

## **APPENDIX A**

### **TERMS AND CONDITIONS**

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## **TERMS AND CONDITIONS**

### **1. TERM AND SCOPE OF CONTRACT**

- (a) The term of the Contract shall commence on the Effective Date and shall end on the Expiration Date identified in the Contract, subject to the other provisions of the Contract. The Effective Date shall be: a) the date the Contract has been fully executed by the Contractor and by the Commonwealth and all approvals required by Commonwealth contracting procedures have been obtained or b) the date referenced in the Contract, whichever is later. The Contract shall not be a legally binding contract until after the fully-executed Contract has been sent to the Contractor.
- (b) The Commonwealth may, in its sole discretion, renew the Contract for three 1-year periods, or any combination thereof, on the terms and conditions in force at the date of the renewal and utilizing pricing to be negotiated but consistent with and no less favorable than the pricing in force at the date of the renewal. Further, the Commonwealth reserves the right to extend this Contract or any part of this Contract up to three (3) months, or as necessary to prevent a lapse in Contract coverage.
- (c) The fully executed Contract shall not contain ink signatures by the Commonwealth. The Contractor understands and agrees that the receipt of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent constitutes a valid, binding contract with the Commonwealth. The printed name of the purchasing agent on the Contract represents the signature of that individual who is authorized to bind the Commonwealth to the obligations contained in the Contract. The printed name also indicates that all approvals required by Commonwealth contracting procedures have been obtained.
- (d) The Contractor shall not start performance until all of the following have occurred:
  - (1) The Effective Date has arrived;
  - (2) The Contractor has received a copy of the fully executed Contract; and
  - (3) The Contractor has received a Purchase Order.

The Commonwealth shall not be liable to pay the Contractor for any supply furnished or work performed or expenses incurred before the Effective Date or before the Contractor receives a copy of the fully executed Contract or before the Contractor has received a Purchase Order. No Commonwealth employee has the authority to verbally direct the commencement of any work or delivery of any supply under this Contract prior to the Effective Date.

- (e) The Contractor agrees to provide the Services to the Commonwealth as such services are defined in this Contract, the RFP and the Contractor's Proposal, and in accordance with the terms of this Contract.
- (f) The Contractor shall provide to Commonwealth the following Services pursuant to the terms of the Contract:
  - (1) Commencing as of the Effective Date, the Transition and Transformation Services set forth in Schedule D (Transition and Transformation Methodology);
  - (2) Commencing as of the Effective Date and continuing until the Expiration Date:
    - (i) The services, function and responsibilities described in the Contract, including the Services set forth in Schedule B (Services and Statements of Work);
    - (ii) The services being performed in the thirteen (13) months prior to the Effective Date by Commonwealth employees and contractors whose scope of work is being taken over or replaced as a result of the Contract, even if the service, function or responsibility is not specifically described in the Contract;
    - (iii) Any incidental services, functions or responsibilities not specifically described in the Contract, but which are required for the proper performance and delivery of the Services identified in (i) through (ii) above; and
    - (iv) The services, functions and responsibilities related to those categories of Services which Contractor is assuming pursuant to the Contract; and
  - (3) Commencing upon written notice by Commonwealth to Contractor in accordance with Paragraph 28 (TERMINATION ASSISTANCE), the Termination Assistance Services.

The services set forth in (1) through (3) above shall be collectively referenced as the "Services," as they may evolve during the Term of the Contract or be supplemented, enhanced, modified or replaced pursuant to the terms hereof.

- (g) The Services shall be provided from and to the Services Locations. Contractor 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.

Upon Contractor's receipt of appropriate, advance notice (which except in an emergency situation shall not be less than five (5) days) and subject to Contractor's reasonable security requirements, authorized representatives of Commonwealth, Commonwealth agents and agents of the Federal government shall be permitted access to any Contractor Services Location.

## **2. PURCHASE ORDERS**

- (a) The Commonwealth may issue Purchase Orders against the Contract. These orders constitute the Contractor's authority to make delivery. All Purchase Orders received by the Contractor up to and including the expiration date of the Contract are acceptable and must be performed in accordance with the Contract. Contractors are not permitted to accept Purchase Orders which require performance in excess of those performance time periods specified in the Contract. Each Purchase Order will be deemed to incorporate the terms and conditions set forth in the Contract.
- (b) Purchase Orders will not include an ink signature by the Commonwealth. The electronically-printed name of the purchaser represents the signature of the individual who has the authority, on behalf of the Commonwealth, to authorize the Contractor to proceed.
- (c) Purchase Orders may be issued electronically or through facsimile equipment. The electronic transmission of a purchase order shall require acknowledgement of receipt of the transmission by the Contractor.
- (d) Receipt of the electronic or facsimile transmission of the Purchase Order shall constitute receipt of an order.
- (e) Purchase Orders received by the Contractor after 4:00 p.m. will be considered received the following business day.
- (f) The Commonwealth and the Contractor specifically agree as follows:
  - (1) No handwritten signature shall be required in order for the Contract or Purchase Order to be legally enforceable.
  - (2) Upon receipt of a Purchase Order, the Contractor shall promptly and properly transmit an acknowledgement in return. Any order which is issued electronically shall not give rise to any obligation to deliver on the part of the Contractor, or any obligation to receive and pay for delivered products on the part of the Commonwealth, unless and until the



Commonwealth agency transmitting the order has properly received an acknowledgement.

- (3) The parties agree that no writing shall be required in order to make the order legally binding. The parties hereby agree not to contest the validity or enforceability of the Contract or a genuine Purchase Order or acknowledgement that have been issued electronically under the provisions of a statute of frauds or any other applicable law relating to whether certain agreements shall be in writing and signed by the party bound thereby. The Contract and any genuine Purchase Order or acknowledgement issued electronically, if introduced as evidence on paper in any judicial, arbitration, mediation, or administrative proceedings, will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither party shall contest the admissibility of copies of the Contract or any genuine Purchase Order or acknowledgements under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Contract or Purchase Order or acknowledgement were not in writing or signed by the parties. A Purchase Order or acknowledgment shall be deemed to be genuine for all purposes if it is transmitted to the location designated for such documents.
- (4) Each party will immediately take steps to verify any document that appears to be obviously garbled in transmission or improperly formatted to include re-transmission of any such document if necessary.
- (g) Purchase Orders under five thousand dollars (\$5,000) in total amount may also be made in person or by telephone using a Commonwealth Procurement VISA Card. When an order is placed by telephone, the Commonwealth agency shall provide the agency name, employee name, credit card number, and expiration date of the card. The Contractor agrees to accept payment through the use of the Commonwealth Procurement VISA card.

### **3. CONTRACT SCOPE**

- (a) If the Contractor must perform work at a Commonwealth facility outside of the daily operational hours set forth by the Commonwealth, it must make arrangements with the Commonwealth to assure access to the facility and equipment. No additional payment will be made on the basis of lack of access, unless the Commonwealth fails to provide access as set out in the RFP or in the SLA Matrix as set out in Schedule F-1.
- (b) Except as set out in this Contract, the Contractor shall not offer for sale or provide Commonwealth agencies with any hardware or software (i.e., personal computers, file servers, laptops, personal computer packaged software, etc.). Contractor may recommend the use of tools such as hardware and software, without requiring

agencies to purchase those tools. If not on a statewide contract, the recommended hardware or software will be acquired through separate purchase agreements. Contractor shall not be considered for award of those purchase agreements.

- (c) The Contractor shall review the standards set out in IT Bulletins. The Contractor shall ensure that Services procured under this Contract comply with the applicable standards. In the event such standards change during Contractor's performance, and the Commonwealth requests that Contractor comply with the changed standard, then any incremental costs incurred by Contractor to comply with such changes shall be paid for pursuant to a change order to the Contract.

#### **4. IDENTIFICATION NUMBER**

The Contractor must have a SAP vendor number.

#### **5. ORDER OF PRECEDENCE, DEFINITIONS AND CONSTRUCTION**

- (a) If any conflicts or discrepancies should arise in the terms and conditions of this Contract, or the interpretation thereof, the order of precedence shall be:
  - (1) This Contract (first, the Contract, including the terms and conditions, second the Schedules and Appendices); then
  - (2) The Contractor's Proposal (including the clarifications and the BAFO), as accepted by the Commonwealth; and then
  - (3) The RFP.
- (b) Except as otherwise expressly provided in the Contract, all capitalized terms used in the Contract shall have the meanings set forth in Schedule A (Defined Terms).
- (c) Interpretation:
  - (1) The terms defined in the Contract include the plural as well as the singular and the derivatives of such terms. Unless otherwise expressly stated, the words "herein," "hereof," and "hereunder" and other words of similar import refer to the Contract as a whole and not to any particular Paragraph, Section, subsection or other subdivision. The words "include" and "including" shall not be construed as terms of limitation.
  - (2) Headings preceding the text of Paragraphs or Sections, and headings to Schedules and Appendices, the table of contents and the table of Schedules and Appendices included in or attached to the Contract are used for convenience only and are not to be considered in construing or interpreting the Contract.

- (3) References to any law refer to such law in changed or supplemented form, or to a newly adopted law replacing a previous law.
- (4) Except as may be expressly set forth herein, all references to time herein refer to Eastern Standard Time or Eastern Daylight Time, as applicable.
- (d) The Contract includes each Schedule and Appendix referenced herein, all of which are incorporated into the Contract by this reference

## **6. CONTRACT INTEGRATION**

- (a) This Contract, including the Contract signature pages, together with the Contractor's Proposal, the Contractor's clarifications and the Contractor's Best and Final Offer, and the RFP and addenda thereto that are incorporated herein by reference, constitutes the final, complete, and exclusive Contract between the parties containing all the terms and conditions agreed to by the parties.
- (b) All representations, understandings, promises, and agreements pertaining to the subject matter of this Contract made prior to or at the time this Contract is executed are superseded by this Contract.
- (c) There are no conditions precedent to the performance of this Contract except as expressly set forth herein.
- (d) No contract terms or conditions are applicable to this Contract except as they are expressly set forth herein.

## **7. PERIOD OF PERFORMANCE**

The Contractor, for the life of this Contract, shall complete all Services as specified under the terms of this Contract. In no event shall the Commonwealth be responsible or liable to pay for any Services provided by the Contractor prior to the Effective Date, and the Contractor hereby waives any claim or cause of action for any such Services.

## **8. SPECIAL REQUIREMENTS**

The Commonwealth reserves the right to purchase Services covered under this Contract through other procurement methods whenever the Commonwealth deems it to be in its best interest.

## **9. SUBCONTRACTS**

- (a) The Contractor may subcontract any portion of the Services described in this Contract to third parties selected by Contractor and approved in writing by the Commonwealth, which approval will not be unreasonably withheld. Approved Subcontractors will be listed on Schedule I (Approved Subcontractors).

Notwithstanding the above, if Contractor has disclosed the identity of Subcontractor(s) together with the scope of work to be subcontracted in the Contractor's Proposal, award of the Contract is deemed approval of all named Subcontractors for the specified scope of work and a separate approval is not required. The existence of any subcontract shall not change the obligations of Contractor to the Commonwealth under this Contract. Upon written request of the Commonwealth, the Contractor shall promptly provide the Commonwealth with a copy of any specified subcontract agreement between the Contractor and the subcontractor. If a subcontract agreement contains confidential proprietary information or trade secrets, a signed written statement to this effect must be provided with the subcontract in accordance with 65 P.S. § 67.707(b) for the information to be considered exempt under 65 P.S. § 67.708(b)(11) from public records requests. In addition, the Contractor must provide a copy of the subcontract agreement, which redacts the confidential proprietary information or trade secrets.

- (b) If Commonwealth reasonably determines that a subcontractor should no longer be retained by Contractor due to material performance deficiencies arising from the subcontractor's performance, the Commonwealth reserves the right, for good cause, to require that the Contractor remove a subcontractor from the project. If the Contractor incurs costs or delays, resulting from the removal of the subcontractor, those delays or any costs related to the delays may be addressed in accordance with Paragraph 26 (Changes); provided, however, that the Commonwealth will not be responsible for any costs incurred related to payments to either the replaced subcontractor or to the new subcontractor.

