controlled access protection as defined in the Federal Department of Defense Trusted Computer System Evaluation (DOD 5200.28-STD). Each Commonwealth Agency's specific security requirements must be satisfied prior to the migration of its data or processing activities to any Vendor Services Location, including any facilities to be used to support Disaster Recovery. Vendor shall maintain a log recording all entry to any Vendor Services Location, which log shall at all times be subject to Commonwealth review and audit. All of Vendor's security procedures required under this Agreement shall be subject to periodic review by Commonwealth, any Commonwealth Agency or any agency of the United States federal government directly or indirectly having any dealings with any Commonwealth Agency. Vendor, as part of the Designated Services, shall promptly and in good faith address any concerns any such reviewing entity may have regarding those security procedures and, if Commonwealth is not the reviewing entity, shall promptly inform Commonwealth of the expressed concerns and its plans to address the same. Vendor acknowledges that, because Commonwealth is a governmental entity, Commonwealth is subject to various federal and state statutory and regulatory confidentiality and security requirements, including, without limitation, those described on *Exhibit 8.02*, all of which will be binding upon Vendor during the Outsource Term. This Agreement and the business relationship between Commonwealth and Vendor will be subject to review and approval by impacted Commonwealth Agencies and impacted federal agencies and other entities. At a minimum, Vendor will be required to comply with the Privacy Act of 1974, as amended (42 U.S.C.A. . 2000aa *et seq.*), the Drivers Privacy Protection Act, as amended (18 U.S.C.A. . 2721 *et seq.*), the Tax Information Security Guidelines promulgated by the Internal Revenue Service; and various confidentiality regulations promulgated by the U.S. Department of Health and Human Services, all as though Vendor were a governmental entity. Vendor will also be required to comply with the Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191 (HIPAA) and the

regulations promulgated related thereto (45 C.F.R. 160.101, *et seq.*) as a Business Associate as that term is defined by HIPAA according to the Business Associate Agreement included in Exhibit 8.02 (which Agreement shall apply to covered portions of the Commonwealth as a hybrid entity as agencies direct, and which Agreement shall govern only insofar as no other more stringent law otherwise applies to that data, and only insofar as the Agreement does not conflict with more stringent provisions of this Amendment, where "more stringent" is defined as in 45 C.F.R. 160.202). If and only to the extent specifically required in writing by a federal agency, in order for Vendor to be granted operational access to Commonwealth Data in connection with its performance of the Services, Vendor may be appointed as an agent of Commonwealth for the limited purpose of having operational access to certain Commonwealth Data not as a contractor of Commonwealth, but as an agent of Commonwealth having an agent's fiduciary obligations to Commonwealth as its principal. Vendor shall deliver to Commonwealth written notice of any breach of such security standards and procedures of which Vendor then has knowledge, which notice shall be delivered as promptly as is reasonable under the circumstances. Any breach by Vendor of such security standards or procedures under this *Section 8.02* shall be subject to the penalty provisions of *Section 3.14*.

ARTICLE 9. RETAINED RESPONSIBILITIES

Commonwealth shall be responsible for:

- (1) Payment of all license, support, maintenance and upgrade fees applicable to the Commonwealth Software.
- (2) Payment of all lease and, if applicable, purchase option fees relating to the Commonwealth Machines.
- (3) Facilities and facilities-related expenses for the Commonwealth Services Locations.
- (4) Appointment of the Commonwealth Project Manager.
- (5) Assignment of specific Commonwealth managerial, technical and user personnel to participate in essential project activities, including, preparation and review of specifications, software development, testing, migration activities, data conversion, training, operations, and project administration. Commonwealth shall ensure that all such staff have reasonably adequate skills and experience for their respective functions.
- (6) Providing Vendor with adequate access to Commonwealth's premises and equipment, including office, data processing and communication facilities reasonably required for performance of the Services, but subject to any applicable data security measures.
- (7) Provide all software application development.

- (8) Disposition of Commonwealth hardware assets which are not purchased by Vendor under this Agreement.

ARTICLE 10. VIRUSES AND MALICIOUS CODE.

- (1) The Vendor shall be liable for any damage to any data and/or software owned or licensed by the Commonwealth if the Vendor or any of its employees, subcontractors or consultants introduces a virus or malicious, mischievous or destructive programming into the Commonwealth's software or computer networks and has failed to comply with the Commonwealth software security standards. The Commonwealth must demonstrate that the Vendor or any of its employees, subcontractors or consultants introduced the virus or malicious, mischievous or destructive programming. The Vendor's liability shall cease if the Commonwealth has not fully complied with its own software security standards.
- (2) The Vendor shall be liable for any damages incurred by the Commonwealth including, but not limited to, the expenditure of Commonwealth funds to eliminate or remove a computer virus or malicious, mischievous or destructive programming that result from the Vendor's failure to take proactive measures to keep virus or malicious, mischievous or destructive programming from originating from the Vendor or any of its employees, subcontractors or consultants through appropriate firewalls and maintenance of anti-virus software and software security updates (such as operating systems security patches, etc.).
- (3) In the event of destruction or modification of software, the Vendor shall eliminate the virus, malicious, mischievous or destructive programming, restore the Commonwealth's software, and be liable to the Commonwealth for any resulting damages.
- (4) The Vendor shall be responsible for reviewing Commonwealth software security standards and complying with those standards.
- (5) The Commonwealth may, at any time, audit, by a means deemed appropriate by the Commonwealth, any computing devices being used by representatives of the Vendor to provide Designated Services to the Commonwealth for the sole purpose of determining whether those devices have anti-virus software with current virus signature files and the current minimum operating system patches or workarounds have been installed. Devices found to be out of compliance will immediately be disconnected and will not be permitted to connect or reconnect to the Commonwealth network until the proper installations have been made.
- (6) The Vendor may use the anti-virus software used by the Commonwealth to protect Vendor's computing devices used in the course of providing services to the Commonwealth. It is understood that the Vendor may not install the software on any computing device not being used to provide services to the Commonwealth,

and that all copies of the software will be removed from all devices upon termination of this Contract.

- (7) The Commonwealth will not be responsible for any damages to the Vendor's computers, data, software, etc. caused as a result of the installation of the Commonwealth's anti-virus software or monitoring software on the Vendor's computers.

ARTICLE 11. THIRD PARTY SERVICES. Notwithstanding any request made to Vendor or the submission of an Additional Services Proposal by Vendor pursuant to *Section 3.02*, Commonwealth shall have the right, in its sole discretion, to contract with any number of third parties to perform the Additional Services. In the event Commonwealth contracts with a third party to perform any service on behalf of or for Commonwealth, Vendor, as part of the Designated Services, shall cooperate with Commonwealth and such third party to the extent reasonably required by Commonwealth, including provision of (1) existing written requirements, standards and policies for systems operations so that the enhancements or developments of such third party may be operated by, and will be compatible with the operations of, Vendor, (2) assistance and support services to such third party, and (3) such access to the Systems as may be reasonably required by such third party (subject to all security standards, licenses, confidentiality restrictions and other standards and procedures then in effect at each of the Services Locations) to develop, test and deploy the service contracted for by Commonwealth. In addition thereto, Vendor shall not commit or permit any act which will unduly interfere with the performance of work by Commonwealth employees or any such third party, and Commonwealth will not commit or permit any act which will interfere with Vendor's performance of the Designated Services or the Additional Services. All additional out-of-scope support costs incurred by Vendor as a result of a Commonwealth contract with a third party will be handled in accordance with the Change Control Procedures.

ARTICLE 12. PROJECT TEAM

12.01 Vendor Project Manager and Transformation Project Manager. Vendor shall appoint the Vendor Project Manager who on a full-time basis shall be in charge of implementing the Services, and Vendor shall replace the Vendor Project Manager only when required or permitted pursuant to *Section 12.04*. The Vendor Project Manager shall at all times be subject to Commonwealth's continuing approval. Within thirty (30) days from the Amendment Effective Date, Vendor shall appoint the Transformation Project Manager who will have the responsibilities set forth in Exhibit 4.01.

12.02 Services Location Managers. With respect to each Vendor Services Location, Vendor shall appoint a Vendor Services Location Manager who on a full-time basis shall be resident at such Vendor Services Location and in charge of implementing the Services at such Vendor Services Location, and Vendor shall replace a Vendor Services Location Manager only when required or permitted pursuant to *Section 12.04*. Each Vendor Services Location Manager shall at all times be subject to Commonwealth's continuing approval.

12.03 Key Positions. The positions identified in *Exhibit 12.03* are designated by

Commonwealth and Vendor as key positions within the Project Staff. All of the Key Employees shall be dedicated to the Commonwealth account on a full-time basis. The Commonwealth Project Manager and the Vendor Project Manager shall meet once every Contract Year thereafter or upon the request of either the Commonwealth Project Manager or the Vendor Project Manager to update the list of the Key Employees. Each Key Employee shall at all times be subject to Commonwealth's continuing approval. Except for a replacement or reassignment of a Key Employee pursuant to *Section 12.04*, Vendor shall not reassign or replace any Key Employee.

12.04 Reassignment Waivers. Vendor shall not reassign or replace the Vendor Project Manager or any Vendor Services Location Manager during the first eighteen (18) months of his or her assignment as the Vendor Project Manager or a Vendor Services Location Manager unless Commonwealth consents to such reassignment or replacement or unless the individual (1) voluntarily resigns from Vendor, (2) is dismissed by Vendor for (a) misconduct (e.g., fraud, drug abuse, theft) or (b) unsatisfactory performance in respect of his or her duties and responsibilities to Vendor or Commonwealth pursuant to this Agreement or (3) is unable to work due to his or her death or disability. In addition, Vendor shall, in connection with its assignment of other Key Employees, use commercially reasonable efforts to assure the greatest degree of continuity possible among such Key Employees. If, in any instance, Commonwealth withholds or withdraws its approval of any employee or representative of Vendor for the performance of the Services, including without limitation, the Vendor Project Manager, any Vendor Services Location Manager or any other Key Employee, Vendor promptly shall reassign and replace such employee or representative.

12.05 Project Staff. Except as otherwise provided in this *Article 12*, Vendor shall appoint the Project Staff, each member of whom shall possess suitable training and skills to provide the Services assigned to him or her. Commencing on the Amendment Effective Date and continuing through the completion of the Transformation Plan, Vendor shall maintain the staffing levels necessary to perform its obligations under the Transformation Plan and to perform the Designated Services then required to be performed. All members of the Project Staff shall be identified on a database to be created and maintained by Vendor as part of the Designated Services and made accessible to Commonwealth for review and audit. Such database shall include each individual's name, start date as a member of the Project Staff and, if applicable, end date as a member of the Project Staff. Vendor shall update such database as necessary throughout the Outsource Term such that Commonwealth will always have during the Outsource Term a then-current database of all current and former members of the Project Staff. Each member of the Project Staff shall at all times be subject to Commonwealth's continuing approval which shall not unreasonably be withdrawn.

12.06 Subcontractors. Vendor shall not subcontract any portion of the Designated Services without Commonwealth's prior consent, which consent may be withheld, delayed or conditioned in Commonwealth's sole discretion. For purposes hereof, Commonwealth shall be deemed to have consented to Vendor's subcontractors identified in *Exhibit 12.06*. Commonwealth's consent with respect to any subcontracting shall not relieve Vendor of its responsibility for the performance of any of its obligations under this Agreement or constitute Commonwealth's consent to further subcontracting. Vendor will be responsible for the provision of

Services whether or not Vendor provides the services directly or through a subcontractor. Further, Commonwealth considers Vendor the sole point of contact with regard to all contractual matters, including payment of any and all charges becoming due under this Agreement. At Commonwealth's option, the non-economic terms of any subcontract by Vendor under this Agreement shall be subject to Commonwealth's approval. The terms of this *Section 12.06* shall not be construed as Commonwealth's requiring the approval of any employment agreement between Vendor and any of its employees. Upon request of the Commonwealth, the Vendor must provide the Commonwealth with a copy of the subcontract agreement between the Vendor and the subcontractor.