## **10. OTHER CONTRACTORS**

- (a) The Commonwealth may undertake or award other contracts for additional or related work, and the Contractor shall fully cooperate with other contractors and Commonwealth employees, and coordinate its work with such additional work as may be required. Except as otherwise required by this Contract, the Contractor will not commit or permit any act that will interfere with the performance of work by any other contractor or by Commonwealth employees. This paragraph shall be included in the Contracts of all contractors with which this Contractor will be required to cooperate. The Commonwealth shall equitably enforce this paragraph as to all contractors to prevent the imposition of unreasonable burdens on any contractor. The Contractor may submit a request under Paragraph 26 (Changes), if it believes that it has incurred costs or delay in complying with this paragraph.
- (b) Throughout the Term, Commonwealth may request that Contractor work together with Commonwealth and/or third parties to identify ways to achieve reductions in the cost of service delivery and corresponding reductions in the price(s) quoted in the Contract. If so requested by Commonwealth, Contractor will, at its own expense, promptly prepare a detailed proposal identifying all viable means of achieving the desired reductions without (to the extent practically possible)

adversely impacting business objectives or requirements identified by Commonwealth. Commonwealth shall not be obligated to accept or implement any such proposal.

## **11. PRIME CONTRACTOR RESPONSIBILITIES**

The Contractor will be responsible for all Services in this Contract whether or not Contractor provides them directly. Further, the Contractor is the sole point of contact with regard to all contractual matters, including payment of any and all charges resulting from the Contract.

## **12. COMPENSATION**

- (a) In consideration of Contractor providing the Services, subject to the terms of this Contract, Commonwealth shall pay to Contractor the Fees as set out at Schedule C (Fee Methodology). All items shall be performed within the time period(s) specified in the Contract. The Contractor shall be compensated only for items supplied and performed to the satisfaction of the Commonwealth. The Contractor shall not be allowed or paid travel or per diem expenses except as specifically set forth in the Contract.
- (b) Unless the Contractor has been authorized by the Commonwealth for evaluated receipt settlement, the Contractor shall send an invoice itemized by Purchase Order line item to the address referenced on the Purchase Order promptly after items are satisfactorily delivered. The invoice should include only amounts due under the Contract/Purchase Order. The Purchase Order number must be included on all invoices. In addition, the Commonwealth shall have the right to require the Contractor to prepare and submit a “Work In Progress” sheet that contains, at a minimum, the tasks performed, number of hours, hourly rates, and the purchase order or task order to which it refers.

## **13. PAYMENT**

- (a) The Commonwealth shall put forth reasonable efforts to make payment by the required payment date. The required payment date is:
  - (1) The date on which payment is due under the terms of the Contract; or
  - (2) Thirty (30) calendar days after a proper invoice actually is received at the “Bill To” address if a date on which payment is due is not specified in the Contract (a “proper” invoice is not received until the Commonwealth accepts the Service as satisfactorily performed).

The payment date shall be the date specified on the invoice if later than the dates established by (1) and (2) above.

- (b) Payment may be delayed if the payment amount on an invoice is not based upon the price(s) as stated in the Contract, if any payment is not made within fifteen (15) days after the required payment date, the Commonwealth may pay interest as determined by the Secretary of Budget in accordance with Act No. 266 of 1982 and regulations promulgated pursuant thereto. Payment should not be construed by the Contractor as acceptance of the Service performed by the Contractor. The Commonwealth reserves the right to conduct further testing and inspection after payment, but within a reasonable time after performance, and to reject the Service if such post payment testing or inspection discloses a defect or a failure to meet specifications.
- (c) Contractor shall continue to provide the Services even in the event payment is delayed or is not made in timely fashion.
- (d) All charges shall be exclusive of any taxes and fees and shall be supported by a line-item detailed analysis of the charges, showing how the charges are authorized under the Contract, and providing details of any allocation, algorithm or other calculation that was used to derive the charges, and providing sufficient detail that Commonwealth will be able to (i) reconcile the charges to the contractual commitments that give rise to them, and (ii) operate its internal cross charging protocols to re-charge the amounts billed by Contractor to the applicable business units.

#### **14. SIGNIFICANT EVENTS**

Commonwealth requires the right to adjust the scope or volume of Services to be provided in response to an event, or series of events taken together, that have or will have a significant and sustained impact on Commonwealth's demand for the Services, and requires Contractor to equitably adjust the price for the Services to reflect any such changes to the scope or volume of the Services.

#### **15. ASSIGNABILITY**

- (a) This Contract may not be assigned by Contractor, either in whole or in part without the prior written consent of the Commonwealth, which consent shall not be unreasonably withheld, conditioned, or delayed. Transfer of the majority of the stock or the majority of the assets of a corporation, or other change of ownership will be deemed an assignment. In the event that Contractor requests the right to assign this Contract, including an assignment to an affiliate or subsidiary, Contractor will provide the Commonwealth with copies of the following documents (to the extent they exist): most recent audited financial statements, Public Utility Commission Certificate of Public Convenience approval, proof of interconnection agreements with necessary carriers within the Commonwealth, copies of PUC approved tariffs, and such other documents as Commonwealth reasonably deems necessary. Within thirty (30) days of such

notice, the Commonwealth shall provide its written decision regarding the requested assignment.

- (b) Subject to the terms and conditions of this Paragraph 15 (ASSIGNABILITY), the Contract is binding upon the parties and their respective successors and assigns.
- (c) Any assignment consented to by the Commonwealth shall be evidenced by a written assignment agreement executed by the Contractor and its assignee in which the assignee agrees to be legally bound by all of the terms and conditions of the Contract and to assume the duties, obligations, and responsibilities being assigned. In addition, the assignee must execute a contract with the Commonwealth in the same form as this Contract.
- (d) Notwithstanding the foregoing, the Contractor may, without the consent of the Commonwealth, assign its rights to payment to be received under the Contract, provided that the Contractor provides written notice of such assignment to the Commonwealth together with a written acknowledgement from the assignee that any such payments are subject to all of the terms and conditions of the Contract.
- (e) A change of name by the Contractor, following which the Contractor's federal identification number remains unchanged, is not considered to be an assignment. The Contractor shall give the Commonwealth written notice of any such change of name.

## **16. STEP-IN RIGHTS**

- (a) In the event that Contractor is failing to deliver all or part of the Services, the Commonwealth shall give the Contractor notice of the failure. The Contractor shall have ten (10) days to provide the Commonwealth with a correction plan. If the correction plan is not received within ten (10) days or the failure is not corrected within twenty (20) days of the notice provided under this paragraph, Commonwealth may assign Commonwealth staff or third parties to step in and perform failing elements of the Services, to the extent those services are listed below, until such time as Contractor can demonstrate the ability to resume provision of such Services. Provided, however, that if in the Commonwealth's sole discretion the failure creates an emergency, no notice is required for the Commonwealth to exercise its rights under this paragraph.
  - (1) Help Desk;
  - (2) Provision, maintenance and installation of Voice CPE;
  - (3) Premise Wiring;
  - (4) Management of COPA Data on CPE; and

- (5) Dedicated platform for CTMS Management (but excluding any SMP component).
- (b) All costs associated with the exercise of such step-in rights shall be borne by Contractor.
- (c) Commonwealth's exercise of its step-in rights shall not constitute a waiver by Commonwealth of any termination rights or rights to pursue a claim for damages arising out of the failure that led to the step-in rights being exercised.

## **17. TRANSITION AND TRANSFORMATION**

Contractor shall plan, prepare for and conduct the transition of the Services in accordance with the Transition Plan set out in Schedule D (Transition and Transformation Methodology). The transition of the Services shall be completed no later the final Transition date specified in the Transition Plan. Contractor's responsibilities with respect to the transition include:

- (1) Transfer of the Services to Contractor and subsequent transformation of the Services to realize any planned cost reductions and Service performance improvements in accordance with detailed Transition and Transformation Plans agreed to by Commonwealth and including a number of Transition and Transformation Milestones (which shall include Critical Milestones);
- (2) Performing the transition without disruption to Commonwealth's operations;
- (3) Paying all costs associated with the transition; and
- (4) Otherwise performing such transition and migration tasks as are necessary to enable Contractor to provide the Services in accordance with the terms of the Contract, including the applicable Service Levels.

## **18. COMPLETION OF TRANSITION AND TRANSFORMATION**

- (a) Commonwealth reserves the right to monitor, test and otherwise observe and participate in transition. Contractor will notify Commonwealth without delay if any Commonwealth monitoring, testing or participation has caused (or Contractor expects it to cause) a problem or delay in transition and work with Commonwealth to prevent or circumvent the problem or delay.
- (b) In Contractor's performance and completion of transition and transformation activities, no functionality of Commonwealth's then current business operations or environment will be discontinued until Contractor demonstrates to



Commonwealth's reasonable satisfaction that the affected processes and operations have been successfully migrated to Contractor's target environment and are functioning properly in that environment.

- (c) If any Transition Milestone or Critical Milestone is not completed on or before the given date for such milestone as applicable, due to the fault of Contractor and a Milestone Credit is applicable, then for the period of delay Contractor shall pay to Commonwealth liquidated damages pursuant to Paragraph 62 and Schedule D.

## **19. INSPECTION AND ACCEPTANCE**

- (a) Acceptance of Services related to transition/transformation will occur in accordance with the Acceptance Criteria set out in Schedule D-3 and the Detailed Transition Plan.
- (b) Acceptance of Services other than those related to transition/transformation will occur in accordance with the project procedure manual.
- (c) If the Services are in compliance with the specifications, then the Commonwealth shall provide the Contractor with Commonwealth's written conditional acceptance of the Services. If the Services are not in compliance with the specifications, then the Commonwealth shall provide the Contractor with Commonwealth's written rejection of the Service. Payment will only be made if the Commonwealth has accepted the Service through written acceptance.
- (d) If the Services do not meet an accessibility standard as set out in ITB- ACC001, the Contractor must provide written justification for its failure to meet the standard. The justification must provide specific details as to why the standard has not been met. The Commonwealth may either waive the requirement as not applicable to the Commonwealth's business requirements or require that the Contractor provide an acceptable alternative. Any Commonwealth waiver of the requirement must be in writing.
- (e) Upon the Contractor's receipt of the Commonwealth's written notice of rejection, which must identify the reasons for the failure of the Services to comply with the specifications, the Contractor shall have fifteen (15) business days, or such other time as the Commonwealth and Contractor may agree is reasonable, within which to correct all such failures, and resubmit the corrected Services, certifying to the Commonwealth, in writing, that the failures have been corrected, and that the Services have been brought into compliance with the specifications. Upon receipt of such corrected and resubmitted Service and certification, the Commonwealth shall have thirty (30) business days to test the corrected Service to confirm that it is in compliance with the specifications. If the corrected Service is in compliance with the specifications, then the Commonwealth shall provide the Contractor with Commonwealth's acceptance of the Service.

- (f) If, in the opinion of the Commonwealth, the corrected Service still contains material failures, the Commonwealth may either:
  - (1) Repeat the procedure set forth above; or
  - (2) Terminate the Contract in accordance with Paragraph 27 (TERMINATION).

## **20. DEFAULT**

- (a) The Commonwealth may, subject to the provisions of Paragraph 21 (NOTICE OF DELAYS), and in addition to its other rights under the Contract, declare the Contractor in default by written notice thereof to the Contractor, and terminate (as provided in Paragraph 27 (TERMINATION)) the whole or any part of this Contract and shall further have the right to seek damages from Contractor for any of the following reasons:
  - (1) Failure to begin work within the time specified in the Contract or as otherwise specified;
  - (2) Failure to successfully complete a Major Milestone in accordance with the agreed Transition or Transformation Plans or to complete specified work in accordance with the Contract terms;
  - (3) Multiple failures over time of a single Service Level or a pattern of failure over time across multiple Service Levels (a Service Level Termination Event); this will include failures of Critical Service Levels and Key Service Levels;
  - (4) Failure to make agreed-upon adjustments to the fees or Service Levels in accordance with the outcome of Benchmarking Procedures;
  - (5) Failure or refusal to remove material, or remove and replace any work rejected as defective or unsatisfactory;
  - (6) Abandonment or willful refusal to provide the Services or any part of the Services;
  - (7) Failure to perform its responsibilities under any Business Continuity or Disaster Recovery Plans, including such Business Continuity or Disaster Recovery Plans that apply to Contractor's own locations used for the delivery of the Services;
  - (8) Insolvency or bankruptcy;
  - (9) Assignment made for the benefit of creditors;

- (10) Failure or refusal within 30 days after written notice by the Contracting Officer, of the Contractor to make payment or show cause why payment should not be made, of any amounts due for materials furnished, labor supplied or performed, for equipment rentals, or for utility services rendered;
  - (11) Failure to protect, to repair, or to make good any damage or injury to property as required under the terms of this Contract;
  - (12) Breaches of covenants, agreements, obligations, representations or warranties in the Contract occurring simultaneously or over time, whether or not each such breach is a material breach, and whether or not each such breach was cured, that taken together constitute a material breach of the Contract after Contractor has been made aware of such breaches, on an individual basis. Regardless of any other provision in this Contract to the contrary no cure period is available to Contractor should the Commonwealth terminate under this Paragraph 20(a)(14);
  - (13) An act or omission of Contractor in the performance of this Contract, which is not otherwise explicitly required or permitted under this Contract, and which results in any Regulatory Entity notifying Commonwealth that it is subjecting the Commonwealth to a hearing or tribunal or withdrawing any license granted to Commonwealth or Contractor and such hearing, tribunal or withdrawal would have a material and adverse effect on Commonwealth's operations or business or the Services. Regardless of any other provision in this Contract the contrary no cure period is available to Contractor should the Commonwealth terminate under this Paragraph 20(a)(15);
- (b) In the event that the Commonwealth terminates this Contract in whole or in part as provided in Subparagraph (a) above, the Commonwealth may procure, upon such terms and in such manner as it determines, services similar or identical to those so terminated, and the Contractor shall be liable to the Commonwealth for any reasonable excess costs for such similar or identical services included within the terminated part of the Contract.
  - (c) If the Contract is terminated as provided in Subparagraph (a) above, the Commonwealth, in addition to any other rights provided in this Paragraph 20 (DEFAULT), may require the Contractor to transfer title and deliver immediately to the Commonwealth in the manner and to the extent directed by the Commonwealth, such partially completed work, including, where applicable, reports, working papers and other documentation, as the Contractor has specifically produced or specifically acquired for the performance of such part of the Contract as has been terminated. Except as provided below, payment for completed work accepted by the Commonwealth shall be at the Contract price.

Except as provided below, payment for partially completed work including, where applicable, reports and working papers, delivered to and accepted by the Commonwealth shall be in an amount agreed upon by the Contractor and Contracting Officer. The Commonwealth may withhold from amounts otherwise due the Contractor for such completed or partially completed work, such sum as the Contracting Officer determines to be necessary to protect the Commonwealth against loss.

- (d) The rights and remedies of the Commonwealth provided in this Paragraph 20 (DEFAULT) shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.
- (e) The Commonwealth's failure to exercise any rights or remedies provided in this Paragraph 20 (DEFAULT) shall not be construed to be a waiver by the Commonwealth of its rights and remedies in regard to the event of default or any succeeding event of default.
- (f) Following exhaustion of the Contractor's administrative remedies as set forth in Paragraph 30 (CONTRACT CONTROVERSIES), the Contractor's exclusive remedy shall be to seek damages in the Board of Claims.

## **21. NOTICE OF DELAYS**

Whenever the Contractor encounters any difficulty that delays or threatens to delay the timely performance of this Contract (including actual or potential labor disputes), the Contractor shall immediately give notice thereof in writing to the Commonwealth stating all relevant information with respect thereto. Such notice shall not in any way constitute a basis for an extension of the delivery schedule or be construed as a waiver by the Commonwealth of any rights or remedies to which it is entitled by law or pursuant to provisions of this Contract. Failure to give such notice, however, may be grounds for denial of any request for an extension of the delivery schedule because of such delay. If an extension of the delivery schedule is granted, it will be done consistent with Paragraph 26 (CHANGES).

## **22. CONDUCT OF SERVICES**

- (a) Following execution of the Contract, Contractor shall proceed diligently with all Services and shall perform such Services with qualified personnel, in accordance with the completion criteria set forth in the Contract.
- (b) The Contractor's Services hereunder shall be monitored by the Commonwealth and the Commonwealth's designated representatives. If the Commonwealth reasonably determines that the Contractor has not performed to the requirements in the Contract or has otherwise exposed the Commonwealth to material risk, the Commonwealth and the Contractor will attempt to reach agreement with respect to such matter. Failure of the Commonwealth or the Contractor to arrive at such

mutual determinations shall be a dispute concerning a question of fact within the meaning of Paragraph 30 (CONTRACT CONTROVERSIES) of this Contract.

## **23. KEY POSITIONS**

- (a) Commonwealth shall appoint an individual (the “Commonwealth Project Manager”) who, from the Effective Date of the Contract, shall serve as the primary Commonwealth representative under the Contract. The Commonwealth Project Manager shall:

- (1) Have overall responsibility for managing and coordinating the performance of Commonwealth’s obligations under the Contract; and
  - (2) Be authorized to act for and on behalf of Commonwealth with respect to all matters relating to the Contract.

Notwithstanding the foregoing, the Commonwealth Project Manager may, upon notice to the Contractor Project Manager, delegate such of his or her responsibilities to other Commonwealth employees or third parties, as the Commonwealth Project Manager deems appropriate.

- (b) Contractor shall appoint an individual (the “Contractor Project Manager”) who, from the Effective Date of the Contract, shall serve, on a full time basis, as the primary Contractor representative under the Contract. The Contractor Project Manager shall be a Key Position and the initial appointment and subsequent replacement of the Contractor Project Manager shall be subject to all procedures related to Key Positions. The Contractor Project Manager shall:

- (1) Have overall responsibility for managing and coordinating the performance of Contractor’s obligations under the Contract; and
  - (2) Be authorized to act for and on behalf of Contractor with respect to all matters relating to the Contract.

- (c) Contractor acknowledges that certain of the Contractor employees and subcontractors are critical to the provision of the Services hereunder (“Key Positions”). With respect to Key Positions, the Parties agree as follows:

- (1) Each individual in a Key Position shall be dedicated to the Commonwealth account in accordance with the requirements set out in Schedule L (Key Positions);
  - (2) Before assigning an individual to a Key Position, whether as an initial assignment or as a replacement, Contractor shall:
    - (i) Notify Commonwealth of the proposed assignment;

- (ii) Introduce the individual to appropriate representatives of Commonwealth;
- (iii) Provide Commonwealth with a resume and any other information regarding the individual that may be reasonably requested by Commonwealth;
- (iv) Allow Commonwealth to interview the individual; and
- (v) Obtain Commonwealth's approval for such assignment, which approval will not be unreasonably withheld.

Contractor shall only assign an individual to a Key Position who is mutually agreed upon by Commonwealth and Contractor; Contractor retains exclusive direction and control as to hiring, termination, and right to discipline or reward such individuals in connection with their employment;

- (3) Contractor shall not replace or reassign individuals in Key Positions (except as a result of voluntary resignation, involuntary termination for cause, serious illness, disability or death) for the applicable time period set out in Schedule L (Key Positions) following the date of his or her assignment to the Commonwealth account unless Commonwealth consents in writing to such reassignment or replacement or such individual in such Key Position;
- (4) If Commonwealth decides that any individual in a Key Position should not continue in that position, then Commonwealth may, in its sole discretion and upon notice to Contractor, require removal of such individual in the Key Position from the Contractor Personnel in accordance with the following:
  - (i) Contractor shall, as soon as reasonably practicable, replace such individual in the Key Position with another person of suitable ability and qualifications in accordance with procedures set forth above; and
  - (ii) In the event that an individual in a Key Position is convicted of criminal conduct or is in breach of Contractor's obligations, Contractor shall immediately remove and replace such individual with another person of suitable ability and qualifications in accordance with the procedures set forth above.

- (5) Contractor shall not without Commonwealth consent replace or reassign greater than twenty percent (20%) of individuals in Key Positions in any rolling six (6) month period.
- (d) All of the individuals that Contractor appoints as Contractor Personnel will be dedicated to the Commonwealth account and have suitable training and functional and language skills necessary to perform the Services assigned to such individuals. Except as otherwise approved by Commonwealth (in its sole discretion), those Contractor Personnel located at a Commonwealth Services Location may only provide services on such premises in relation to the Services. Contractor will notify Commonwealth as soon as possible after dismissing or reassigning any member of the Contractor Personnel whose normal work location is at a Commonwealth Services Location. Commonwealth will have the right from time to time to require Contractor to remove any member of the Contractor Personnel from working on the Commonwealth account with or without cause, provided that Contractor may request to have a discussion regarding such removal, which discussion must be held within a reasonable time period, not to exceed five (5) days. At the end of such period, if Commonwealth desires the person to be removed, Contractor will complete such removal within twenty-four (24) hours, or as agreed by the Parties, and replace such individual as soon as practicable at no cost to Commonwealth.
- (e) It is the express intent of the Parties that all Contractor Personnel will be at all times exclusively employees of the Contractor or a Subcontractor authorized under this Contract. Nothing in this Contract will in any way be construed to provide that Contractor Personnel are agents, employees or representatives of Commonwealth, and personnel designated by the Contractor hereunder shall be treated, at all times, as under the authority, direction, supervision and control of the Contractor. Contractor shall cause Contractor Personnel to comply at all times with all applicable Commonwealth policies and procedures.
- (f) The Contractor will be responsible for all labor obligations derived from the relationship with its employees and any Contractor Personnel, and in no case shall Commonwealth be deemed a direct or substitute employer of said employees.
- (g) Contractor shall:
  - (1) Enter into, or shall have entered into, a non disclosure agreement with each Contractor Personnel prior to assigning such employee to the Commonwealth account, and cause each Contractor Personnel to maintain and enforce the confidentiality provisions of the Contract both during and after their assignment to the Commonwealth account; and
  - (2) Enter into, or shall have entered into, an agreement with each Contractor Personnel which assigns, transfers and conveys to Contractor all of such employee's right, title and interest in and to any materials created pursuant

to the Contract, including all rights of patent, copyright, trade secret or other proprietary rights in and to such materials.

- (h) If Commonwealth reasonably determines that the turnover rate of Contractor Personnel is unacceptable and so notifies Contractor, Contractor shall within ten (10) business days:
  - (1) Provide Commonwealth with data concerning Contractor's turnover rate; and
  - (2) Meet with Commonwealth to discuss the reasons for the turnover rate; and
  - (3) Submit a proposal for reducing the turnover rate for Commonwealth's review and approval.

Notwithstanding any transfer or turnover of Contractor Personnel, Contractor shall remain obligated to perform the Services without degradation and in accordance with the Service Levels.

## **24. SERVICE LEVELS**

- (a) The Contractor shall comply with the procedures and requirements of Schedule F (Service Level Methodology) during the term of the Contract and through the Expiration Date.
- (b) All Services without expressly defined Service Levels must be performed at least to the same degree of accuracy, completeness, efficiency, quality and timeliness as is provided by well-managed suppliers providing services similar to the Services, so long as such performance is commercially and operationally reasonable. For where there are expressly defined Service Levels, or where performance can be commercially reasonably reported, Contractor will measure and report its performance against these standards on at least a monthly basis, except as may otherwise be agreed between the Parties in respect of Services performed less frequently than monthly.
- (c) 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 Contract, including without limitation claims for liquidated damages, injunctive relief and termination rights, provided however, Service level Credits paid would be credited against any such claim for damages.

## **25. CONTINUOUS IMPROVEMENT AND BENCHMARKING**

- (a) Contractor shall, on a continuous basis, (i) as part of its total quality management process, identify ways to improve the quality of the Services, and (ii) without violating its non disclosure obligations owed to a third party or a third party's



proprietary rights, identify and apply proven techniques and tools from other installations within its operations that would benefit Commonwealth either operationally or financially.