12.07 Managerial Control. Subject to the other provisions of this Agreement, including without limitation, provisions regarding security procedures and government security clearance and the other provisions of this *Article 12*, Vendor shall have complete managerial control over its employees, and Vendor may dismiss, promote, replace or reassign a member of the Project Staff; provided, however, that unless otherwise agreed to by Commonwealth, Vendor shall deliver a notice to Commonwealth before or immediately after dismissing any member of the Project Staff. In addition, Vendor shall deliver to Commonwealth written notice of any criminal activities undertaken by, or alleged to have been undertaken by, any member of the Project Staff and of which Vendor then has knowledge, which notice shall be delivered as promptly as is reasonable under the circumstances, and Vendor will cooperate fully with any investigation undertaken by or through Commonwealth in respect of such actual or alleged criminal activities.

12.08 Conduct of Vendor Personnel. While at the Commonwealth Services Locations and the Vendor Services locations, Vendor's personnel, contractors, subcontractors and agents (1) shall comply with all lawful requests, rules and regulations of Commonwealth regarding personal and professional conduct (including the wearing of a particular uniform, identification badge or personal protective equipment and adhering to security regulations and general safety practices or procedures) and (2) otherwise shall conduct themselves in a businesslike manner.

12.09 Unsatisfactory Conduct. Subject to the terms of *Sections 12.08, 35.04* and *35.05*, if Commonwealth determines in good faith that a particular Vendor employee, contractor or subcontractor is not conducting himself or herself in an appropriate manner, Commonwealth may provide Vendor with notice of such conduct. Upon receipt of such notice, Vendor shall promptly investigate the matter and take appropriate action, which may include (1) removing the offending individual from the Project Staff and replacing him or her with a similarly qualified individual or (2) taking other appropriate disciplinary action to prevent a recurrence. In the event there are repeat violations of this *Section 12.09* by a particular Vendor employee, contractor or subcontractor, Vendor shall promptly remove him or her from the Project Staff as set forth above.

ARTICLE 13. CHANGE CONTROL

13.01 Governance. Provisions for the governance of this Agreement and the Services delivered pursuant hereto are expressed in Exhibit 13.00 to this Agreement.

13.02 Change Control Procedures. The following Change Control Procedures will apply if either party wishes to implement or have Vendor implement a Change.

- (1) The requesting party will forward to the other party a Change Order which will include the following:

Project identification

Originator's name and title

The date of the Change Order

A description of the proposed change

The reason for the proposed change.

For Vendor, all Change Orders must be directed to or received by Vendor's Project Manager. For Commonwealth, all Change Orders must be directed to or originate from BIO-DPH.

- (2) For any Vendor-initiated Change Order, Commonwealth shall have the option of accepting or rejecting that Change Order.
- (3) Vendor will assign a number to and log each Change Order.
- (4) All Change Orders will be categorized by Commonwealth as Priority 1 (urgent), Priority 2 (ordinary) or Priority 3 (low).
- (5) Vendor will make reasonable efforts to investigate the impact of the Change Order on the Fees, timetable, specifications, Services, terms and conditions and, the relative obligations of the parties under this Agreement and the (the "Impact Study") in accordance with a schedule that reflects the applicable priority category.
- (6) Vendor will inform Commonwealth if there will be any charges for Vendor services in conducting the Impact Study and Commonwealth will decide whether Vendor should conduct the Impact Study. Vendor shall be entitled hereunder to charge Commonwealth only for those expenses incurred by Vendor in connection with the conduct of the Impact Study that are (i) Vendor's out-of-pocket expenses paid by Vendor to third parties (other than Vendor's or any Vendor's Agent's employees) for expertise not otherwise possessed by or available to Vendor or (ii) for employees of Vendor or any Vendor Agent not theretofore engaged in the provision of the Designated Services or any Additional Services. In order for any of the foregoing expenses to be reimbursable to Vendor, Vendor must first provide an estimate thereof to Commonwealth and obtain from Commonwealth its prior written approval thereof. If Vendor provides any such estimate and Commonwealth does not approve the estimated expenses, Vendor shall not be obligated to proceed with the Impact Study. In all cases, Vendor shall make a good faith effort to maximize its use of its employees and the employees of Vendors Agents then engaged in the provision of the Designated Services and the Additional Services to the extent Vendor can do so without adversely affecting its ability to provide the Designated Services and the Additional Services in accordance with the Services Levels. Any

disputes between the parties regarding the validity, estimated amount or actual amount of any reimbursable expenses shall be subject to the dispute resolution provisions of *Article 32*.

- (7) If both parties agree on the Impact Study and any necessary Changes to the Services, the relative obligations of the parties under this Agreement, and the Fees, a Change Order will be issued to take into account the agreed to changes.
- (8) If the parties cannot agree upon the Impact Study or the resultant Changes to this Agreement, any Commonwealth-initiated Change Order will nevertheless be implemented at Commonwealth's option, and either party may elect to have all outstanding related matters treated as a dispute between the parties under *Article 32*. During the pendency of any such dispute, Commonwealth shall pay to Vendor any undisputed amounts. Any changes to Service Levels which are required by the implementation of the Changes, will be reflected in the Change Order that is issued.

All Changes shall be made pursuant to the Change Control Procedures. Vendor shall (1) schedule all Changes so as not to interrupt or unduly interfere with Commonwealth's operations, (2) prepare and deliver to Commonwealth each month a ninety-day rolling schedule for ongoing proposed and approved and planned Changes, (3) review and determine the cause of any failed Changes and deviations from scheduled Changes, and (4) document and provide to the Management Committee and to the Commonwealth Project Manager, individually, same-day notification (which may be given orally provided that such oral notice is confirmed in writing to such persons within three (3) Commonwealth business days) of all changes performed on an emergency basis to maintain the continuity of the Services.

ARTICLE 14. INSURANCE

14.01 Vendor and Primary Subcontractor Insurance Requirements. During the Outsource Term, Vendor shall maintain at its own expense, and require subcontractors listed in Exhibit 12.06 and their respective successors as subcontractors to Vendor under this Agreement to maintain at their own expense or Vendor's expense, insurance of the type and in the amounts specified below and issued by companies authorized to conduct such business under the laws of Pennsylvania:

- (1) statutory workers' compensation in accordance with all applicable Federal, state and local requirements, and employer liability in an amount not less than \$2,000,000 per occurrence;
- (2) comprehensive general public liability (including contractual liability insurance) in an amount not less than \$5,000,000 per occurrence;
- (3) comprehensive automobile liability covering all vehicles that Vendor or such subcontractors owns, hires, or leases in an amount not less than \$5,000,000 per occurrence (combined single limit for bodily injury and property damages).

- (4) Personal property insurance, on a replacement basis, covering all of Vendor's and Vendor's Agents' personal property located at any Vendor Services Location.
- (5) Professional liability/error & omission in the amount of not less than \$15,000,000 per claim.
- (6) Comprehensive crime insurance in an amount of not less than \$15,000,000 per claim.
- (7) Umbrella/excess in an amount of not less than \$15,000,000 per occurrence.

For purposes hereof, Vendor and such subcontractors may maintain "umbrella" insurance policies to fulfill the foregoing insurance requirements, as appropriate.

14.02 Insurance Documentation. Prior to the expiration of any then effective insurance policy, Vendor shall furnish to Commonwealth certificates of insurance or other appropriate documentation (including evidence of renewal of insurance) evidencing all coverage referenced above and naming Commonwealth as an additional insured to the extent of Vendor's indemnities contained in this Agreement. Vendor shall have included in all policies of insurance required hereunder a waiver by the insurer of all right of subrogation against Commonwealth in connection with any loss or damage thereby insured against. Such certificates or other documentation will include a provision whereby thirty (30) days' notice must be received by Commonwealth prior to coverage cancellation or alteration of the coverage by either Vendor or its subcontractors or the applicable insurer. Such cancellation or alteration shall not relieve Vendor of its continuing obligation to maintain insurance coverage in accordance with this *Article 14*.

14.03 Insurance Requirements for Other Subcontractors. During the Outsource Term, Vendor shall require each of its subcontractors identified in the Designated Services (other than these subcontractors to which *Section 14.01* applies) and any other subcontractors performing any services on-site at any of the Vendor Services Locations to maintain at their own expense or Vendor's expense, insurance of the type and in the amounts specified below:

- (1) statutory workers' compensation in accordance with all applicable Federal, state and local requirements, and employer liability in an amount not less than \$500,000 per occurrence;
- (2) comprehensive general public liability (including contractual liability insurance) in an amount not less than \$1,000,000 per occurrence;
- (3) if any of the subcontractor personnel will be on-site at any of Commonwealth's of Vendor's facilities, comprehensive automobile liability covering all vehicles owned, hired or leased by that subcontractor and in an amount not less than \$1,000,000 per occurrence (combined single limit for bodily injury and property damages); and

- (4) if the subcontractor personnel will be on-site at any of Commonwealth's or Vendor's facilities, personal property insurance, on a replacement basis, covering all of that subcontractor's personal property located at any such facilities.

ARTICLE 15. ASSET TRANSFER. Prior to the Amendment Effective Date, the Commonwealth transferred certain assets to Vendor (or to a Vendor Agent at Vendor's direction), by bill of sale, good and marketable title to the computer hardware and other equipment and furniture described on *Exhibit 15*, free and clear of any liens, claims or other encumbrances, and for the purchase price set forth for each such item on such exhibit. .

EXCEPT FOR THE FOREGOING WARRANTY OF TITLE, ALL SUCH COMPUTER HARDWARE, EQUIPMENT AND FURNITURE SHALL BE TRANSFERRED TO VENDER "AS IS" AND "WHERE IS" AND WITH ALL FAULTS, AND COMMONWEALTH HEREBY EXPRESSLY DISCLAIMS ANY AND ALL OTHER REPRESENTATIONS AND WARRANTIES IN RESPECT THEREOF, WHETHER EXPRESS OR IMPLIED, AND INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PURPOSE.

ARTICLE 16. PROPRIETARY RIGHTS

16.01 **Commonwealth Software.** As between Commonwealth and Vendor, all Commonwealth Software shall be and shall remain the exclusive property of Commonwealth or its licensors, and Vendor shall have no rights or interests in the Commonwealth Software by virtue of this Agreement except as described in this *Section 16.01* or elsewhere in this Agreement. Commonwealth hereby grants to Vendor, at no cost to Vendor, for the limited purpose of providing the Services, a nonexclusive, nontransferable, royalty-free right (subject to the terms of any third party agreement to which Commonwealth is a party and which theretofore is disclosed to Vendor) to (1) have access to the Commonwealth Software, (2) copy the Commonwealth Software for archival purposes or as may otherwise be required by this Agreement, (3) modify the Commonwealth Software as required by this Agreement, if permitted by the Software licensing terms and pursuant to the terms of Commonwealth Third Party Software license agreement, if applicable, and (4) sublicense Vendor's subcontractors approved by Commonwealth to do any of the foregoing; provided, however, that neither Vendor nor any of its subcontractors may decompile or reverse engineer, or attempt to decompile or reverse engineer, any of the Commonwealth Software. As of the Effective Date and subject to the terms of any third party agreement to which Commonwealth is a party, (1) Commonwealth shall, at no cost to Vendor, provide Vendor with access to the Commonwealth Software in the form in use by Commonwealth as of the Effective Date and (2) Vendor, as part of the Designated Services, shall compile and, as changes are made, update a list of all of the Commonwealth Software then in use by Vendor or any of its subcontractors in connection with Vendor's performance of the Services. Upon the expiration or termination for any reason of Vendor's obligation to provide the Services or of this Agreement, the rights granted to Vendor in this *Section 16.01* shall immediately revert to Commonwealth or Commonwealth's designee, and Vendor forthwith shall, at no cost to Commonwealth, deliver to Commonwealth all of the Commonwealth Software (including any related source code and object code in Vendor's possession or under its control) in the form in use as of the effective date of such

expiration or termination, together with a current copy of the list of Commonwealth Software in use as of the date of such expiration or termination. Concurrently therewith, Vendor shall destroy or erase all other copies of any of the Commonwealth Software then in Vendor's possession or under its control unless otherwise instructed by Commonwealth; provided, however, pursuant to and if permitted by the Commonwealth's license agreement for Commonwealth Third Party Software, if applicable, that Vendor may retain one archival copy of such Commonwealth Software, including the Developed Software, until the later of six (6) years after such expiration or termination of this Agreement and the final resolution of any actively asserted pending disputes between the parties, such retention being for the sole purpose of establishing Vendor's performance under this Agreement.

16.02 Vendor Proprietary Software and Vendor Tools. As between Commonwealth and Vendor, all Vendor Software and Vendor Tools shall be and shall remain the exclusive property of Vendor, and Commonwealth shall have no rights or interests in the Vendor Software or the Vendor Tools by virtue of this Agreement except as described in this *Section 16.02*. As part of the Designated Services, Vendor shall during the Outsource Term (1) use the Vendor Software and the Vendor Tools to provide the Services, (2) make available the commercially available Vendor Software and the commercially available Vendor Tools to Commonwealth for use by Commonwealth solely in connection with the Services, and (3) maintain on Commonwealth's premises and make available to Commonwealth upon Commonwealth's request from time to time, for archival purposes only, a copy of the Vendor Proprietary Software and the Vendor Tools owned by Vendor or International Business Machines, Corp. and then being used by Vendor to provide the Services. Upon the expiration or termination for any reason of Vendor's obligation to provide the Services under this Agreement and at the request of Commonwealth, Vendor shall, subject to mutually agreed terms and conditions, (1) grant, or cause International Business Machines, Corp. to grant, to Commonwealth a nonexclusive, nontransferable license to use and, if permitted by the terms of mutually agreed terms and conditions relating thereto, modify and make derivative works of, and unless Commonwealth terminates this Agreement pursuant to the terms of *Section 28.01*, *Section 28.08* or *Section 28.09* to grant to third parties engaged by Commonwealth the right to use and, if permitted by mutually agreed terms and conditions relating thereto, modify and make derivative works of, all or any portion of the commercially available Vendor Proprietary Software and the commercially available Vendor Tools owned by Vendor or International Business Machines, Corp. theretofore being used by Vendor in connection with the Services, the foregoing rights being granted to the extent reasonably necessary to facilitate Commonwealth's or such third party's performance of the activities or services substantially equivalent to the Services to be provided by Vendor under this Agreement immediately prior to such expiration or termination and (2) deliver to Commonwealth the object code version of such commercially available Vendor Proprietary Software and such commercially available Vendor Tools in the form being used by Vendor in connection with the Services immediately prior to such expiration or termination. It is understood and agreed by Vendor that the rights granted to Commonwealth hereunder in respect of the commercially available Vendor Proprietary Software and the commercially available Vendor Tools shall not restrict Commonwealth from using such Vendor Proprietary Software and such Vendor Tools in the manner in which such items were used by Vendor and International Business Machines, Corp. to provide the Services immediately prior to the expiration or termination of this Agreement. The foregoing obligations of Vendor shall be subject to mutually agreed terms and

conditions. In consideration of the grant to Commonwealth of the foregoing license, Commonwealth shall be assessed license fees hereunder not in excess of any license fees therefor being offered, as of the date of termination, by Vendor or International Business Machines, Corp., as applicable, to their respective state governmental customers generally, unless Commonwealth terminates this Agreement pursuant to the terms of *Section 28.01, Section 28.08 or Section 28.09*, in which case the then-prevailing license fees of Vendor and International Business Machines, Corp, as applicable, shall apply. The foregoing shall not limit or otherwise affect Commonwealth's obligations to pay third party assignment or transfer fees as contemplated in Article 31; provided, however, that Commonwealth shall not be assessed any additional fees in respect thereof by Vendor. For purposes of this *Section 16.02*, "International Business Machines, Corp." includes any successor to that entity as subcontractor to Vendor under this Agreement.

16.03 Developed Documentation. Documentation developed by Vendor specifically for the Commonwealth in connection with its performance under this Agreement is the sole and exclusive property of the Commonwealth and shall be considered "works made for hire" under the United States Copyright Act of 1976, as amended, 17 United States Code. In the event that the documentation does not fall within the specifically enumerated works that constitute works made for hire under the United States copyright laws, Vendor agrees to assign and, upon their authorship or creation, expressly and automatically assigns all copyright interests, proprietary rights, trade secrets, and other right, title, and interest in and to such documentation to Commonwealth. Commonwealth shall have all rights accorded an owner of copyright under the United States copyright laws including, but not limited to, the exclusive right to reproduce the documentation in multiple copies, the right to distribute, copies by sales or other transfers, the right to register all copyrights in its own name as author in the United States and in foreign countries, the right to prepare derivative works based upon the Creative Works and the right to display the documentation. Upon completion or termination of this Contract, all working papers, files and other documents related to the documentation shall immediately be delivered by Vendor to the Commonwealth. Vendor warrants that the documentation is original and does not infringe any copyright, patent, trademark, or other intellectual property right of any third party and are in conformance with the intellectual property laws of the United States. Provided however that Commonwealth's sole remedy for breach of this warranty is the indemnity contained in Section 33.01(1).

16.04 Residual Knowledge. Either Party, in the course of conducting business, may use any ideas, concepts, and know-how, relating to the Services which Vendor or Commonwealth (alone or jointly with the Commonwealth) develops or learns in connection with Vendor's provision of Services to Commonwealth under this Agreement.

ARTICLE 17. REQUIRED CONSENTS Commonwealth, with reasonable assistance at no additional cost by Vendor and the Vendor Agents shall obtain all consents, approvals, authorizations, notices, requests and acknowledgements necessary to allow Vendor to use the Commonwealth Software, the Commonwealth Machines and the services under Commonwealth's third party service contracts, all to the extent necessary to enable Vendor to provide the Services to Commonwealth. Commonwealth shall be responsible for all costs and expenses imposed by third parties in connection with obtaining any such consents. Vendor shall obtain all consents, approvals,

authorizations, notices, requests and acknowledgements necessary to allow (1) Vendor to use the Vendor Proprietary Software, the Developed Software and the Vendor Machines to provide the Services to Commonwealth, and (2) Commonwealth to use the Vendor Proprietary Software in accordance with the terms of this Agreement upon the expiration or termination for any reason of Vendor's obligation to provide the Services or of this Agreement. Vendor shall be responsible for all costs and expenses imposed by a third party in connection with any such consents described in the foregoing clause (1). Commonwealth's costs and expenses under the foregoing clause (2) shall be governed by the terms of *Section 16.02*. Each party shall cooperate with and assist the other party in obtaining the consents contemplated in this *Article 17*.

ARTICLE 18. REPORTS AND DATA

18.01 **Data.** Commonwealth shall supply or continue to supply to Vendor the Commonwealth Data in the form and on such time schedules as may be agreed to by Commonwealth and Vendor from time to time. All Commonwealth Data is and shall remain the property of Commonwealth. Subject to *Article 25*, the Commonwealth Data shall not be (1) used by Vendor or Vendor Agents other than in connection with providing the Services, and then only in accordance with the terms of this Agreement, (2) disclosed, sold, assigned, leased or otherwise provided to third parties by Vendor or Vendor Agents without Commonwealth's consent and any applicable consent required by any federal governmental entity, or (3) commercially exploited by or on behalf of Vendor or Vendor Agents.

18.02 **Reports.** As part of the Designated Services, Vendor shall provide the Reports, in electronic form, to Commonwealth. The Reports shall be prepared by Vendor and provided by Vendor to Commonwealth according to the descriptions and schedules set forth in *Exhibit 18.02*.

18.03 **Correction of Errors.** In the event of any errors or inaccuracies in any of the Commonwealth Data or the Reports, or any other data processing errors or unexpected interruptions (e.g., "abends"), Vendor and Commonwealth shall work together in good faith, using all commercially reasonable efforts and commencing immediately upon the discovery of the situation, to correct such error, inaccuracy or interruption. The foregoing obligations of Vendor under this *Section 18.03* shall be subject to any limitations placed upon Vendor's access to the Commonwealth Data by Commonwealth or pursuant to this Agreement. Promptly upon the completion of the correction of such error, inaccuracy or interruption, the Commonwealth Project Manager and the Vendor Project Manager shall meet to determine and document the cause thereof. If the error, inaccuracy or interruption is determined to be caused by the error, negligence or omission of Vendor to perform an obligation under this Agreement, there shall be no charge to Commonwealth for Vendor's participation in such correction. If the error, inaccuracy or interruption is determined to be caused by the error, negligence or omission of Commonwealth to perform an obligation under this Agreement, Commonwealth shall reimburse Vendor for Vendor's out-of-pocket expenses paid by Vendor to third parties (other than Vendor's or any Vendor's Agent's employees) for expertise not otherwise possessed by or available to Vendor and Vendor's expenses for its employees or the employees of any Vendor Agent not theretofore engaged in the provision of the Designated Services or any Additional Services.

18.04 **Return of Data.** At no cost to Commonwealth and as part of the Designated Services, Vendor shall, upon Commonwealth's request at any time and the cessation of the Termination Assistance Services, (1) promptly return to Commonwealth, in the format and on the media in use as of the date of the request, all or the requested portion of the Commonwealth Data then in Vendor's possession or under its control and (2) erase or destroy all or the requested portion of Commonwealth Data then in Vendor's possession or under its control. Commonwealth Data returned to the Commonwealth must be in a form that is not a Vendor proprietary format that is not freely accessible to the Commonwealth.

ARTICLE 19. DISASTER RECOVERY

19.01 **Enterprise Disaster Recovery.** As part of the Designated Services, Vendor shall have responsibility for execution of that portion of the disaster recovery plan relating to the Services as described in *Exhibit 19.01*. Vendor will immediately provide Commonwealth with notice of the occurrence of any disaster affecting the provision or receipt of all or any material portion of the Services and implement the disaster recovery plan then in effect. Vendor agrees to utilize the disaster recovery planning methodology software then utilized by Commonwealth in connection with activities contemplated under this *Article 19*. Jointly with the Commonwealth, Vendor shall at least annually review and update the disaster recovery plan, it being understood and agreed that the parties will work together and cooperate in good faith on any such review or updated of the disaster recovery plan. With the Commonwealth's support as specified in the disaster recovery plan, Vendor shall semi-annually test the operability of the disaster recovery plan then in effect. Vendor will certify to Commonwealth (1) within 15 business days of completion of a disaster recovery test, that the disaster recovery plan was fully, timely and successfully implemented, or, if the disaster recovery plan was not fully, timely and successfully implemented, report all deficiencies (including root cause analysis) and corrective actions, and certify that such corrective actions addressed all deficiencies; and (2) annually and at additional times at the request of Commonwealth, that any applicable third-party business recovery center agreement then remains in full force and effect without any default, including payment, thereunder by any party thereto, and that Commonwealth is entitled, pursuant to the terms of the business recovery center agreement, to assume that agreement upon the expiration or termination of this Agreement. In the event Vendor fails its obligations set forth in *Section 19.01(1)* or *Section 19.01(2)*, Commonwealth shall have the right to terminate this Agreement for cause without an opportunity for Vendor to cure pursuant to the provisions of *Section 28.03* if, 10 days after delivery of written notice by the Commonwealth, Vendor has not corrected the failure and complied fully with such obligations.