- (b) Generally, Contractor will commit to continuously and incrementally improving its performance of the Services provided under the Contract consistent with developments in the market for Services similar in scope, scale and geographic coverage.
- (c) Commencing 24 months after the Effective Date, Contractor will undertake annual reviews of the Services, their associated charges and the underlying technology used to deliver the Services and bring to the Commonwealth the Contractor's plan to improve performance and reduce charges in accordance with Schedule O (Benchmarking Procedures). In the event Commonwealth and Contractor do not agree to a plan for improved performance or reduction in charges, then Commonwealth will have the right to use a third party to benchmark the Contractor's performance of and charges for any element of the Services, selecting such a Benchmarker from a list of Benchmarkers mutually approved by Commonwealth and Contractor and attached to the Contract. The Commonwealth and Contractor will be equally responsible for the charges charged by the Benchmarker to conduct the Benchmarking Procedures. The Benchmarker selected, and any subsequent replacement benchmarker, is subject to approval by the Contractor.
- (d) Within 30 days of the completion of the benchmark, the charges for benchmarked Services will be changed, pursuant to Paragraph 26 (Changes), to bring them back within the first quartile of the market range, as considered from the perspective of Commonwealth's benefit, for the provision of a package of similarly situated Services (focusing on scope, scale and performance requirements, with a representative mix of urban and rural usage).
- (e) Contractor may dispute the outcome of a benchmark, and in the event that after exhaustion of the governance and dispute resolution processes Commonwealth and Contractor are unable to agree on adjustments to the performance of and charges for the Services following a benchmarking exercise, Commonwealth shall have the right to terminate the Contract or a part of the Contract without payment of termination fees to Contractor.

## **26. CHANGES**

- (a) At any time during the performance of the Contract, the Commonwealth or the Contractor may request a change to the Contract in accordance with Change Control Procedure set out in Schedule G (Change Control Procedure). Contractor will make reasonable efforts to investigate the impact of the change request on the price, timetable, specifications, and other terms and conditions of the Contract. If the Commonwealth is the requestor of the change, the Contractor will inform the

Commonwealth if there will be any charges for the Contractor's Services in investigating the change request prior to incurring such charges. If the Commonwealth and the Contractor agree on the results of the investigation and any necessary amendments to the Contract, the Contract will be modified to take into account the agreed changes and the change will be implemented. If the parties cannot agree upon the results of the investigation or the necessary amendments to the Contract, the contracting officer may unilaterally order the work to be done, and the matter will be handled in accordance with Paragraph 30 (CONTRACT CONTROVERSIES) of this Contract. The change request will be evidenced by a Purchase Order issued by the Commonwealth. No work may begin on the change request until the Contractor has received the Purchase Order.

- (b) Changes outside the scope of this Contract shall be accomplished through the Commonwealth's normal procurement procedures, and may result in an amended Contract or a new contract. No payment will be made for Services outside of the scope of the Contract for which no amendment has been executed, prior to the provision of the Services.

- (c) Mandatory Changes

The Commonwealth may request a Mandatory Change pursuant to Schedule G (Change Control Procedure).

## **27. TERMINATION**

- (a) For Convenience

The Commonwealth may terminate this Contract without cause by giving Contractor thirty (30) calendar days prior written notice (Notice of Termination) whenever the Commonwealth shall determine that such termination is in the best interest of the Commonwealth (Termination for Convenience). Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance under this Contract is terminated either in whole or in part and the date on which such termination becomes effective. The Contractor shall cease work as of the date set forth in the 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 said notice, and as may be otherwise provided for in Schedule C-3 (Termination Fees).

- (b) Non-Appropriation

Any payment obligation or portion thereof of the Commonwealth created by this Contract is conditioned upon the availability and appropriation of funds. When funds (state or federal) are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal year period, the

Commonwealth shall have the right to terminate the Contract. The Contractor shall be reimbursed in the same manner as that described in this Paragraph related to Termination for Convenience to the extent that appropriated funds are available.

(c) Default

The Commonwealth may, in addition to its other rights under this Contract, terminate this Contract in whole or in part by providing written notice of default to the Contractor if the Contractor fails to perform any of its material obligations or breaches any material representations under this Contract, and such failure is not cured within 30 days after notice is given to Contractor specifying the nature of the default, or, if a cure within such period is not practical, commence a good faith effort to cure such failure to perform within the specified period (or such longer period as the Commonwealth may specify in writing) after receipt of written notice from the Commonwealth specifying such failure, or if the Contractor repeatedly fails to perform any material portion of its obligations or breaches any of its material representations under this Contract, regardless of whether such failures or breaches are cured. The Contracting Officer shall provide any notice of default or written cure notice for Contract terminations.

- (1) Subject to Paragraph 36 (LIMITATION OF LIABILITY) of this Contract, in the event the Commonwealth terminates this Contract in whole or in part as provided in this Paragraph 27(c)(1), the Commonwealth may procure services similar to those so terminated, and the Contractor, in addition to liability for any liquidated damages, shall be liable to the Commonwealth, as the Commonwealth's sole and exclusive remedy for such default, for the difference between the Contract price for the terminated portion of the Services and the actual and reasonable cost (but in no event greater than the fair market value) of producing substitute equivalent services for the terminated Services, provided that the Contractor shall continue the performance of this Contract to the extent not terminated under the provisions of this Paragraph.
- (2) The Contractor shall not be liable for any excess costs if the failure to perform the Contract arises out of causes beyond the control of the Contractor or beyond the control of its subcontractors. Such causes may include, but are not limited to, acts of God or of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, work stoppages, freight embargoes, acts of terrorism, and unusually severe weather. The Contractor shall notify the Contracting Officer immediately in writing of its inability to perform because of a cause beyond the control of the Contractor.

- (3) Nothing in this Subparagraph 27(c) shall abridge the Commonwealth's right to suspend, debar, or take other administrative action against the Contractor.
- (4) If it is later determined that the Commonwealth erred in terminating the Contract for default, then the Contract shall be deemed to have been terminated for convenience under Subparagraph 27(a).
- (5) If this Contract is terminated as provided by this Subparagraph 27(c), the Commonwealth may, in addition to any other rights provided in this Subparagraph, and subject to Paragraph 48 (OWNERSHIP RIGHTS) of this Contract, require the Contractor to deliver to the Commonwealth in the manner and to the extent directed by the Contracting Officer, such reports and other documentation as the Contractor has specifically produced or specifically acquired for the performance of such part of the Contract as has been terminated. Payment for such reports and documentation will be made consistent with the Contract.

(d) Termination Fees

- (1) In the event of termination other than for non-appropriation, termination under Subparagraph 27(f) or termination under Subparagraph 25(b), Contractor shall receive the applicable termination fee as set out in Schedule C-3 (Termination Fees).
- (2) In no event shall the Contractor be paid for any loss of anticipated profit (by the Contractor or any Subcontractor), loss of use of money, or administrative or overhead costs.
- (3) Any dispute regarding termination costs shall be a dispute handled in accordance with Paragraph 30 (CONTRACT CONTROVERSIES) of this Contract.

(e) Non-Payment

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

- (f) In the event that the Contractor fails to resume delivery of Critical Services within the time periods prescribed in Schedule E (Critical Services), the Commonwealth may terminate this Contract, without opportunity for cure, notwithstanding any other provision in this Contract to the contrary, except in the event of a force majeure event and the application of the provisions of Section 38(b). If the

Contract is terminated pursuant to this Subparagraph 27(f), the Contractor will not be entitled to receive payment of termination fees to Contractor. In addition, the Commonwealth will have the right to seek damages from the Contractor if it terminates the Contract pursuant to this Subparagraph 27(f), provided, however, that the Commonwealth will not have the right to seek damages from the Contractor in the event that the termination is a result of the inability of the Contractor to reinstitute services due to a force majeure event.

This Paragraph 27 shall not be deemed to limit the Commonwealth's right to terminate this Contract for any reason as permitted by the other provisions of this Contract, or under applicable law.

## **28. TERMINATION ASSISTANCE**

- (a) Commonwealth shall have the right to receive Termination Assistance Services from Contractor upon request after notification of termination, and such Termination Assistance Services for a period of up to 24 months (the "Termination Assistance Period"), which services shall provide all assistance reasonably necessary to ensure the continuation of the affected Services and their performance in accordance with the Service Levels and the successful transfer of the affected Services to Commonwealth or to any new Contractor selected by Commonwealth. Such Termination Assistance Services shall first be rendered using resources already working on Commonwealth's account and included within the fees, provided that the use of such resources shall not adversely impact Contractor's adherence to Service Levels; then by resources already working on Commonwealth's account and included within the fees, to the extent that Commonwealth permits Service Levels to be relaxed; and finally, using additional resources at costs determined by a rate card attached to the Contract.
- (b) At the end of a Termination Assistance Period, the provisions of Schedule Q (Exit Rights) shall apply.

## **29. BACKGROUND CHECKS**

- (a) The Contractor must, at its expense, arrange for a background check for each of its employees, as well as for the employees of its subcontractors, who will have access to Commonwealth Services Locations, either through on site or remote access. Background checks will not be conducted by the Commonwealth but rather will be conducted by Contractor or its subcontractors according to Contractor policy and practice and consistent with ITB-SEC009. The background check must be conducted prior to initial access by a Contractor Personnel and every two (2) years thereafter or at a longer interval if required by applicable law.
- (b) Before the Commonwealth will permit Contractor Personnel access to Commonwealth facilities, the Contractor must provide written confirmation to the office designated by the agency that the background check has been conducted.

If, at any time, it is discovered that Contractor Personnel has a criminal record that includes a felony or misdemeanor involving terroristic threats, violence, use of a lethal weapon, or breach of trust/fiduciary responsibility; or which raises concerns about building, system, or personal security, or is otherwise job-related, the Contractor shall not assign that employee to any Commonwealth facilities, shall remove any access privileges already given to the employee, and shall not permit that employee remote access to Commonwealth facilities or systems, unless the agency consents, in writing, prior to the access being provided. The agency may withhold its consent at its sole discretion. Failure of the Contractor to comply with the terms of this Paragraph may result in default of the Contractor under its contract with the Commonwealth.

- (c) The Commonwealth specifically reserves the right of the Commonwealth to conduct background checks over and above that described herein.

### **30. CONTRACT CONTROVERSIES**

- (a) All disputes between the parties arising under or relating to this Contract shall initially be referred in writing by either party to the Contractor Project Manager and the Commonwealth Project Manager. If the Contractor 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 Contractor Project Manager or the Commonwealth Project Manager, the parties shall submit the dispute to the Management Committee for immediate review.
- (b) Within ten (10) Commonwealth business days after any dispute between the parties is submitted to the Management Committee pursuant to Subparagraph 30(a), 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 Contractor pursuant to Subparagraph 30(c).
- (c) In the event of a controversy or claim arising from the Contract that has not been resolved by the above process, the Contractor must, within six (6) months, file a written claim with the contracting officer for a determination. The claim shall state all grounds upon which the Contractor 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 Contractor. The

Commonwealth shall send its written determination to the Contractor. 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 Contractor may file a statement of claim with the Commonwealth Board of Claims.
- (3) Each of Commonwealth and Contractor acknowledge that the provision of the Services is critical to the operations of Commonwealth. Accordingly, in the event of a dispute between Commonwealth and Contractor arising under or relating to this Contract, Contractor shall continue to provide the Services in accordance with the terms of this Contract 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 compensate the Contractor pursuant to the terms of the Contract.

### **31. CONFIDENTIALITY**

- (a) 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. 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 Contractor, 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 Contract; 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 Contractor 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; and further provided, that if the disclosure is by the Commonwealth to another contractor or sub-contractor, such disclosure is subject to a suitable non-disclosure agreement. The obligations in this Paragraph 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 Contractor or any confidentiality Contractor entered into before the Effective Date between Commonwealth and Contractor, 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 Contract. The immediately preceding sentence shall not release or relax, in whole or in part, Contractor'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 Contractor to which Commonwealth is a party.