Vendor shall use commercially reasonable efforts to reinstitute the Critical Services supported by the Non-dedicated Hardware per Exhibit 19.01 as promptly as possible but in any event within 72 hours after the occurrence of a disaster. Critical Services supported by the Dedicated Hardware per Exhibit 19.01 to be performed on hardware located at the business recovery center and dedicated to a particular Commonwealth Agency as indicated on Exhibit 19.02 shall be reinstated within 24 hours. If the Critical Services supported by the Non-dedicated Hardware are not fully reinstated within such 72-hour period (or, in the case of Critical Services supported by the Dedicated Hardware within such 24-hour period), Commonwealth shall have the right to terminate this Agreement for critical failure pursuant to the provisions of *Section 28.04*; and Vendor shall, prior to

or at the expiration of the applicable restitution period, deliver to Commonwealth a written report detailing the cause of the disaster, Vendor's plans to reinstitute the Critical Services and its anticipated schedule to do so. Thereafter, Vendor and Commonwealth shall develop a plan to reinstitute the Critical Services as promptly as is possible under the circumstances, with Vendor making such reinstatement its highest priority throughout its outsourcing organization. Vendor shall prepare and deliver to Commonwealth updated reports such that Commonwealth shall at all times be fully informed as to the status of Vendor's efforts and anticipated schedule to reinstitute the Critical Services. In the event that any Vendor Machines are required to be replaced as a result of the disaster, Vendor shall replace such Vendor Machines with current or Improved Technology to the extent then available. In the event of a declared disaster that results in the provision of the Critical Services or a portion thereof from a business recovery center, Commonwealth shall be responsible for paying any third party declaration fee and the fees for use of the business recovery center (unless the disaster was caused by an omission, negligence or willful misconduct of Vendor or any Vendor Agent or any of their respective employees, in which case Vendor shall be responsible for such declaration and usage fees), and Commonwealth shall continue to pay the Designated Fees to Vendor, prorated for any Services that are not being delivered to Commonwealth. In addition to the prorated Designated Fees, Commonwealth shall also pay to Vendor, at the then-effective Time and Materials Services Hourly Rates, charges assessed by Vendor for disaster recovery services requested by Commonwealth and performed by Vendor or any of the Vendor Agents to reconstitute the Designated Services (unless the disaster was caused by the omission, negligence or willful misconduct of Vendor or any Vendor Agent or any of their respective employees, in which case such services shall be performed at no additional cost or expense to Commonwealth.) In the event Vendor provides the Critical Services from a business recovery center for more than 45 days due to Vendor's inability to reinstate the Critical Services because of Vendor's negligence or willful misconduct, Commonwealth may, in addition to any other remedy it may have under this Agreement, at law or in equity, terminate this Agreement for cause under *Section 28.03*, but without regard to any additional cure periods provided for therein. Any Vendor obligations to implement a disaster recovery plan set forth in this paragraph can be triggered by a notice of disaster provided to Vendor by Commonwealth. Payment of travel and living expenses of Vendor in connection with the provision of the Critical Services from a business recovery center shall be reimbursed by Commonwealth, but shall be subject to Commonwealth's travel and reimbursement policies then in effect generally.

19.02 Additional Disaster Recovery Services for the Department of Public Welfare, Pennsylvania Game Commission and Pennsylvania State Police. As part of the Designated Services and in addition to Vendor's obligations set forth in *Section 19.01*, Vendor shall provide the disaster recovery services in respect of Commonwealth's Department of Public Welfare and Pennsylvania Game Commission and Pennsylvania State Police set forth on *Exhibit 19.02*.

ARTICLE 20. FORCE MAJEURE. No failure or delay by Vendor in the performance of its obligations pursuant to this Agreement shall be deemed a default of this Agreement or a ground for termination hereunder (except as provided in this *Article 20*) to the extent such failure or delay is due to a Force Majeure Event and such Force Majeure Event could not have been prevented by Vendor's reasonable precautions or efforts to mitigate damage. The occurrence of a Force Majeure Event does not limit or otherwise affect Vendor's obligation to provide normal recovery procedures

and any disaster recovery services described in *Article 19* to the extent such obligations are not directly precluded by the occurrence of that Force Majeure Event. The occurrence of a Force Majeure Event in respect of another customer of Vendor does not constitute a Force Majeure Event under this Agreement, except to the extent such customer and Commonwealth experience the same Force Majeure Event at a site shared by Commonwealth and such other customer. The party delayed by a Force Majeure Event shall immediately orally notify the other party (to be confirmed in a written notice within three (3) business days after the inception of such delay) of the occurrence of a Force Majeure Event and describe in reasonable detail the nature of the Force Majeure Event. From and after becoming aware of a Force Majeure Event, the party delayed thereby shall undertake all commercially reasonable measures (including the use of alternative sources for products and services and workaroud plans) to mitigate the impact and duration of the Force Majeure Event, and such party shall consistently and diligently prosecute such measures until the Force Majeure Event is relieved. If Vendor does not fulfill its obligations under the immediately preceding sentence and, as a result thereof, such Force Majeure Event precludes Vendor from delivering the Critical Services for more than forty five (45) days, Commonwealth may terminate this Agreement for cause under *Section 28.04*, but without regard to any additional cure periods provided for therein. In any other case in which a Force Majeure Event precludes Vendor from delivering the Critical Services for more than forty-five (45) days (without consideration of any such Critical Services performed from a business recovery center under *Article 19*), Commonwealth may terminate this Agreement for convenience under *Section 28.01*, but without regard to any notice period or additional cure periods provided for therein. In the event of a Force Majeure Event, Vendor shall not increase the Fees under this Agreement or charge Commonwealth usage fees in addition to the Designated Fees except for applicable disaster recovery declaration and usage fees in accordance with the provisions of *Article 19*.

ARTICLE 21. PAYMENTS

21.01 **Designated Fees.** In consideration of Vendor providing the Designated Services, subject to the terms of this Agreement, Commonwealth shall pay to Vendor the Designated Fees pursuant to *Exhibit 21.01A*.

21.02 **Additional Services Fees.** In consideration of Vendor providing the Additional Services, subject to the terms of this Agreement, Commonwealth shall pay to Vendor the applicable Additional Fees pursuant to *Exhibit 21.02*.

21.03 **CTC Time and Materials Services Fees.** In consideration of Vendor providing the CTC Time and Materials Services, subject to the terms of this Agreement, Commonwealth shall pay the CTC Time and Materials Services Fees pursuant to the terms set forth in *Exhibit 21.03*. The CTC Services set forth in Exhibit 3.01B are provided by Vendor at the convenience of the Commonwealth at the rates set forth in Exhibit 21.03. Notwithstanding any provision to the contrary in this Agreement, the Commonwealth may terminate the CTC Services in whole or in part without notice or termination charges.

21.04 **Cost of Living Adjustment.** The Fees shall not be subject to any cost of living or inflationary adjustment or, except as expressly provided otherwise in this Agreement, any other

adjustment based on Vendor's costs to provide the Services. Upon the commencement of the second Contract Year and upon the commencement of each Contract Year thereafter, Vendor may, at its option, calculate and apply a cost of living adjustment to the Fees, CTC Time and Materials Fees and the Time and Materials Hourly Rates. Such adjustment shall be based on the unadjusted Consumer Price Index, as published in the Summary Data from the Consumer Price Index News Release by the Bureau of Labor Statistics, U.S. Department of Labor, for All Urban Consumers ("CPI-U"), using, for each adjustment, the immediately preceding Contract Year as the base year and adjusting only for cost of living increases over five percent (5%) over the immediately preceding Contract Year. Any such adjustment shall be determined as soon as practicable after the commencement of the applicable Contract Year, and will be applicable retroactively to the commencement of that Contract Year.

21.05 Expenses. Except as expressly provided otherwise in this Agreement, expenses of Vendor relating to the Services are included in the Fees, and no such expenses or other costs or fees shall be reimbursed by Commonwealth unless agreed to by Commonwealth in writing.

21.06 Offset Provision. Vendor agrees that Commonwealth may set off the amount of any state tax liability or other debt of Vendor or any of its subsidiaries that is owed to Commonwealth and not being contested on appeal against any payments due Vendor under this Agreement or any other agreement with Commonwealth.

21.07 Pro-ration. All periodic fees or charges under this Agreement are to be computed on a calendar month basis and shall be prorated on a per diem basis for any partial month.

21.08 Unused Credits. Any unused credits against future payments owed to either party by the other pursuant to this Agreement shall be paid to the applicable party within forty-five (45) days after the expiration or termination for any reason of Vendor's obligation to provide the Services or of this Agreement. This *Section 21.08* shall survive the expiration or any termination of this Agreement.

21.09 Pricing Protection. Notwithstanding anything to the contrary elsewhere in this Agreement, the CTC Time and Materials Services Fees and the Time and Materials Services Hourly Rates shall in no event and at no time during the Outsource Term exceed Vendor's then lowest charges for such services to Vendor's state governmental customers generally receiving comparable goods and services at comparable volumes and upon material terms and conditions comparable to those contained in this Agreement and pursuant to an outsourcing agreement dated after the Effective Date. Upon Commonwealth's request from time to time, and in any event on each anniversary of the Effective Date, Vendor shall advise Commonwealth in writing that this *Section 21.09* has not been contradicted by any transaction entered into by Vendor on or after the Effective Date. If Vendor is unable to provide such written notice because of a transaction entered into by Vendor contradicting this *Section 21.09*, Vendor shall offer to Commonwealth an adjustment to the CTC Time and Materials Services Hourly Fees and the Time and Materials Services Hourly Rates to correct such contradiction.

ARTICLE 22. PAYMENT SCHEDULE AND INVOICES

22.01 **Designated Fees.** On or before the 15th day of each calendar month of the Outsourcing Term, Vendor shall provide Commonwealth with a single invoice for the Designated Fees. Each such invoice shall include the Designated Fees, if applicable, for the then-current month, as well as any Service Level Credits then payable by Vendor or refundable by Commonwealth, and any then accrued CTC Time and Materials Services Fees and Additional Fees, or other reimbursable charges to Commonwealth for Services actually rendered prior to the date of such invoice.

22.02 **Detailed Invoices.** Upon Commonwealth's request, Vendor shall provide on the monthly invoices varying degrees of detail (e.g., per agency, end-user, department, project, site) as specified in *Exhibit 22.02*.

22.03 **Time of Payment.** Any sum due Vendor pursuant to any such invoice shall be due and payable on the last business day of the calendar month following the calendar month during which such invoice was delivered to Commonwealth. (E.g., an invoice delivered to Commonwealth on June 15, 1999 will be due and payable on July 30, 1999, the last business day of July, 1999.) In the event any invoices remain unpaid after such due date, interest must be paid if authorized by the Secretary of the Budget.

22.04 **Fee Dispute.** During the pendency of a dispute between Commonwealth and Vendor pursuant to which Commonwealth, in good faith, believes it is entitled to withhold, and does withhold, payment, Vendor shall continue to fully provide the Services and otherwise fully perform its obligations under this Agreement. Notwithstanding the foregoing, Commonwealth will not withhold more than ten percent (10%) of any monthly invoice and the aggregate amount withheld by Commonwealth at any time with respect to all such disputes will not exceed \$1,500,000.

ARTICLE 23. TAXES

23.01 **Commonwealth Exemption.** No taxes from which the Commonwealth is exempt shall be included in the Fee. The Commonwealth is exempt from all excise taxes imposed by the Internal Revenue Service and has accordingly registered with the Internal Revenue Service to make tax-free purchases under registration No. 23-23740001-K. With the exception of purchases of the following items, no exemption certificates are required and none will be issued: undyed diesel fuel, tires, trucks, gas-guzzler emergency vehicles, and sports fishing equipment. The Commonwealth is also exempt from Pennsylvania sales tax, local sales tax, public transportation assistance taxes, and fees and vehicle rental tax. The Department of Revenue regulations provide that exemption certificates are not required for sales made to governmental entities and none will be issued.