(b) 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.

(c) Each party shall bear the cost it incurs as a result of compliance with this Paragraph. The obligations in this Paragraph 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).



- (d) 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 Contractor.
- (e) For purposes of this Paragraph, “*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 Contractor, all Contractor Proprietary Software and all Contractor documentation and manuals not made available in the ordinary course of business (except those items developed by Contractor specifically to deliver Services to the Commonwealth pursuant to this Contract), and any other information identified in writing by Contractor as confidential or proprietary to Contractor, its subcontractors or licensors.

## **32. INSURANCE**

- (a) During the Contract term, Contractor shall maintain at its own 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 Contractor 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 Contractor's and Contractor's Agents' personal property located at any Contractor Services Location.
  - (5) Professional liability/error & omission in the aggregate amount of not less than \$15,000,000 .
  - (6) Comprehensive crime insurance in an amount of not less than \$15,000,000 per claim.

- (7) Umbrella/excess in an aggregate amount of not less than \$30,000,000.
- (b) Prior to the expiration of any then effective insurance policy, Contractor shall furnish to Commonwealth certificates of insurance or other appropriate documentation (including evidence of renewal of insurance) evidencing all coverage referenced in this Paragraph 32 (INSURANCE), as applicable, and including Commonwealth as an additional insured to the extent of Contractor's indemnities contained in this Contract on the general, property and automobile liability policies. Contractor shall have included in the property, general liability and automobile liability policies 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 Contractor or its subcontractors or the applicable insurer. Such cancellation or alteration shall not relieve Contractor of its continuing obligation to maintain insurance coverage in accordance with this Paragraph 32 (INSURANCE).
- (c) During the Contract term, Contractor shall require each of its Approved Subcontractors and any other subcontractors performing any Services on-site at any of the Contractor Services Locations to maintain at their own expense or Contractor'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 \$1,000,000 per occurrence;
  - (2) Comprehensive general public liability (including contractual liability insurance) in an amount not less than \$2,000,000 per occurrence;
  - (3) If any of the Subcontractor personnel will be on-site at any of Commonwealth's or Contractor's facilities, comprehensive automobile liability covering all vehicles owned, hired or leased by that Subcontractor and in an amount not less than \$2,000,000 per occurrence (combined single limit for bodily injury and property damages);
  - (4) If the Subcontractor personnel will be on-site at any of Commonwealth's or Contractor's facilities, personal property insurance, on a replacement basis, covering all of that Subcontractor's personal property located at any such facilities; and
  - (5) Errors & Omissions liability in the amount of \$2,000,000 each claim and aggregate (if applicable).
- (d) For purposes hereof, Contractor and such subcontractors may maintain "umbrella" insurance policies to fulfill the foregoing insurance requirements, as appropriate.

### **33. CONTRACTOR RESPONSIBILITY PROGRAM**

- (a) The Contractor certifies, for itself and all its subcontractors, that as of the date of its execution of this Bid/Contract that neither the Contractor, nor any subcontractors, nor any suppliers are under suspension or debarment by the Commonwealth or any governmental entity, instrumentality, or authority and, if the Contractor cannot so certify, then it agrees to submit, along with its Bid, a written explanation of why such certification cannot be made.
- (b) The Contractor also certifies, that as of the date of its execution of this Bid/Contract, it has no tax liabilities or other Commonwealth obligations.
- (c) The Contractor's obligations pursuant to these provisions are ongoing from and after the effective date of the Contract through the termination date thereof. Accordingly, the Contractor shall have an obligation to inform the Commonwealth if, at any time during the term of the Contract, 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 the Contractor 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 the Contract with the Commonwealth.
- (e) The Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between the Contractor and the Commonwealth, which results in the suspension or debarment of the Contractor. 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 Contractor shall not be responsible for investigative costs for investigations that do not result in the Contractor's suspension or debarment.
- (f) The Contractor 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

#### **34. OFFSET PROVISION FOR COMMONWEALTH CONTRACTS**

The Contractor agrees that the Commonwealth may set off the amount of any state tax liability or other obligation of the Contractor or its subsidiaries to the Commonwealth against any payments due the Contractor under any contract with the Commonwealth.

#### **35. TAXES-FEDERAL, STATE, AND LOCAL**

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. Nothing in this Paragraph 35 (TAXES-FEDERAL, STATE, AND LOCAL) is meant to exempt a construction contractor from the payment of any of these taxes or fees which are required to be paid with respect to the purchase, use, rental or lease of tangible personal property or taxable services used or transferred in connection with the performance of a construction contract.

#### **36. LIMITATION OF LIABILITY**

- (a) The Contractor's liability to the Commonwealth under this Contract shall be limited to **\$87,874,718**. This limitation will apply, except as otherwise stated in this Paragraph 36 (LIMITATION OF LIABILITY), regardless of the form of action, whether in contract or in tort, including negligence and whether related to direct, consequential, exemplary or punitive damages.
- (b) This limitation does not apply to damages for:
  - (1) Bodily injury;
  - (2) Death;
  - (3) Intentional injury;
  - (4) Damage to real property or tangible personal property for which the Contractor is legally liable; or
  - (5) The Contractor's indemnity of the Commonwealth for patent, copyright, trade secret or trademark protection;

- (6) Third party claims related to confidential or proprietary data misuse of confidential information or data;
  - (7) Milestone Credits, provided, however that payment will accrue against the cap;
  - (8) Commonwealth's losses resulting from Contractor's gross negligence, willful misconduct; or
  - (9) Contractor's abandonment of any Services, wrongful termination of the Contract or willful refusal to provide Termination Assistance Services.
- (c) Except as provided for in Paragraph 36(c)(1) through (4), neither Party will be liable for indirect, incidental, special, consequential, exemplary or punitive damages arising out of or relating to the Contract ("Excluded Damages"):
- (1) Additional costs to maintain the Services arising from a default by Contractor including the cost of work-arounds;
  - (2) Loss of or corruption to Commonwealth data including, without limitation, the cost and expense of rectification of the data arising out of a default (including for recovering, reconstructing, reformatting or reloading data), but only to the extent such damages arise out of the failure of Contractor to comply with its obligations under Paragraph 44;
  - (3) Expenditure or charges incurred by Commonwealth and rendered necessary as a result of a default by Contractor; and
  - (4) Any regulatory losses, fines, expenses or other losses suffered by Commonwealth as a result of Contractor's failure to comply with any law or regulation.

### **37. COMMONWEALTH HELD HARMLESS**

- (a) Except as set out in Paragraph 45 (PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET PROTECTION), the Contractor shall hold the Commonwealth harmless from and indemnify the Commonwealth against any and all third party claims, demands and actions based upon or arising out of any activities performed by the Contractor and its employees and agents under this Contract, provided the Commonwealth gives Contractor prompt notice of any such claim of which it learns. Pursuant to the *Commonwealth Attorneys Act* (71 P.S. § 732-101, *et seq.*), the Office of Attorney General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG may, however, in its sole discretion and under such terms as it deems appropriate, delegate its right of defense. If OAG delegates the

defense to the Contractor, the Commonwealth will cooperate with all reasonable requests of Contractor made in the defense of such suits.

- (b) Notwithstanding the above, neither party shall enter into any settlement without the other party's written consent, which shall not be unreasonably withheld. The Commonwealth may, in its sole discretion, allow the Contractor to control the defense and any related settlement negotiations.

### **38. DISASTER RECOVERY AND BUSINESS CONTINUITY**

- (a) As part of the Services, Contractor shall have responsibility for execution of that portion of the disaster recovery plan relating to the Services as described in Schedule J (Disaster Recovery and Business Continuity Plan). Contractor 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. Jointly with the Commonwealth, Contractor 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, Contractor shall semi-annually test the operability of the disaster recovery plan then in effect. Contractor 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 Contract.

In the event Contractor fails its obligations set forth in this Paragraph 38 (DISASTER RECOVERY AND BUSINESS CONTINUITY), Commonwealth shall have the right to terminate this Contract for cause without an opportunity for Contractor to cure if, 10 days after delivery of written notice by the Commonwealth, Contractor has not corrected the failure and complied fully with such obligations.

- (b) Contractor shall use commercially reasonable efforts to reinstitute the Critical Services within the timeframes indicated in Schedule E (Critical Services). If the

Critical Services are not fully reinstituted within the designated timeframes, due to a force majeure event, Commonwealth shall have the right to terminate this Contract pursuant to the provisions of Subparagraph 27(f), if Contractor has not fully reinstituted the Critical Services within forty-five (45) days of the force majeure event. Thereafter, Contractor and Commonwealth shall develop a plan to reinstitute the Critical Services as promptly as is possible under the circumstances, with Contractor making such reinstitution its highest priority throughout its outsourcing organization. Contractor shall prepare and deliver to Commonwealth updated reports such that Commonwealth shall at all times be fully informed as to the status of Contractor's efforts and anticipated schedule to reinstitute the Critical Services. In the event that any Contractor equipment is required to be replaced as a result of the disaster, Contractor shall replace such equipment 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 Contractor or any Contractor Agent or any of their respective employees, in which case Contractor shall be responsible for such declaration and usage fees), and Commonwealth shall continue to pay the Fees to Contractor, prorated for any Services that are not being delivered to Commonwealth. In addition to the prorated Fees, Commonwealth shall also pay to Contractor, at the then-effective time and materials hourly rates as set out in the Schedule C (Fee Methodology), charges assessed by Contractor for disaster recovery services requested by Commonwealth and performed by Contractor or any of the Contractor Agents to reconstitute the Services (unless the disaster was caused by the omission, negligence or willful misconduct of Contractor or any of its agents 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 Contractor provides the Critical Services from a business recovery center for more than forty-five (45) days due to Contractor's inability to reinstate the Critical Services because of Contractor's negligence or willful misconduct, Commonwealth may, in addition to any other remedy it may have under this Contract, at law or in equity, terminate this Contract for cause under Subparagraph 27(f), without regard to any additional cure periods. Any Contractor obligations to implement a disaster recovery plan set forth in this Paragraph can be triggered by a notice of disaster provided to Contractor by Commonwealth. Payment of travel and living expenses of Contractor 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.

### **39. CRITICAL SERVICES**

Contractor shall provide the Critical Services as listed in Schedule E (Critical Services) to this Contract.

#### **40. GOVERNANCE**

The Parties shall comply with the provisions for the governance of this Contract and the Services delivered pursuant hereto are set out in Schedule K (Governance) to this Contract.

#### **41. POLICIES AND PROCEDURES**

Contractor shall comply with the most stringent of:

- (a) Commonwealth standards set out in IT Bulletins, standards and procedures related to the Services, including but not limited to those governing security, treatment of personal information, quality, change, and problem management, safety, data privacy and data security, and pervasive and transaction controls; provided, however that the Contractor may submit a request under Paragraph 26 (Changes), if it believes that it has incurred costs or delay in complying with this Paragraph due to changes in the IT Bulletins, standards and procedures related to the Services; or
- (b) The policies, standard and procedures that are generally adopted by leading providers of Services similar in scope, scale and geographic coverage to the outsourced Services.

#### **42. TECHNICAL ARCHITECTURE**

As part of the Services, Contractor shall suggest to Commonwealth information management technical architecture and product standards to be in effect at the Contractor Services Locations during the Contract 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.

#### **43. QUALITY ASSURANCE AND INTERNAL CONTROLS**

- (a) Contractor will develop and implement quality assurance and internal controls, including implementing tools and methodologies, to ensure that the Services are performed in an accurate and timely manner, in accordance with the Contract. Without limiting the foregoing, Contractor will:
  - (1) Maintain a strong control environment in day-to-day operations;
  - (2) Develop and execute a process to ensure regular internal control self-assessments are performed with respect to all Services and report the outcome of such self-assessments to Client;
  - (3) Maintain an internal audit function sufficient to monitor the processes and systems used to provide the Services (i.e., perform audits, track control



measures, communicate status to management, drive corrective action, etc.); and

- (4) Provide to Commonwealth a summary of audit activity performed, associated significant findings, status of follow-up activity, summary of control incidents (i.e., frauds, conflict of interest situations, etc.) and related corrective action, every six months.
- (b) Contractor shall implement and maintain independently audited quality certification (such as ISO9001-2000 accreditation or a comprehensively implemented Six Sigma program) and provide copies of its certification under such program and also any relevant audit or report documentation whenever so requested by Commonwealth.
- (c) As part of the Services and included in the Fees, Contractor will;
  - (1) Undertake at least annually, and shall cause to be undertaken by Contractor's material sub-contractors, a SAS 70 Type II audit that covers the common controls for any Contractor sites where Contractor performs work for Client;
  - (2) Provide the reports from such audits to Client; and
  - (3) Will perform these SAS 70 Type II audits at such time(s) that shall mean the audit report is recent enough for Commonwealth to rely upon it in meeting its reporting obligations.