23.02 **Vendor Taxes.** Fees are inclusive of any applicable sales, use, personal property and other taxes attributable to periods on or after the Effective Date and based upon or measured by Vendor's cost in acquiring or providing equipment, materials, supplies or services furnished or used by Vendor in performing or furnishing the Services, including without limitation, all personal property and use taxes, if any, due on Vendor Machines.

23.03 **Segregation of Fees.** Commonwealth and Vendor shall cooperate to segregate the Fees into the following separate payment streams: (1) those for Services, and (2) those for which Vendor functions merely as a paying agent for Commonwealth in receiving goods, supplies, or services (including leasing and licensing arrangements).

ARTICLE 24. AUDIT RIGHTS

24.01 **Single Audit Act.** In compliance with the Single Audit Act of 1984, Vendor agrees to the following:

- (1) This Agreement is subject to audit by Federal and Commonwealth Agencies or their authorized representatives in accordance with the auditing standards promulgated by the Comptroller General of the United States and specified in Government Auditing Standards, 1994 Revisions (Yellow Book).
- (2) The audit requirement of this Agreement will be satisfied if a single audit is performed under the provisions of the Single Audit Act of 1984, 31 U.S.C. 7501 *et seq.*, and all rules and regulations promulgated pursuant to that Act.
- (3) Commonwealth reserves the right for Federal and Commonwealth Agencies or their authorized representatives to perform additional audits of a financial/compliance, economy/efficiency or program results nature, if deemed necessary.
- (4) Vendor further agrees to comply with requirements that may be issued by any Commonwealth Agency upon receipt of additional guidance received from the Federal government regarding the Single Audit Act of 1984.

24.02 **Processing.** Upon reasonable written notice from Commonwealth, Vendor and Vendor Agents shall provide such auditors and inspectors with access to the Services Locations and the Software and the Machines for the purpose of performing audits or inspections of the Services and the operations of Commonwealth and Vendor, subject always to Vendor's reasonable security requirements. Vendor shall provide, and shall cause Vendor Agents to provide, to such auditors and inspectors any reasonable assistance that they may require. If any such audit results in Vendor being notified that it or any Vendor Agent is not in compliance with any law, regulation, audit requirement or generally accepted accounting principle relating to the Services, Vendor shall, and shall cause such Vendor Agent to, promptly take actions to comply with such law, regulation, audit requirement or generally accepted accounting principle. Commonwealth shall bear the expense of any such compliance that is (1) required by a law, regulation or other audit requirement relating to Commonwealth's operations to the extent the same was first enacted on or after the Effective Date or (2) necessary due to Commonwealth's noncompliance with any law, regulation or audit requirement imposed on Commonwealth. Vendor shall bear the expense of any such response that is (1) required by a law, regulation or other audit requirement relating to Vendor's business or enacted prior to the Effective Date, (2) to be performed by Vendor as part of the Designated Services, or (3) necessary due to Vendor's noncompliance with any law, regulation or audit

requirement imposed on Vendor. As part of the Designated Services, Vendor shall provide to Commonwealth summary data of those portions of Vendor's and Vendor Agents' internal audit reports relating solely to the Services.

24.03 Fees. Upon reasonable written notice from Commonwealth, Vendor shall provide such auditors and inspectors with access to such financial records and supporting documentation as may reasonably be requested by Commonwealth, and such auditors and inspectors may audit the Fees charged to Commonwealth to determine that such Fees are accurate and in accordance with this Agreement. Such audit shall not require Vendor to disclose cost, profit and overhead data, including both direct and indirect rates, markups, profit margins or confidential employee records or trade secret information.

24.04 Overcharges. If, as a result of such audit, Commonwealth determines that Vendor has overcharged Commonwealth, Commonwealth shall notify Vendor of the amount of such overcharge and Vendor shall promptly pay to Commonwealth the amount of the overcharge, plus interest at the rate of six percent (6%) per annum, calculated from the date of receipt by Vendor of the overcharged amount until the date of repayment to Commonwealth. In the event any such audit reveals an overcharge to Commonwealth during any calendar month during the Outsource Term exceeding fifteen percent (15%) of all Fees in the aggregate paid by Commonwealth in respect of such calendar month, Vendor shall reimburse Commonwealth for the cost of such audit. If as a result of such audit, Commonwealth or Vendor determines that Vendor has undercharged Commonwealth, Commonwealth shall promptly pay to Vendor the amount of such undercharge, without interest. Any disagreement between the parties with regard to the results of any such audit shall be treated as a dispute between the parties subject to the provisions of *Article 32*.

24.05 Record Retention. As part of the Designated Services, Vendor shall (1) retain records and supporting documentation sufficient to document the Services and the Fees paid or payable by Commonwealth under this Agreement for at least three (3) years after the expiration or termination of this Agreement or until all questioned items relating to such records and documentation are resolved by the parties, whichever is later, and (2) upon notice from Commonwealth, provide such auditors and inspectors as are designated by Commonwealth with reasonable access to such records and documentation for inspection, audit and reproduction. Such records and documentation shall be in such detail as will properly reflect, in accordance with generally accepted accounting principles, all charges claimed under the provisions of this Agreement. Any such records which relate to litigation or the settlement of claims arising out of the performance of this Agreement, or any Fees as to which exception has been taken by the auditors, shall be retained by Vendor until such litigation, claims, or exceptions have been finally resolved. Such audit shall not require Vendor to disclose cost, profit and overhead data, including direct and indirect rates, markups, profit margins or confidential employee records or other trade secret information.

24.06 Inclusion in Subcontracts. The provisions of this *Article 24*, except for *Section 24.04*, shall be applicable to and included in each subcontract under this Agreement.

ARTICLE 25. CONFIDENTIALITY

25.01 General Obligations. All Confidential Information relating to a party shall be held in confidence by the other party to the same extent and in at least the same manner as such party protects its own confidential or proprietary information of the greatest sensitivity. Neither party shall disclose, publish, release, transfer or otherwise make available any Confidential Information of the other party in any form to, or for the use or benefit of, any person or entity without the other party's consent. Subject to the other provisions of this Agreement, each party shall, however, be permitted to disclose relevant aspects of the other party's Confidential Information to its officers, agents, subcontractors and employees and to the officers, agents, subcontractors and employees of its corporate affiliates or subsidiaries to the extent that such disclosure is reasonably necessary for the performance of its duties and obligations under this Agreement; provided, however, that such party shall take all reasonable measures to ensure that Confidential Information of the other party is not disclosed or duplicated in contravention of the provisions of this Agreement by such officers, agents, subcontractors and employees and that such party shall be responsible for any unauthorized disclosure of the Confidential Information of the other party by such officers, agents, subcontractors or employees. The obligations in this *Section 25.01* shall not restrict any disclosure by either party pursuant to any applicable law, or in accordance with the order of any court or government agency of competent jurisdiction (provided that the disclosing party shall give prompt notice to the non-disclosing party of such order) and, except to the extent provided otherwise by any applicable law, shall not apply with respect to information which (1) is developed by the other party without violating the disclosing party's proprietary rights, (2) is or becomes publicly known (other than through unauthorized disclosure), (3) is disclosed by the owner of such information to a third party free of any obligation of confidentiality, (4) is already known by such party without an obligation of confidentiality other than pursuant to this Agreement or any confidentiality agreement entered into before the Effective Date between Commonwealth and Vendor, or (5) is rightfully received by the disclosing party free of any obligation of confidentiality. The confidentiality period for Confidential Information which is related to hardware, software, technical specifications, and methods and processes related to data processing and/or computing shall continue from the date of disclosure until two years following expiration or termination of this Agreement. The immediately preceding sentence shall not release or relax, in whole or in part, Vendor's confidentiality obligations with respect to information pertaining to any private individual or, with respect to any Commonwealth Agency, information or documentation which is not permitted to be disclosed to third parties under local, Commonwealth or Federal laws and regulations or pursuant to the terms of any third party agreement to which Commonwealth is a party. Nothing in this *Section 25.01* shall supersede or limit, or be deemed to supersede or limit, any other provision of this Agreement or set forth on *Exhibit 25.01* attached hereto pertaining to confidentiality or disclosure of any Commonwealth Data or to any security procedures required to be followed by Vendor or its employees and other representatives. In addition to the confidentiality and non-disclosure and other restrictive provisions of this *Section 25.01* and elsewhere in this Agreement, Vendor shall be subject to, and shall be required to abide by, the provisions set forth on *Exhibit 25.01* attached hereto, all of which provisions are required to be incorporated into this Agreement to satisfy the requirements of a particular Commonwealth Agency, a particular agency of the Federal government with whom Commonwealth interacts or other third party.

25.02 Unauthorized Acts. Each party shall:

- (1) Notify the other party promptly of any known unauthorized possession, use or knowledge of the other party's Confidential Information by any person or entity.
- (2) Promptly furnish to the other party full details known by such party relating to the unauthorized possession, use or knowledge thereof and shall use reasonable efforts to assist the other party in investigating or preventing the recurrence of any unauthorized possession, use or knowledge of the other party's Confidential Information.
- (3) Use reasonable efforts to cooperate with the other party in any litigation and investigation against third parties deemed necessary by the other party to protect its proprietary rights.
- (4) Promptly use all reasonable efforts to prevent a recurrence of any such unauthorized possession, use or knowledge of the other party's Confidential Information.

Each party shall bear the cost it incurs as a result of compliance with this *Section 25.02*. The obligations in this *Section 25.02* shall not restrict any disclosure by either party pursuant to any applicable law or pursuant to the order of any court or other legal process or government agency of competent jurisdiction (provided that the disclosing party shall give prompt notice to the non-disclosing party of such order).

25.03 Exclusions. There shall be no restriction with respect to the use or disclosure of any ideas, concepts, know-how or data processing techniques developed alone or jointly with Commonwealth in connection with Services provided to Commonwealth under this Agreement.

ARTICLE 26. REPRESENTATIONS AND WARRANTIES

26.01 By Commonwealth. Commonwealth represents and warrants as of the Amendment Effective Date that:

- (1) It has all requisite power and authority to execute, deliver and perform its obligations under this Agreement.
- (2) The execution, delivery and performance of this Agreement by Commonwealth have been duly authorized by Commonwealth.
- (3) The Commonwealth Proprietary Software does not and will not infringe upon the proprietary rights of any third party, provided that Commonwealth will have no obligation with respect to any losses to the extent the same arise out of or in connection with Vendor's modification or misuse of equipment, systems, programs, or products or Vendor's combination, operation or use with devices, data, equipment, systems, programs or products not furnished by Commonwealth under this Agreement.

- (4) It has, or at any time of provision to Vendor, will have the right to use and to disclose to Vendor and Vendor Agents and allow Vendor and Vendor Agents to use in accordance with the terms of this Agreement all of the Commonwealth Software so disclosed to Vendor.
- (5) Commonwealth has not disclosed any Confidential Information of Vendor.

It has, or at the time of provision to Vendor, will have the right to use and to disclose to Vendor all of the Commonwealth Software so disclosed to Vendor.

26.02 **By Vendor.** Vendor represents, warrants and covenants as of the Amendment Effective Date that:

- (1) It is a corporation duly incorporated, validly existing, and in good standing under the laws of Delaware.
- (2) It has all requisite corporate power and authority to execute, deliver, and perform its obligations under this Agreement.
- (3) Vendor is duly licensed, authorized and qualified to do business and is in good standing in Pennsylvania and in every other jurisdiction in which a license, authorization or qualification is required for the ownership or leasing of its assets or the transaction of business of the character transacted by it except where the failure to be so licensed, authorized or qualified would not have a material adverse effect on Vendor's ability to fulfill its obligations under this Agreement.
- (4) The execution, delivery and performance of this Agreement by Vendor has been duly authorized by Vendor.
- (5) Vendor shall comply with all applicable Federal, state and local laws and regulations applicable to Vendor and shall obtain all applicable permits and licenses required of Vendor in connection with its obligations under this Agreement.
- (6) Vendor has not disclosed any Confidential Information of Commonwealth.
- (7) The Vendor Proprietary Software does not and will not, and the Developed Software and the Services will not, infringe upon the proprietary rights of any third party, provided that Vendor will have no obligation with respect to any losses to the extent the same arise out of or in connection with Commonwealth's modification or misuse of equipment, systems, programs, or products or Commonwealth's combination, operation or use with devices, data, equipment, systems, programs or products not furnished by Vendor under this Agreement.

ARTICLE 27. DISCLAIMER

EXCEPT AS SPECIFIED IN THIS AGREEMENT, NEITHER PARTY MAKES ANY OTHER REPRESENTATIONS OR WARRANTIES IN RESPECT OF THE SERVICES OR THE SYSTEMS AND EACH EXPLICITLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE IN RESPECT OF THE SERVICES AND THE SYSTEMS.

ARTICLE 28. TERMINATION

28.01 Termination for Convenience. Commonwealth shall have the right to terminate this Agreement for any reason, upon not less than 180 days written notice, whenever Commonwealth shall determine that such termination is in the best interest of Commonwealth ("Termination for Convenience"). Any such termination shall be effected by delivery to Vendor of a Notice of Termination specifying that this Agreement is terminated and the date on which termination becomes effective. If Commonwealth delivers any such Notice of Termination, Vendor shall cease work as of the date set forth in that Notice of Termination, and shall be paid only for such Services as have already been satisfactorily rendered up to and including the cease work date set forth in such Notice of Termination, for such Services performed thereafter under *Article 30* and *Article 31* of this Agreement and as provided in *Section 28.06*. The above shall not be deemed to limit Commonwealth's right to terminate this Agreement for any reason as permitted by the other provisions of this Agreement, or under applicable statutory law or regulations.

28.02 Termination for Change in Control. In the event of the sale by Vendor of all or substantially all of its assets (in a single transaction or a series of related transactions) or the sale of a controlling interest in Vendor's outstanding stock, Vendor shall be entitled to assign this Agreement to its successor upon written notice thereof to Commonwealth. Commonwealth shall be entitled to receive from Vendor, upon Commonwealth's request, such information as is reasonably requested by Commonwealth to enable Commonwealth to assess the financial, technical and management capabilities of such successor to assume Vendor's obligations under this Agreement. If Commonwealth determines, in the exercise of its reasonable discretion, that such successor does not or may not have such requisite financial, technical or management capabilities, and if Commonwealth informs Vendor thereof in writing and describing in reasonable detail its basis therefor, then, and only then, such assignment by Vendor shall be subject to Commonwealth's prior written consent, which consent may be withheld, delayed or conditioned in Commonwealth's sole discretion. If Commonwealth withholds such consent, then Commonwealth shall have the exclusive option of continuing under the terms and conditions of this Agreement with Vendor or its successors or assigns for the full remaining term of this Agreement, or continuing under the terms and conditions of this Agreement with Vendor or its successors or assigns for such period of time as is necessary or desirable to terminate this Agreement.

28.03 Termination for Cause. If Vendor (1) fails to perform any of its material obligations or breaches any material representations under this Agreement (except as provided in *Section 28.04*), and such failure is not cured within forty-five (45) days after notice is given to Vendor specifying the nature of the default or (2) repeatedly fails to perform any material portion of

its obligations or breaches any of its material representations under this Agreement, regardless of whether such failures or breaches are cured, the Commonwealth may, upon further notice to Vendor, terminate this Agreement as of the date specified in such notice of termination. In the event of any termination by Commonwealth under this *Section 28.03*, Vendor's obligations under *Article 30* and *Article 31* shall survive such termination.

28.04 Termination for Critical Failures. In the event Vendor fails to provide any of the Critical Services and Vendor fails to cure such failure within 96 hours, or if Vendor fails to provide any Critical Services five (5) or more times in any 30-day period during the Outsource Term, Commonwealth may, upon notice to Vendor and in addition to any other remedies available to Commonwealth under this Agreement, at law or in equity, terminate Vendor's obligation to provide the Services or terminate this Agreement for cause as of the date specified in the notice of termination. In the event of any such termination by Commonwealth, Vendor's obligations under *Article 30* and *Article 31* shall survive such termination. Vendor shall be excused from any failure under this Section 28.04 if and to the extent that such failure was caused by the Commonwealth's (or its agent's) acts, omissions or failure to comply with its agreements or obligations hereunder. Commonwealth shall provide Vendor with notice of termination pursuant to this Section 28.04 within 180 days of Vendor's failure triggering such right. In the event Commonwealth does not notify Vendor within said 180 day period, Commonwealth will be deemed to have waived its right to termination under Section 28.04 for such failure.

28.05 Termination for Insolvency. In the event that Vendor becomes insolvent for any reason whatsoever, or makes an assignment for the benefit of creditors, or has a receiver appointed, or if it is declared as bankrupt under the laws of the United States, or if a petition of reorganization or rearrangement is filed against it under the bankruptcy laws, Commonwealth shall have the exclusive option of continuing with Vendor or its successors or assigns or trustee in bankruptcy under the terms and conditions of this Agreement for the full remaining term of this Agreement, or continuing with Vendor or its successors or assigns or trustee in bankruptcy under the terms and conditions of this Agreement for such period of time as is necessary or desirable to terminate this Agreement.

28.06 Transfer of Assets. Upon the termination of this Agreement other than for non-appropriation, Commonwealth may, either itself or through its designee, take title to the Vendor Machines and license the Vendor Software.

28.07 Termination Fees. Fees to be charged upon termination, except for termination for non-appropriation, for which there will be no termination fees, will be as set out on *Exhibit 28.07*.

28.08 Non-Appropriation. Any payment obligation or portion thereof of Commonwealth created by this Agreement is conditioned upon the availability of Commonwealth or Federal funds which are appropriated or allocated for the payment of such an obligation or portion thereof; provided, however, that Commonwealth will request such funds each year during the Outsource Term. If such funds are not allocated and available, this Agreement may be terminated by Commonwealth at the end of the period for which funds are available. No penalty shall accrue to Commonwealth in the event this provision is exercised, and Commonwealth shall not be obligated

or liable for any future payments due for any damages as a result of termination under this *Section 28.08*. If possible, Commonwealth will promptly notify Vendor if it appears reasonably likely that funds will not be appropriated or allocated. Notwithstanding any other provision of this Agreement to the contrary, Vendor shall be released from any obligation to provide further Services pursuant to this Agreement.

28.09 Failure to Pay Fees. In the event Commonwealth fails to pay undisputed Fees for 9 consecutive months, Vendor may terminate this Agreement for its convenience. In such event, no termination fees will be due Vendor, and, notwithstanding any other provision of this Agreement to the contrary, Vendor shall be released from any obligation to provide further Services pursuant to this Agreement.

ARTICLE 29. INTENTIONALLY LEFT BLANK.

ARTICLE 30. TERMINATION ASSISTANCE

Upon any request by Commonwealth, Vendor shall perform the Termination Assistance Services, including Vendor's continuing performance of those Designated Services and those Additional Services as may be requested by Commonwealth. In addition thereto, Vendor shall, at Commonwealth's request, maintain in full force and effect any then-existing third party agreement for use of a business recovery center entered into pursuant to the terms of *Article 19*. The Termination Assistance Services shall be provided for up to 365 days after the effective date of the expiration or termination for any reason, other than non-appropriation, of Vendor's obligation to perform the Services or of this Agreement and subject to the Time and Materials Services Hourly Rates. Until the expiration or termination of this Agreement, there shall be no additional charge to Commonwealth for the Termination Assistance Services. Thereafter, Vendor shall charge Commonwealth for such services at its then-prevailing time and materials rates for state governmental customers generally. Vendor shall disclose those rates to Commonwealth from time to time at the request of Commonwealth. Upon any expiration or termination of this Agreement, Commonwealth shall be entitled to offer employment to any or all members of the Project Staff, and neither Vendor nor International Business Machines, Corp. (or their respective successors under this Agreement) will interfere with any attempt by Commonwealth to employ any such individuals. Vendor acknowledges and agrees that, upon any breach or threatened breach by Vendor of its obligations under this *Article 30*, Commonwealth shall be entitled to seek injunctive relief, including an order of specific performance. The provisions of this *Article 30* will survive any expiration of the Outsource Term and any termination of this Agreement. If this Agreement is terminated due to failure by Commonwealth to pay amounts owed hereunder, Commonwealth will pay monthly in advance for Termination Assistance Services.

ARTICLE 31. EXIT PLAN

Upon the expiration or termination for any reason of Vendor's obligation to perform the Services or of this Agreement:

- (1) Vendor shall provide the Termination Assistance Services in accordance with

Article 30.

- (2) Vendor will request, with respect to any contracts applicable to Vendor Third Party Software being provided to Commonwealth and being used by Vendor to perform the Services, that the third party agree in writing that it will permit the assignment or transfer of the applicable agreement with Vendor to Commonwealth at the termination or expiration of this Agreement. If any such third party refuses to provide such a written agreement, then Vendor will notify Commonwealth of this fact. Upon any such notification by Vendor, Commonwealth shall notify Vendor in writing whether Vendor may use such third party in connection with Vendor's performance of the Designated Services. If Vendor is notified by Commonwealth that it must not use such third party services, then Vendor will make commercially reasonable efforts to locate an alternate third party provider, but Vendor is not responsible for any additional third-party costs that may result from using an alternate provider. If no alternate provider can be located by Vendor, Vendor will so notify Commonwealth and the parties, both acting in good faith and through their respective project managers, will attempt to resolve the issue to their mutual satisfaction. Further, Vendor is not responsible for any fees associated with the assignment or transfer of the license to the Commonwealth or for any breach by such third party of its agreement regarding the assignment or transfer.

Vendor acknowledges and agrees that, upon any breach or threatened breach by Vendor of its obligations under this *Article 31*, Commonwealth shall be entitled to seek injunctive relief, including an order of specific performance. The provisions of this *Article 31* will survive any expiration of the Outsource Term and any termination of this Agreement.

ARTICLE 32. DISPUTE RESOLUTION

32.01 Project Managers. All disputes between the parties arising under or relating to this Agreement shall initially be referred in writing by either party to the Vendor Project Manager and the Commonwealth Project Manager. If the Vendor Project Manager and the Commonwealth Project Manager are unable to resolve the dispute within ten (10) Commonwealth business day(s) after referral of the matter to them or upon the earlier request by either the Vendor Project Manager or the Commonwealth Project Manager, the parties shall submit the dispute to the Management Committee for immediate review.

32.02 Management Committee. Within ten (10) Commonwealth business days after any dispute between the parties is submitted to the Management Committee pursuant to *Section 32.01*, the Management Committee shall meet for the purpose of attempting to resolve such dispute. At any meeting of the Management Committee at which more than one (1) dispute will be considered, Commonwealth may establish the order in which such disputes shall be addressed. If the Management Committee is unable to resolve a dispute within fifteen (15) Commonwealth business days after the date of the initial meeting of the Management Committee during which such dispute was considered, the Management Committee shall immediately notify Commonwealth and Vendor pursuant to *Section 32.04*.