#### **44. VIRUS, MALICIOUS, MISCHIEVOUS OR DESTRUCTIVE PROGRAMMING**

- (a) The Contractor shall be liable for any damage to any data and/or software owned or licensed by the Commonwealth if the Contractor 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 Contractor or any of its employees, subcontractors or consultants introduced the virus or malicious, mischievous or destructive programming. To the extent that the Commonwealth has not fully complied with its own IT Bulletins, standards or procedures (including software security standards) or has otherwise contributed to the damages to such data or software, the Contractor shall have no liability under this Paragraph 44.
- (b) The Contractor 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 Contractor's failure to take proactive measures

to keep virus or malicious, mischievous or destructive programming from originating from the Contractor 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.).

- (c) In the event of destruction or modification of software under this Paragraph 44, the Contractor shall eliminate the virus, malicious, mischievous or destructive programming, restore the Commonwealth's software, and be liable to the Commonwealth for any resulting damages.
- (d) The Contractor shall be responsible for reviewing Commonwealth software security standards and complying with those standards.
- (e) The Commonwealth may, upon five (5) days written notice, audit, by a means deemed appropriate by the Commonwealth, any computing devices being used by representatives of the Contractor to provide 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.
- (f) The Contractor may use the anti-virus software used by the Commonwealth to protect Contractor's computing devices used in the course of providing Services to the Commonwealth. It is understood that the Contractor 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.
- (g) The Commonwealth will not be responsible for any damages to the Contractor's computers, data, software, etc. caused as a result of the installation of the Commonwealth's anti-virus software or monitoring software on the Contractor's computers.

#### **45. PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET PROTECTION**

- (a) The Contractor shall hold the Commonwealth harmless from any suit or proceeding which may be brought by a third party against the Commonwealth, its departments, officers or employees for the alleged infringement of any United States or foreign patents, copyrights, or trademarks, or for a misappropriation of trade secrets arising out of performance of this Contract, including all work, services, materials, reports, studies, and computer programs provided by the Contractor, and in any such suit or proceeding will satisfy any final award for such infringement, including costs. The Commonwealth agrees to give Contractor prompt notice of any such claim of which it learns. Pursuant to the Commonwealth Attorneys Act 71 P.S. § 732-101, *et seq.*, the Office of Attorney

General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG may, however, in its sole discretion and under the terms it deems appropriate, delegate its right of defense. If OAG delegates the defense to the Contractor, the Commonwealth will cooperate with all reasonable requests of Contractor made in the defense of such suits. No settlement which prevents the Commonwealth from continuing to use the Developed Materials as provided herein shall be made without the Commonwealth's prior written consent. In all events, the Commonwealth shall have the right to participate in the defense of any such suit or proceeding through counsel of its own choosing. It is expressly agreed by the Contractor that, in the event it requests that the Commonwealth to provide support to the Contractor in defending any such claim, the Contractor shall reimburse the Commonwealth for all reasonable expenses (including attorneys' fees, if such are made necessary by the Contractor's request) incurred by the Commonwealth for such support. If OAG does not delegate the defense of the matter, the Contractor's obligation to indemnify ceases. The Contractor will, at its expense, provide whatever cooperation OAG requests in the defense of the suit.

- (b) The Contractor agrees to exercise reasonable due diligence to prevent claims of infringement on the rights of third parties. The Contractor certifies that, in all respects applicable to this Contract, it has exercised and will continue to exercise due diligence to ensure that all works produced under this Contract do not infringe on the patents, copyrights, trademarks, trade secrets or other proprietary interests of any kind which may be held by third parties. .
- (c) If the defense of the suit is delegated to the Contractor, the Contractor shall pay all damages and costs finally awarded therein against the Commonwealth, when such damages and costs are required to be paid. If information and assistance are furnished by the Commonwealth at the Contractor's written request, it shall be at the Contractor's expense, but the responsibility for such expense shall be only that within the Contractor's written authorization.
- (d) If the products, materials, reports, studies, or computer programs furnished hereunder become subject to a claim of infringement of a United States patent, copyright, or trademark, or for a misappropriation of trade secret, or if any of the products, materials, reports, studies or computer programs provided by the Contractor are in such suit or proceeding held to constitute infringement and the use or publication thereof is enjoined, then without diminishing the Contractor's obligation to satisfy any final award, the Contractor may, at its option and expense, substitute functional equivalents for the alleged infringing products, materials, reports, studies, or computer programs or, at the Contractor's option and expense, obtain the rights for the Commonwealth to continue the use of such products, materials, reports, studies, or computer programs.
- (e) If any of the products, materials, reports, studies, or computer programs provided by the Contractor are in such suit or proceeding held to constitute infringement

and the use or publication thereof is enjoined, the Contractor shall, at its own expense and at its option, either procure the right to publish or continue use of such infringing products, materials, reports, studies, or computer programs, replace them with non-infringing items, or modify them so that they are no longer infringing.

- (f) If the Contractor is unable to do any of the preceding, the Contractor agrees to pay the Commonwealth:
  - (1) Any amounts paid by the Commonwealth less a reasonable amount based on the acceptance and use of the deliverable;
  - (2) Any license fee less an amount for the period of usage of any software; and
  - (3) The prorated portion of any Fees representing the time remaining in any period of service for which payment was made.
- (g) The obligations of the Contractor under this Paragraph 45 (PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET PROTECTION) continue without time limit and survive the termination of this Contract.
- (h) Notwithstanding the above, the Contractor shall have no obligation for:
  - (1) Modification of any product, service, or deliverable provided by the Commonwealth or any third party, except for the Contractor or any of its Subcontractors;
  - (2) Any material provided by the Commonwealth to the Contractor and incorporated into, or used to prepare, a product, service, or deliverable;
  - (3) Use of the product, service, or deliverable in other than its specified operating environment;
  - (4) The combination, operation, or use of the product, service, or deliverable with other products, services, or deliverables not provided by the Contractor as a system or the combination, operation, or use of the product, service, or deliverable, with any products, data, or apparatus that the Contractor did not provide;
  - (5) Infringement of a non-Contractor product alone;
  - (6) The Commonwealth's distribution, marketing or use beyond the scope contemplated by the Contract;

- (7) The Commonwealth's failure to use corrections or enhancements made available to the Commonwealth by the Contractor at no charge;
  - (8) Any infringement or claim thereof against the Commonwealth brought prior to the execution of this Contract, unless the infringement or claim relates to services provided by Contractor under another contract with the Commonwealth; or
  - (9) Infringement related to content provided by or on behalf of the Commonwealth, except as provided by the Contractor or any of its Subcontractors or suppliers.
- (i) The obligation to defend and indemnify the Commonwealth, under the terms of this Paragraph 45 (PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET PROTECTION), shall be the Contractor's sole and exclusive obligation and the Commonwealth's sole and exclusive remedy against the Contractor for the infringement or misappropriation of intellectual property.

#### **46. SENSITIVE INFORMATION**

- (a) The Contractor shall not publish or otherwise disclose, except to the Commonwealth or the Contractor's subcontractors, any information or data obtained hereunder from private individuals, organizations, or public agencies, in a way that allows the information or data furnished by or about any particular person or establishment to be identified.
- (b) The parties shall not use or disclose any information about a recipient receiving services from, or otherwise enrolled in, a Commonwealth program affected by or benefiting from services under this Contract for any purpose not connected with the parties' Contract responsibilities.
- (c) Contractor, as directed, shall comply with all federal or state laws and regulations related to the use of information that constitutes protected health information (PHI) as defined by the regulations promulgated pursuant to the *Health Insurance Portability and Accountability Act* (HIPAA). By signing this Contract, the Contractor agrees to the terms of the Business Associates Agreement, which is incorporated into this Contract as Appendix A. If Contract Participant, or relevant portion thereof, is a Covered Entity as defined in HIPAA, and the Contractor is performing the work of a Business Associate, the Contract Participant will fill in the blanks in the attached Appendix. It is understood that Appendix A is only applicable if the Contract Participant indicates in writing to Contractor, specifying the work and scope intended to be subject to a Business Associates Agreement, and only to the extent that Contractor and the Contract Participant agree in writing as to the specific application of Appendix A and the Business Associate Agreement. If not applicable to the entire Contract Participant, Appendix A is

only applicable with respect to the internal entities indicated by the Contract Participant and agreed to by the Contractor.

- (d) Contractor will comply with all obligations applicable to it under all applicable data protection legislation in relation to all personal data that is processed by it in the course of performing its obligations under this Contract including by:
  - (1) Maintaining a valid and up to date registration or notification under the data protection legislation; and
  - (2) Complying with all data protection legislation applicable to cross border data flows of personal data and required security measures for personal data.

#### **47. CONTRACT CONSTRUCTION**

As set out in Paragraph 70 (GOVERNING LAW), the provisions of this Contract shall be construed in accordance with the provisions of all applicable laws and regulations of the Commonwealth of Pennsylvania.

#### **48. OWNERSHIP RIGHTS**

- (a) As between Commonwealth and Contractor, all Commonwealth Software shall be and shall remain the exclusive property of Commonwealth or its licensors, and Contractor shall have no rights or interests in the Commonwealth Software by virtue of this Contract except as described in this Paragraph or elsewhere in this Contract. Commonwealth hereby grants to Contractor, at no cost to Contractor, for the limited purpose of providing the Services, a nonexclusive, nontransferable, royalty-free right (subject to the terms of any third party Contract to which Commonwealth is a party and which theretofore is disclosed to Contractor) to (1) have access to the Commonwealth Software, (2) copy the Commonwealth Software for archival purposes or as may otherwise be required by this Contract, (3) modify the Commonwealth Software as required by this Contract, if permitted by the software licensing terms and pursuant to the terms of any Commonwealth license agreement with third parties (Third Party License Agreements), if applicable, and (4) sublicense Contractor's subcontractors approved by Commonwealth to do any of the foregoing.
- (b) Upon the expiration or termination for any reason of Contractor's obligation to provide the Services or of this Contract, the rights granted to Contractor in Subparagraph (a) shall immediately revert to Commonwealth or Commonwealth's designee, and Contractor forthwith shall, at no cost to Commonwealth, deliver to Commonwealth all of the Commonwealth Software (including any related source code and object code in Contractor's possession or under its control) in the form in use as of the effective date of such expiration or termination. Concurrently therewith, Contractor shall destroy or erase all other copies of any of the Commonwealth Software then in Contractor's possession or under its control unless

otherwise instructed by Commonwealth; provided, however, pursuant to and if permitted by any Third Party License Agreement, if applicable, that Contractor may retain one archival copy of such Commonwealth Software, until the later of six (6) months after such expiration or termination of this Contract and the final resolution of any actively asserted pending disputes between the parties, such retention being for the sole purpose of establishing Contractor's performance under this Contract.