32.04 Submission of Claims. In the event of a controversy or claim arising from the Agreement that has not been resolved by the above process, the Vendor must, within six months, file a written claim with the contracting officer for a determination. The claim shall state all grounds upon which the Vendor asserts a controversy exists

- (1) The Commonwealth shall review timely-filed claims and issue a final determination, in writing, regarding the claim. The final determination shall be issued within 120 days of the receipt of the claim, unless extended by consent of the contracting officer and the Vendor. The Commonwealth shall send its written determination to the Vendor. If the Commonwealth fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The Commonwealth's determination shall be the final order of the purchasing agency.
- (2) Within fifteen (15) days of the mailing date of the determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the Vendor may file a statement of claim with the Commonwealth Board of Claims. Pending a final judicial resolution of a controversy or claim, the Vendor shall proceed diligently with the performance of the Agreement in a manner consistent with the determination of the Commonwealth and the Commonwealth shall compensate the Vendor pursuant to the terms of the Agreement.

32.05 Continuity of Services. Each of Commonwealth and Vendor acknowledge that the provision of the Services is critical to the operations of Commonwealth. Accordingly, in the event of a dispute between Commonwealth and Vendor arising under or relating to this Agreement, Vendor shall continue to provide the Services in accordance with the terms of this Agreement during the pendency of the resolution of such dispute, including the final judicial resolution thereof by Commonwealth's Board of Claims or any appeal thereof, and Commonwealth shall continue to pay Vendor as set forth in *Article 22*.

ARTICLE 33. INDEMNIFICATION

33.01 Indemnity by Vendor. Vendor shall indemnify Commonwealth from, and defend Commonwealth against, any liability or expenses (including reasonable attorneys' fees and expenses) arising out of or relating to any claim:

- (1) that the Services, the Developed Software, the Vendor Software, the Vendor Machines, any modifications to Commonwealth Software performed or developed by Vendor, its employees or Vendor Agents or any other resources or items provided to Commonwealth by Vendor, its employees or Vendor Agents infringe upon the proprietary rights of any third party, provided, however, that Vendor shall not be liable under this *Section 33.01(1)* to the extent that the claim of infringement results from Vendor's performance of the Services in accordance with information or direction provided by Commonwealth or Commonwealth's Agents.

Commonwealth acknowledges that Vendor may desire to replace an infringing product hereunder, and Commonwealth agrees that Vendor shall be entitled to undertake such replacement; provided, however that such replacement shall not excuse any of Vendor's other obligations under this Agreement.

Vendor will have no obligation with respect to any losses to the extent the same arise out of or in connection with Commonwealth's modification or misuse of equipment, systems, programs, or products or Commonwealth's combination, operation or use with devices, data, equipment, systems, programs or products not furnished by Vendor under this Agreement.

- (2) brought by a Vendor Agent and relating to any duties or obligations of Vendor, its employees or Vendor Agents accruing after the Effective Date in respect of such Vendor Agent.
- (3) relating to the inaccuracy or untruthfulness of any representation or warranty made by Vendor under this Agreement.
- (4) relating to (a) a violation of federal, state or other laws or regulations for the protection of persons or members of a protected class or category of persons by Vendor, its employees or Vendor Agents, (b) sexual discrimination or harassment by Vendor, its employees or Vendor Agents, (c) work-related bodily injury or death caused by Vendor, its employees or Vendor Agents (Vendor hereby waiving, as between Vendor and Commonwealth, the protection of any worker's compensation statute with respect to its indemnification obligations hereunder), (d) accrued employee benefits for which Vendor is responsible, and (e) any representations for which Vendor is responsible, made by Vendor to Commonwealth under this Agreement.
- (5) relating to breaches of the physical and data security controls at (a) the Commonwealth Services Locations to the extent the same (i) are controlled or provided by Vendor after the Effective Date and (ii) relate to Vendor's provision of the Services, and (b) the Vendor Services Locations;
- (6) relating to any amounts, including taxes, interest and penalties, assessed against Commonwealth which are obligations of Vendor pursuant to *Article 23*.
- (7) relating to Vendor's noncompliance with legal or regulatory requirements applicable to Vendor.
- (8) relating to damage to tangible personal or real property resulting from Vendor's or Vendor Agents' negligent acts or omissions.

Vendor shall indemnify Commonwealth from any costs and expenses incurred in connection with the enforcement of this *Section 33.01*.

33.02 **Indemnity by Commonwealth.** Vendor expressly acknowledges and agrees that Commonwealth is statutorily precluded, as of the Effective Date, from providing any indemnification under this Agreement.

33.03 **Indemnification Procedures.** If any claim is commenced against Commonwealth for which Commonwealth is entitled to indemnification under this *Article 33*, Commonwealth shall deliver notice thereof to Vendor as promptly as practicable. After such notice, if the Vendor acknowledges in writing to Commonwealth that this Agreement applies with respect to such claim, then Vendor shall be entitled, if it so elects in a notice delivered to Commonwealth not less than thirty (30) days prior to the date on which a response to such claim is due, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys of its sole choice to handle and defend the same, at its sole cost and expense. Commonwealth shall cooperate in all reasonable respects with the Vendor and the Vendor's attorneys in the investigation, trial and defense of such claim and any appeal arising therefrom; provided, however, that Commonwealth may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy other than the payment of money by the Commonwealth shall be entered into without the consent of the Commonwealth. If the Vendor does not assume full control over the defense of a claim as provided in this *Section 33.03*, the Commonwealth may participate in such defense, at its sole cost and expense, and Commonwealth shall have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of the Vendor.

33.04 **Survival.** The provisions of this *Article 33* shall survive the termination or expiration of this Agreement.

ARTICLE 34. DAMAGES

34.01 **Direct Damages.** Each of Commonwealth and Vendor shall be liable to the other party for any direct damages arising out of or relating to its performance under this Agreement; **provided, however, that neither Commonwealth nor Vendor shall be liable for direct damages, whether based on an action or claim, in contract, equity, negligence, tort or otherwise, in excess of the aggregate amount paid by Commonwealth to Vendor under this Agreement during the 12 month period immediately preceding the occurrence of the event giving rise to such damages.**

34.02 **Consequential Damages.** Neither Commonwealth nor Vendor shall be liable for, nor will the measure of damages include, any indirect, incidental, special or consequential damages or amounts for loss of income, profits or savings arising out of or relating to its performance under this Agreement even if the party knew or should have known of the possibility of such damages.

34.03 **Services Level Credits.** With respect to each Commonwealth Agency, in the event that Vendor fails to perform the Services to be rendered in respect of that Commonwealth Agency in accordance with the applicable Services Levels, Vendor shall be subject to a credit against Fees in accordance with *Exhibit 6.03*, to be credited against Fees then or thereafter becoming due and

owing from Commonwealth; provided, however, that in no event will such charges for any Commonwealth Agency for any month exceed, in the aggregate, ten percent (10%) of the Designated Fees incurred by that Commonwealth Agency for that month. If any such credits are assessed against Vendor Fees, Vendor may "earnback" the credit by exceeding the related Services Level for the impacted Commonwealth Agency for each of the next succeeding three calendar months. For example, if Commonwealth Agency X has a Services Level requiring 99.7% system availability, and if Vendor achieves only 99.5% system availability for that Commonwealth Agency in a particular month, a credit of \$Y will be accrued against Vendor Fees. If, for each of the next succeeding three calendar months, Vendor achieves system availability exceeding 99.7% for Commonwealth Agency X, then Vendor will "earn back" the credit, and the accrual shall be adjusted accordingly and reflected in the next monthly invoice. Any such charges not "earned back" by Vendor shall be credited to Commonwealth on the next monthly invoice.

The Commonwealth's acceptance of any Service Level credit shall not bar or impair Commonwealth's rights and remedies in respect of the failure or root cause as set forth elsewhere in this Agreement, including without limitation claims for damages, injunctive relief and termination rights, provided however, Service level credits paid would be credited against any such claim for damages.

34.04 Exclusions. The limitations or exculpations of liability set forth in *Section 34.01* are not applicable to indemnification claims as set forth in *Sections 33.01(1), (4)(c) and (8) or 33.02(3)(c) and (8)*. With respect to third party claims brought against the Commonwealth related to *Section 33.01(5)*, the Vendor's indemnification obligation is limited to \$10,000,000, per breach.

34.05 Performance Bond. As security for Vendor's performance under this Agreement, Vendor shall deliver to Commonwealth and shall maintain in full force and effect throughout the Outsource Term as part of the Designated Services, an annual performance bond in a form and issued by an issuer reasonably satisfactory to Commonwealth. Vendor shall deliver to Commonwealth the replacement bond to become effective upon the expiration of the then-existing bond. The amount of such bond shall be \$7.5 million during the first two-year term, \$6 million during the second two-year term and \$5 million thereafter; provided, however, that each such reduction shall be subject to Commonwealth not having delivered to Vendor, during the two-year period preceding such reduction, any notice of Vendor's default under this Agreement.

ARTICLE 35. MISCELLANEOUS PROVISIONS

35.01 Assignment. Vendor shall not assign this Agreement, in whole or in any part, voluntarily, involuntarily or by operation of law, without Commonwealth's consent, which consent may be withheld, delayed or conditioned in Commonwealth's sole discretion. The consent of Commonwealth to any assignment shall not (1) relieve Vendor of its responsibility for the performance of any of its obligations under this Agreement or (2) constitute Commonwealth's consent to further assignment. Notwithstanding the above, Vendor may assign its right to receive payments under this Agreement, provided, however, that any such assignment will not increase the number of payments due from Commonwealth and will be subject to any claims and offset rights of the Commonwealth. This Agreement shall be binding on the parties and their respective successors

and permitted assigns. Any assignment in violation of this *Section 35.01* shall be void.

35.02 Notices. Except as otherwise specified in this Agreement, all notices, requests, consents, approvals and other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given, served and delivered, if delivered by hand or mailed by United States registered or certified mail or sent by telecopy (with receipt confirmed) to the address specified below:

In the case of Commonwealth: Commonwealth of Pennsylvania
Governor's Office of Administration
Consolidated Computer Services
1 Technology Park
Harrisburg, PA 17110-2913
Attention: Director
fax: 717-214-7433

With a copy (which shall not constitute notice) to: Chief Counsel
Office of Administration
405 Finance Building
Harrisburg, PA 17110
fax: 717-783-5455

In the case of Vendor: Project Manager
Unisys Corporation
3605 Vartan Way, Suite 202
Harrisburg, PA 17110
FAX: 717-526-1107

With a copy (which shall not constitute notice) to: General Counsel
Office of the General Counsel
Unisys Corporation
Township Line & Union Meeting Roads, Bldg A
Blue Bell, Pennsylvania 19424
FAX: 215-986-0624

Either party may change its address or telecopy number for notification purposes by giving the other party notice of the new address or telecopy number and the date upon which it will become effective.

35.03 Officials Not to Benefit. No official or employee of Commonwealth and no member of its General Assembly who exercise any functions or responsibilities under this Agreement shall participate in any decision relating to this Agreement which affects their personal

interest or the interest of any corporation, partnership or association in which they, directly or indirectly, are interested; nor shall any such official or employee of Commonwealth or member of its General Assembly have any interest, direct or indirect, in this Agreement or the proceeds thereof.

35.04 Certification Regarding Suspension. Vendor certifies that it is not currently under suspension or debarment by Commonwealth, any other state, or the Federal government.

35.05 Suspension of Subcontractors. If Vendor enters into any subcontracts or employs under this Agreement any subcontractor's individuals who are currently suspended or debarred by Commonwealth or the Federal government or who become suspended or debarred by Commonwealth or the Federal government during the term of this Agreement or any extensions or renewals thereof, Commonwealth shall have the right to require Vendor to terminate such subcontracts or employment.

35.06 Americans with Disabilities Act. Pursuant to federal regulations promulgated under the authority of The Americans With Disabilities Act, 28 C.F.R. § 35.101 et seq., the Vendor understands and agrees that it shall not cause any individual with a disability to be excluded from participation in this Agreement or from activities provided for under this Agreement on the basis of the disability. As a condition of accepting this Agreement, the Vendor agrees to comply with the "General Prohibitions Against Discrimination," 28 C.F.R. § 35.130, and all other regulations promulgated under Title II of The Americans With Disabilities Act which are applicable to all benefits, services, programs, and activities provided by the Commonwealth of Pennsylvania through contracts with outside contractors. Vendor shall be responsible for and agrees to indemnify and hold harmless Commonwealth from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against Commonwealth as a result of Vendor's failure to comply with the provisions of this Section 35.06.