- (c) As between Commonwealth and Contractor, all Contractor Software and Contractor Tools shall be and shall remain the exclusive property of Contractor, and Commonwealth shall have no rights or interests in the Contractor Software or the Contractor Tools by virtue of this Contract except as described in this Paragraph. As part of the Services, Contractor shall during the term of the Contract (1) use the Contractor Software and the Contractor Tools to provide the Services, (2) make available the commercially available Contractor Software and the commercially available Contractor 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 Contractor Proprietary Software and the Contractor Tools owned by Contractor and then being used by Contractor to provide the Services.
- (d) All literary works, or other works of authorship (such as application programs, listings, programming tools, documentation, reports, drawings, procedure manuals and similar works) ("Developed Materials") developed hereunder shall be treated in accordance with the following general principles:
  - (1) If and to the extent Developed Materials modify, improve or enhance software programs generally licensed by Contractor to end-users, then such Developed Materials shall be the property of Contractor and Contractor hereby grants to Commonwealth a perpetual, non-exclusive, nontransferable, royalty-free license to use such Developed Materials in Commonwealth's receipt and use of the Services;
  - (2) If and to the extent Developed Materials modify, improve or enhance software or other materials owned by Commonwealth or licensed to Commonwealth by a third party (i.e., a licensor other than Contractor or any Contractor agent), then such modification, improvement or enhancement and all related intellectual property rights therein shall, as between Commonwealth and Contractor, be the property of Commonwealth;
  - (3) If and to the extent Developed Materials constitute a newly created software program or module, and if Commonwealth funds the development cost thereof to any extent, then such software program or module and all related intellectual property rights therein shall be the property of Commonwealth; and

- (4) If and to the extent Developed Materials constitute documentation, reports, drawings, procedure manuals and similar works, such Developed Materials shall be the property of Commonwealth. Contractor will not place trademarks or copyright notices on any such Developed Materials.
- (5) Any data related to the use of the Services by the Commonwealth shall be the property of the Commonwealth. For this purpose, data includes ordering information, inventories, etc. At the end of the Contract, regardless of how it is ended, the Contractor will provide the Commonwealth with such data in a format specified by the Commonwealth.
- (e) Either Party, in the course of conducting business, may use any ideas, concepts, and know-how, relating to the Services which Contractor or Commonwealth (alone or jointly with the Commonwealth) develops or learns in connection with Contractor's provision of Services to Commonwealth under this Contract.

#### **49. PUBLICATION RIGHTS AND/OR COPYRIGHTS**

- (a) The Contractor shall not publish any of the results of the work, which identify the Commonwealth, without the written permission of the Commonwealth. The publication shall include the following statement: "The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the Commonwealth of Pennsylvania." The Contractor shall not include in the documentation any copyrighted matter, unless the Contractor provides the Commonwealth with written permission of the copyright owner.
- (b) Except as otherwise provided in Paragraph 48 (OWNERSHIP RIGHTS) and the confidentiality provisions of Paragraph 31 (CONFIDENTIALITY), the Commonwealth shall have unrestricted authority to reproduce, distribute, and use any submitted report or data designed or developed and delivered to the Commonwealth as part of the performance of the Contract.
- (c) Rights and obligations of the parties under this Paragraph 49 (PUBLICATION RIGHTS AND/OR COPYRIGHTS) survive the termination of this Contract.

#### **50. CHANGE OF OWNERSHIP OR INSOLVENCY**

Intentionally omitted

#### **51. OFFICIALS NOT TO BENEFIT**

No official or employee of the Commonwealth and no member of its General Assembly who exercises any functions or responsibilities under this Contract shall participate in any decision relating to this Contract which affects their personal interest or the interest of any corporation, partnership, or association in which they are, directly or indirectly, interested; nor shall any such official or employee of the Commonwealth or member of



its General Assembly have any interest, direct or indirect, in this Contract or the proceeds thereof.

## **52. INDEPENDENT CAPACITY OF CONTRACTOR**

- (a) The parties to this Contract agree that the Services performed by the Contractor under the terms of this Contract are performed as an independent Contractor and nothing contained in this Contract shall be construed to make either Contractor or Commonwealth partners, joint venturers, principals, agents or employees of the other, except only to the extent that Contractor is expressly appointed under the Contract 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 Contractor 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 between Contractor and Commonwealth, Contractor 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 Contractor's retention of any such officers, directors, employees, agents or contractors.
- (b) Except as otherwise provided by the terms of this Contract, the Commonwealth shall have no control over the manner in which the contractual Services are performed by the Contractor, or any subcontractor. Any job specifications or standards of work attached to or incorporated into this Contract or any subcontracting restrictions contained in this Contract shall not be construed as the Commonwealth's direction or control over the manner of the performance of Services provided by the Contractor.

## **53. COMPLIANCE WITH LAWS**

- (a) The Contractor shall comply with all federal, state, and local laws applicable to its work, including, but not limited to, all statutes, regulations and rules that are in effect as of the Effective Date of the Contract and shall procure at its expense all licenses and all permits necessary for the fulfillment of its obligation.
- (b) If any existing law, regulation or policy is changed or if any new law, regulation or policy is enacted that affects the Services provided under this Contract, the parties to the Contract shall modify this Contract, via Paragraph 26 (Changes), to the extent reasonably necessary to:
  - (1) Ensure that such Services will be in full compliance with such laws, regulations and/or policies; and
  - (2) Modify the rates applicable to such Services; and

- (3) Address any schedule impacts.

#### **54. THE AMERICANS WITH DISABILITIES ACT**

During the term of this Contract, the Contractor agrees as follows:

- (a) Pursuant to federal regulations promulgated under the authority of *The Americans With Disabilities Act*, 28 C.F.R. § 35.101, *et seq.*, the Contractor understands and agrees that no individual with a disability shall, on the basis of the disability, be excluded from participation in this Contract or from activities provided for under this Contract. As a condition of accepting and executing this Contract, the Contractor 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 the benefits, services, programs, and activities provided by the Commonwealth of Pennsylvania through Contracts with outside Contractors.
- (b) The Contractor shall be responsible for and agrees to indemnify and hold harmless the Commonwealth of Pennsylvania from losses, damages, expenses claims, demands, suits, and actions brought by any party against the Commonwealth of Pennsylvania as a result of the Contractor's failure to comply with the provisions of Subparagraph (a) above.

#### **55. EXAMINATION OF RECORDS**

The Commonwealth may, at reasonable times and places, audit the books and records of Contractor or its subcontractors to the extent that the books and records relate to the performance of the contract. Contractor shall maintain books and records related to the Contract for a period of three years from the date of final payment under the Contract. Contractor shall include a requirement in agreements with subcontractors that requires the subcontractor to maintain its records for the same length of time.

#### **56. AUDIT OBLIGATIONS**

- (a) ***SINGLE AUDIT ACT OF 1984***

In compliance with the *Single Audit Act of 1984*, the Contractor agrees to the following:

- (1) This Contract is subject to audit by federal and state agencies or their authorized representative 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 Contract 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 the Act.
  - (3) The Commonwealth reserves the right for federal and state agencies or their authorized representatives to perform additional audits of a financial/compliance, economy/efficiency, or program results nature, if deemed necessary.
  - (4) The Contractor further agrees to comply with requirements that may be issued by the state agency upon receipt of additional guidance received from the federal government regarding the *Single Audit Act of 1984*.
- (b) Access by Commonwealth
- (1) Commonwealth's internal and external auditors will have full access to Contractor's and Contractor subcontractors' facilities and records (excluding records evidencing Contractor's and Contractor subcontractors' costs of providing services) related to the Services to perform operational, technical, regulatory and financial audits as well as fraud checks;
  - (2) Contractor will provide Commonwealth with summaries of any relevant findings from its internal audit reports related to the Services.
  - (3) Contractor and Commonwealth shall develop and agree upon an action plan to promptly address and resolve any deficiencies, concerns and/or recommendations arising out of any audit, and Contractor, at its own expense, shall undertake remedial action in accordance with such action plan and the dates specified therein.

## **57. ENVIRONMENTAL PROTECTION**

In carrying out this Contract, the Contractor shall minimize pollution and shall strictly comply with all applicable environmental laws and regulations, including the *Clean Streams Law*, Act of June 22, 1937 (P.L. 1987, No. \_\_), as amended; the *Pennsylvania Solid Waste Management Act*, Act of July 7, 1980 (P.L. 380, No. 97), as amended; and the *Dam Safety and Encroachment Act*, Act of November 26, 1978 (P.L. 1375, No. 325), as amended.

## **58. NONDISCRIMINATION CLAUSE/SEXUAL HARASSMENT CLAUSE**

Each Contract entered into by a governmental agency shall contain the following provisions by which the Contractor agrees:

- (a) In the hiring of any employee(s) for the manufacture of supplies, performance of work, or any other activity required under the Contract or any subcontract, the Contractor, subcontractor, or any person acting on behalf of the Contractor 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 the Contractor 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 the Contract on account of gender, race, creed, or color.
- (c) Contractors and 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) Contractors 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 the Contracts relates.
- (e) The Contractor and each subcontractor shall furnish all necessary employment documents and records to and permit access to their books, records, and accounts by the contracting agency and the Bureau of Contract Administration and Business Development, for purposes of investigation, to ascertain compliance with provisions of this Nondiscrimination/Sexual Harassment Clause. If the Contractor or any subcontractor does not possess documents or records reflecting the necessary information requested, the Contractor or subcontractor shall furnish such information on reporting forms supplied by the contracting agency or the Bureau of Contract Administration and Business Development.
- (f) The Contractor 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 the contract and all money due or to become due under the Contract 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 Contractor in the Contractor Responsibility File.

## **59. CONTRACTOR INTEGRITY PROVISIONS**

- (a) 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 Contract.
  - (3) Contractor means the individual or entity that has entered into this Contract with the Commonwealth, including directors, officers, partners, managers, key employees, and owners of more than a five percent (5%) interest.
  - (4) Financial Interest means:
    - (i) Ownership of more than a 5% interest in any business; or
    - (ii) 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) The Contractor shall maintain the highest standards of integrity in the performance of this Contract and shall take no action in violation of state or federal laws, regulations, or other requirements that govern contracting with the Commonwealth.
  - (c) The Contractor shall not disclose to others any confidential information gained by virtue of this Contract.
  - (d) The Contractor shall not, in connection with this or any other Contract 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) The Contractor shall not, in connection with this or any other Contract 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 the Contractor nor anyone in privity with him or her 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 Contract except as provided therein.
- (g) Except with the consent of the Commonwealth, the Contractor shall not have a financial interest in any other Contractor, subcontractor, or supplier providing services, labor, or material on this project.
- (h) The Contractor, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify the Commonwealth in writing.
- (i) The Contractor, by execution of this Contract and by the submission of any bills or invoices for payment pursuant thereto, certifies and represents that he or she has not violated any of these provisions.
- (j) The Contractor, 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 the Contractor'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, the Contractor's business or financial records, documents, or files of any type or form which refer to or concern this Contract. Such information shall be retained by the Contractor for a period of three (3) years beyond the termination of the Contract unless otherwise provided by law.
- (k) For violation of any of the above provisions, the Commonwealth may terminate this and any other Contract with the Contractor, 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 Contractor to complete performance hereunder, and debar and suspend the Contractor 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.

## **60. ASSIGNMENT OF RIGHTS UNDER THE ANTITRUST LAWS**

It is recognized that in actual economic practice, overcharges by Contractor's suppliers resulting from violations of state and federal antitrust laws are in fact borne by the Commonwealth. As part of the consideration for the award of this Contract, and intending to be legally bound, the Contractor assigns to the Commonwealth all rights, title, and interest in and to any claims Contractor now has or may hereafter acquire under

state and federal antitrust laws relating to the goods and services which are provided by the Contractor under this Contract.