35.07 Nondiscrimination/Sexual Harassment Clause. During the term of this Agreement, Vendor agrees as follows:

- a. In the hiring of any employees for the manufacture of supplies, performance of work, or any other activity required under the Agreement or any subcontract, Vendor, subcontractor or any person acting on behalf of Vendor or subcontractor shall not by reason of gender, race, creed, or color discriminate against any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates.
- b. Neither Vendor nor any subcontractor nor any person on their behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work or any other activity required under this Agreement on account of gender, race, creed, or color.
- c. Vendor and any subcontractors shall establish and maintain a written sexual harassment policy and shall inform their employees of the policy. The policy must

contain a notice that sexual harassment will not be tolerated and employees who practice it will be disciplined

- d. Vendor shall not discriminate by reason of gender, race, creed, or color against any subcontractor or supplier who is qualified to perform the work to which this Agreement relates.
- e. Vendor and each subcontractor shall furnish all necessary employment documents and records to and permit access to its books, records, and accounts by the contracting officer and the Department of General Services' Bureau of Contract Administration and Business Development for purposes of investigation to ascertain compliance with the provisions of this Nondiscrimination/Sexual Harassment Clause. If Vendor or any subcontractor does not possess documents or records reflecting the necessary information requested, it shall furnish such information on reporting forms supplied by the contracting officer or the Bureau of Contract Administration and Business Development.
- f. Vendor shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that such provisions will be binding upon each subcontractor.
- g. The Commonwealth may cancel or terminate this Agreement, and all money due or to become due under this Agreement may be forfeited for a violation of the terms and conditions of this Nondiscrimination/Sexual Harassment Clause. In addition, the agency may proceed with debarment or suspension and may place the Vendor in the Vendor Responsibility File.

35.08 Vendor Integrity Provisions

- a. For purposes of this clause only, the words "confidential information," "consent," "contractor," "financial interest," and "gratuity" shall have the following definitions:
 - 1) **Confidential information** means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with the Commonwealth.
 - 2) **Consent** means written permission signed by a duly authorized officer or employee of the Commonwealth, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the Commonwealth shall be deemed to have consented by virtue of execution of this agreement.
 - 3) **Vendor** means the individual or entity that has entered into this

Agreement with the Commonwealth, including directors, officers, partners, managers, key employees and owners of more than a five percent interest.

4) **Financial interest** means:

- a) Ownership of more than a five percent interest in any business; or
- b) Holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.

5) **Gratuity** means any payment of more than nominal monetary value in the form of cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind.

- b. Vendor shall maintain the highest standards of integrity in the performance of this Agreement and shall take no action in violation of state or federal laws, regulations, or other requirements that govern contracting with the Commonwealth.
- c. Vendor shall not disclose to others any confidential information gained by virtue of this Agreement.
- d. Vendor shall not, in connection with this or any other agreement with the Commonwealth, directly, or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any officer or employee of the Commonwealth.
- e. Vendor shall not, in connection with this or any other agreement with the Commonwealth, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of the Commonwealth.
- f. Except with the consent of the Commonwealth, neither Vendor nor anyone in privity with Vendor shall accept or agree to accept from, or give or agree to give to, any person, any gratuity from any person in connection with the performance of work under this Agreement except as provided therein.
- g. Except with the consent of the Commonwealth, Vendor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on this Agreement.
- h. Vendor, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify the Commonwealth in writing.

- i. Vendor, by execution of this Agreement and by the submission of any bills or invoices for payment pursuant thereto, certifies, and represents that Vendor has not violated any of these provisions.
- j. Vendor, upon the inquiry or request of the Inspector General of the Commonwealth or any of that official's agents or representatives, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Inspector General to Vendor's integrity or responsibility, as those terms are defined by the Commonwealth's statutes, regulations, or management directives. Such information may include, but shall not be limited to, Vendor's business or financial records, documents or files of any type or form which refers to or concern this Agreement. Such information shall be retained by Vendor for a period of three (3) years beyond the termination of this Agreement unless otherwise provided by law.
- k. For violation of any of the above provisions, the Commonwealth may terminate this and any other agreement with Vendor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all expenses incurred in obtaining another Vendor to complete performance hereunder, and debar and suspend Vendor from doing business with the Commonwealth. These rights and remedies are cumulative, and the use or nonuse of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Commonwealth may have under law, statute, regulation, or otherwise.

35.09 Vendor Responsibility Provisions

- a. Vendor certifies, for itself and all its subcontractors, that as of the date of its execution of this Agreement, that neither the Vendor, nor any subcontractors, nor any suppliers are under suspension or debarment by the Commonwealth or any governmental entity, instrumentality, or authority and, if the Vendor cannot so certify, then it agrees to submit, along with its Bid, a written explanation of why such certification cannot be made.
- b. Vendor also certifies, that as of the date of its execution of this Agreement, it has no tax liabilities or other Commonwealth obligations.
- c. Vendor's obligations pursuant to this Section 35.09 are ongoing from and after the Amendment Effective Date through the termination date thereof. Accordingly, Vendor shall have an obligation to inform the Commonwealth if, at any time during the term of this Agreement, it becomes delinquent in the payment of taxes, or other Commonwealth obligations, or if it or any of its subcontractors are suspended or debarred by the Commonwealth, the federal government, or any other state or governmental entity. Such notification shall be made within 15 days of the date of suspension or debarment.

d. The failure of Vendor to notify the Commonwealth of its suspension or debarment by the Commonwealth, any other state, or the federal government shall constitute an event of default of this Agreement.

e. Vendor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the Vendor's compliance with the terms of this or any other agreement between the Vendor and the Commonwealth, which results in the suspension or debarment of the Vendor. Such costs shall include, but shall not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. The Vendor shall not be responsible for investigative costs for investigations that do not result in the Vendor's suspension or debarment.

f. Vendor may obtain a current list of suspended and debarred Commonwealth contractors by either searching the internet at <http://www.dgs.state.pa.us/> or contacting the:

Department of General Services
Office of Chief Counsel
603 North Office Building
Harrisburg, PA 17125
Telephone No. (717) 783-6472
FAX No. (717) 787-9138

35.10 Assignment of Antitrust Laws. Vendor and Commonwealth recognize that in actual economic practice, overcharges by Vendor's suppliers resulting from violations of state and Federal Antitrust Laws are in fact borne by Commonwealth. As part of the consideration for the award of this Agreement, and intending to be legally bound hereby, Vendor assigns to Commonwealth all right, title and interest in and to any claims Vendor now has or may hereafter acquire under state or Federal Antitrust Laws relating to the goods and services which are subject to this Agreement.

35.11 Conflict of Interest. Vendor, by signing this Agreement, covenants that it has no undisclosed public or private interest, direct or indirect, and shall not acquire directly or indirectly any such interest, and that Vendor has no association, direct or indirect, which interest or association does or may conflict in any manner with the performance of the Services or any other obligations of Vendor under this Agreement. Any such conflicts shall be disclosed to Commonwealth, and Commonwealth shall determine whether such conflict is cause for termination of this Agreement. Vendor further covenants that, in the performance of this Agreement, no person having such interest shall be employed by or associated with Vendor.

35.12 Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one single agreement between the parties.

35.13 Relationship. The parties intend to create an independent contractor relationship

and nothing contained in this Agreement shall be construed to make either Vendor or Commonwealth partners, joint venturers, principals, agents or employees of the other, except only to the extent that Vendor is expressly appointed under *Section 8.02* of this Agreement to act as the agent of Commonwealth and, in those cases, only to the limited extent of such express appointment. No officer, director, employee, agent, affiliate or contractor retained by Vendor to perform work on Commonwealth's behalf hereunder shall be deemed to be an employee, agent or contractor of Commonwealth. Neither party shall have any right, power or authority, express or implied, to bind the other. As Commonwealth is relying upon Vendor's skills and experience in the performance of the Services under this Agreement, Vendor alone shall be responsible for determining the method and means of performing the Services within the terms of this Agreement. As between Vendor and Commonwealth, Vendor is solely responsible for payment of all income, disability, withholding and other employment taxes, and all medical benefit premiums, vacation pay, sick pay and other fringe benefits resulting from Vendor's retention of any such officers, directors, employees, agents or contractors.

35.14 Independent Capacity of Vendor. Except as otherwise expressly provided by the terms of this Agreement, Commonwealth shall have no control over the manner in which the Services are performed by Vendor or any employees of subcontractors of Vendor. Any job specifications or standards of work attached to or incorporated into this Agreement or any subcontracting restrictions contained in this Agreement shall not be construed as Commonwealth's direction or control over the manner of the performance of the Services.

35.15 Consents, Approvals, Notices and Requests. Unless otherwise specified in this Agreement, all consents, approvals, notices and requests, acceptances or similar actions to be given by either party under this Agreement shall not be unreasonably withheld, delayed or conditioned and each party shall make only reasonable requests under this Agreement.

35.16 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, then the remaining provisions of this Agreement or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and each such provision of this Agreement shall be valid and enforceable to the extent permitted by law.

35.17 Waiver. No delay or omission by either party to exercise any right or power it has under this Agreement shall impair or be construed as a waiver of such right or power. A waiver by any party of any breach or covenant shall not be construed to be a waiver of any succeeding breach or any other covenant. All waivers must be in writing and signed by the party waiving its rights.

35.18 Publicity. Neither party shall use the other party's name or refer to the other party directly or indirectly in any media release, public announcement or public disclosure relating to this Agreement or its subject matter, including in any promotional or marketing materials, customer lists or business presentations, without prior written consent from the other party for each such use or release.

35.19 Entire Agreement. This Agreement is the entire agreement between the parties

with respect to its subject matter, and there are no other representations, understandings or agreements between the parties relative to such subject matter.

35.20 **Amendments.** No amendment to, or change, waiver, or discharge of, any provision of this Agreement shall be valid unless in writing and signed by an authorized representative of the party against which such amendment, change, waiver or discharge is sought to be enforced.

35.21 **Governing Law.** This Agreement shall be interpreted in accordance with and governed by the laws of the Commonwealth of Pennsylvania, without giving effect to its conflicts of law provisions. Except as set forth in *Article 32*, Commonwealth and Vendor agree that the courts of the Commonwealth of Pennsylvania and the federal courts of the Middle District of Pennsylvania shall have exclusive jurisdiction over disputes under this Agreement and the resolution thereof. Any legal action relating to this Agreement must be brought in Dauphin County, Pennsylvania, and the parties agree that jurisdiction and venue in such courts is appropriate.

35.22 **Third Party Beneficiaries.** Each party intends that this Agreement shall not benefit, or create any right or cause of action in or on behalf of, any person or entity other than Commonwealth and Vendor.

35.23 **Acknowledgment.** Commonwealth and Vendor each acknowledge that the limitations and exclusions contained in this Agreement have been the subject of active and complete negotiation between the parties and represent the parties' agreement based upon the level of risk to Commonwealth and Vendor associated with their respective obligations under this Agreement and the payments to be made to Vendor and credits to be issued to, and Services to be provided to, Commonwealth pursuant to this Agreement. The parties agree that the terms and conditions of this Agreement shall not be construed in favor of or against any party by reason of the extent to which any party or its professional advisors participated in the preparation of this Agreement.

35.24 **Covenant of Further Assurances.** Commonwealth and Vendor covenant and agree that, subsequent to the execution and delivery of this Agreement and without any additional consideration, each of Commonwealth and Vendor will execute and deliver any further legal instruments and perform any commercially reasonable acts which are or may become necessary to effectuate the purposes of this Agreement.

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