## **61. WARRANTIES**

- (a) Contractor represents, warrants and covenants that as of the Contract's Effective Date:
  - (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 Contract.
  - (3) Contractor is duly licensed, authorized and qualified to do business and is in good standing in Pennsylvania and in every other jurisdiction where Services will be performed by Contractor pursuant to this Contract 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 Contractor's ability to fulfill its obligations under this Contract.
  - (4) The execution, delivery and performance of this Contract by Contractor has been duly authorized by Contractor.
  - (5) Contractor shall comply with all applicable Federal, state and local laws and regulations applicable to Contractor and shall obtain all applicable permits and licenses required of Contractor in connection with its obligations under this Contract.
  - (6) Contractor has not disclosed any Confidential Information of Commonwealth.
  - (7) The Contractor 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 Contractor 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 Contractor under this Contract.
  - (8) Contractor Personnel and Subcontractors that Contractor will use to provide and perform the Services have and during the Term will have, the

suitable knowledge, skills, experience, qualifications and resources to provide and perform the Services:

- (i) In accordance with the Contract; and
  - (ii) In a diligent, workmanlike manner with due care and skill, consistent with the required level of quality and performance and in accordance with the Service Levels.
- (9) The Services will comply with standards set in the Commonwealth's IT Bulletins as issued from time to time, and all internal policies and procedures as set from time to time and as a provided to Contractor.
- (10) Contractor shall cooperate fully with Commonwealth and with any third party appointed by Commonwealth to the extent that such cooperation may be necessary to permit Commonwealth or such third parties to complete any work related to or impacted by the Services provided to Commonwealth by Contractor under the Contract.
- (11) Contractor shall collaborate fully with Commonwealth or with any third party appointed by Commonwealth to the extent that such cooperation may be necessary to permit Commonwealth or such third parties to in-source or transfer to a third party any aspect of the Services then provided by Contractor under the Contract.
- (b) Commonwealth represents, warrants and covenants that as of the Contract's Effective Date:
  - (1) It is a sovereign entity and has all requisite power and authority to execute, deliver, and perform its obligations under this Contract.
  - (2) It has, or at any time of provision to Contractor, will have the right to use and to disclose to Contractor and Contractor Agents and to allow Contractor and Contractor Agents to use in accordance with the terms of this Contract any Commonwealth Software so disclosed to Contractor.

## **62. LIQUIDATED DAMAGES**

- (a) By accepting this Contract, the Contractor agrees to the delivery requirements of this Contract. If a Contract schedule is not met, including Transition Milestones set out in Transition and Transformation Plans, the delay will interfere with the Commonwealth's program. In the event of any such delay, it would be impractical and extremely difficult to establish the actual damage for which the Contractor is the material cause. The Commonwealth and the Contractor therefore agree that, in the event of any such delay the amount of damage shall be the amount set forth in this Paragraph 62 (LIQUIDATED DAMAGES) and agree



that the Contractor shall pay such amount as liquidated damages, not as a penalty. Such liquidated damages are in lieu of all other damages arising from such delay.

- (b) The amount of liquidated damages for failure to meet Critical Transition Milestones is set forth in Schedule D-3.
- (c) If, Schedule D-3 indicates that Contractor may earn back liquidated damages, then Contractor shall have the time specified in Schedule D-1 or Schedule D-3, as indicated, to meet the Acceptance Criteria for the Critical Transition Milestone and earn back the Critical Milestone Credit. If Contractor fails to meet the Acceptance Criteria within 30 days following the Critical Milestone Due Date or, if an earn back period is specified, then 30 days following the end of the specified earn back period, the Commonwealth, at no additional expense and at its option, may either:
  - (1) Immediately terminate the Contract and all software, documentation, reports, Developed Materials and any other materials provided for or created for the Commonwealth as a result of this Contract shall be given to the Commonwealth, and the Commonwealth shall be entitled to its remedies under Subparagraph 27(c); or
  - (2) Order the Contractor to continue with no decrease in effort until the work is completed in a manner acceptable to the Commonwealth or until the Commonwealth terminates the Contract. If the Contract is continued, the liquidated damages will also continue until the work is completed.
- (d) Liquidated damages shall be paid by the Contractor and collected by the Commonwealth by deducting them from the invoices submitted under this Contract or any other contract Contractor has with the Commonwealth, by collecting them through the performance security, if any, or by billing the Contractor as a separate item.
- (e) To the extent that the delay is caused by the Commonwealth, as described in Schedule D-1 no liquidated damages will be applied.
- (f) Contractor shall not be liable for liquidated damages if the delay to the Contract arises out of causes beyond the control of and without the fault or negligence of the Contractor and/or its subcontractors. Such causes may include, but are not limited to, acts of God or of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, work stoppages, freight embargoes, acts of terrorism, and unusually severe weather; but in every case, the delay must be beyond the control of, and without the fault or negligence of, the Contractor and/or its subcontractors. The Contractor shall notify the Commonwealth immediately in writing of its inability to perform because of a cause beyond the control of the Contractor.

- (g) If the delays are caused by the default of a Subcontractor, and if such default arises out of causes beyond the control of both the Contractor and Subcontractor, and without their fault or negligence, the Contractor shall not be liable for liquidated damages for delays, unless the supplies or services to be furnished by the Subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required performance schedule.

**63. CONFLICT OF INTEREST**

Contractor, by signing this Contract, 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 Contractor 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 Contractor under this Contract. Any such conflicts shall be disclosed to Commonwealth, and Commonwealth shall determine whether such conflict is cause for termination of this Contract. Contractor further covenants that, in the performance of this Contract, no person having such interest shall be employed by or associated with Contractor.

**64. SURVIVAL**

Paragraphs 5, 28, 31, 33, 34, 36, 37, 44, 45, 46 48, 55, 56, 61 shall survive the expiration or termination of the Contract.

**65. CONSENTS, APPROVALS, NOTICES AND REQUESTS**

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

**66. SEVERABILITY**

If any provision of this Contract is held by a court of competent jurisdiction to be contrary to law, then the remaining provisions of this Contract 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 Contract shall be valid and enforceable to the extent permitted by law.

**67. WAIVER**

No delay or omission by either party to exercise any right or power it has under this Contract 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.

**68. ENTIRE CONTRACT**

This Contract is the entire Contract between the parties with respect to its subject matter, and there are no other representations, understandings or Contracts between the parties relative to such subject matter

**69. AMENDMENTS**

No amendment to, or change, waiver, or discharge of, any provision of this Contract 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.

**70. GOVERNING LAW**

This Contract 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 Paragraph 30 (CONTRACT CONTROVERSIES), Commonwealth and Contractor 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 Contract and the resolution thereof. Any legal action relating to this Contract must be brought in Dauphin County, Pennsylvania, and the parties agree that jurisdiction and venue in such courts is appropriate.

**71. THIRD PARTY BENEFICIARIES**

Each party intends that this Contract shall not benefit, or create any right or cause of action in or on behalf of, any person or entity other than Commonwealth and Contractor.

**72. ACKNOWLEDGEMENT**

Commonwealth and Contractor each acknowledge that the limitations and exclusions contained in this Contract have been the subject of active and complete negotiation between the parties and represent the parties' Contract based upon the level of risk to Commonwealth and Contractor associated with their respective obligations under this Contract and the payments to be made to Contractor and credits to be issued to, and Services to be provided to, Commonwealth pursuant to this Contract. The parties agree that the terms and conditions of this Contract 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 Contract.

## APPENDIX A-A BUSINESS ASSOCIATE APPENDIX LANGUAGE

### Health Insurance Portability and Accountability Act (HIPAA) Compliance

**WHEREAS**, [name of program and department] (hereinafter the “Covered Entity”) will make available and/or transfer to **Contractor** (hereinafter the “Business Associate”) certain Protected Health Information (PHI), in conjunction with goods or services that are being provided by Business Associate to or on behalf of [name of program and department], that is confidential and must be afforded special treatment and protection in accordance with the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Regulations at 45 CFR Part.160-164.

**WHEREAS**, Business Associate will have access to and/or receive from Covered Entity, PHI that can be used or disclosed only in accordance with this Appendix and the HIPAA Privacy Regulations at 45 CFR Part 160-164.

**NOW, THEREFORE**, Covered Entity and Business Associate agree as follows:

1. **Definitions.**

- (a) “Business Associate” shall have the meaning given to such term under the HIPAA Regulations, including but not limited to, 45 CFR §160.103.
- (b) “Covered Entity” shall have the meaning given to such term under HIPAA and the HIPAA Privacy Regulations, including, but not limited to, 45 CFR §160.103.
- (c) “Protected Health Information” or “PHI” means any information, whether oral or recorded in any form or medium; (i) that relates to the past, present or future physical or mental condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual, and (ii) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual, and shall have the meaning given to such term under HIPAA and the HIPAA Privacy Regulations, including, but not limited to 45 CFR §164.501.
- (d) In accordance with 45 CFR Parts 160-164, [name of program and department] is the **Covered Entity** and \_\_\_\_\_ is the **Business Associate**.
- (e) Terms used, but not otherwise defined, in this Contract shall have the same meaning as those terms in 45 CFR Parts 160-164.

2. **Limits On Use And Disclosure Established By Terms Of Appendix.** Business Associate hereby agrees that it shall be prohibited from using or disclosing the PHI

provided or made available by Covered Entity for any purpose other than as expressly permitted or required by this Appendix, in accordance with 45 CFR §164.504(e)(2)(i).

3. **Stated Purposes For Which Business Associate May Use Or Disclose PHI.** The Parties hereby agree that Business Associate shall be permitted to use and/or disclose PHI provided or made available from Covered Entity for the following stated purposes:

***PROGRAM MUST** Include a general statement describing the stated purposes that Business Associate may use or disclose the PHI. These uses and disclosures must be within the scope of the Appendix. 45 CFR §164.504(e)(2)(i).*

4. **Additional Purposes For Which Business Associate May Use Or Disclose Information.** In addition to the Stated Purposes, Business Associate may use or disclose PHI provided or made available from Covered Entity for the following additional purposes(s) (optional section):

- (a) **Use Of Information For Management, Administration And Legal Responsibilities.** Business Associate is permitted to use PHI if necessary for the proper management and administration of Business Associate or to carry out legal responsibilities of the Business Associate. 45 CFR §164.504(e)(4)(ii).

- (b) **Disclosure Of Information For Management, Administration And Legal**

- (1) **Responsibilities.** Business Associate is permitted to disclose PHI received from Covered Entity for the proper management and administration of Business Associate or to carry out legal responsibilities of Business Associate, provided:

- (i) The disclosure is required by law: or

- (ii) The Business Associate obtains reasonable assurances in writing from the person to whom the information is disclosed that it will be held confidentially and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person, the person will use appropriate safeguards to prevent use of disclosure of the information, and the person immediately notifies the Business Associate of any instance of which it is aware in which the confidentiality of the information has been breached. 45 CFR §164.504(e)(4)(ii).

- (c) **Data Aggregation Services.** Business Associate is also permitted to use or disclose PHI to provide data aggregation services, as that term is defined by 45 CFR §164.501, relating to the health care operations of Covered Entity. 45 CFR §164.504(e)(2)(i)(B).

## 5. BUSINESS ASSOCIATE OBLIGATIONS:

### **Limits On Use And Further Disclosure Established By Appendix And Law.**

Business Associate hereby agrees that the PHI provided or made available by Covered Entity shall not be further used or disclosed other than as permitted or required by the Appendix or as required by law. 45 CFR §165.404(e)(2)(ii)(A).

- (a) **Appropriate Safeguards.** Business Associate will establish and maintain appropriate safeguards to prevent any use or disclosure of PHI other than as provided for by this Appendix. 45 CFR §164.504(e)(2)(ii)(B).
- (b) **Reports Of Improper Use Or Disclosure.** Business Associate hereby agrees that it shall report to [name of Contract officer for program and Department] **within two (2) days of discovery** any use or disclosure of PHI not provided for or allowed by this Appendix. 45 CFR §164.504(e)(2)(ii)(C).
- (c) **Subcontractors And Agents.** Business Associate hereby agrees that anytime PHI is provided or made available to any subcontractors or agents, Business Associate shall provide only the minimum necessary PHI for the purpose of the covered transaction and must enter into a subcontract or contract with the subcontractor or agent that contains the same terms, conditions and restrictions on the use and disclosure of PHI as contained in this Appendix. 45 CFR § 164.504(e)(2)(ii)(D).
- (d) **Right Of Access To PHI.** Business Associate hereby agrees to make available to an individual who is the subject of the PHI the right to access and copy that individual's PHI, at the request of the individual or of the Covered Entity, in the time and manner designated by the Covered Entity. This right of access shall conform with and meet all of the requirements of 45 CFR §164.524 and 45 CFR § 164.504(e)(2)(ii)(E).
- (e) **Amendment And Incorporation Of Amendments.** Business Associate agrees to make any amendments to PHI that have been agreed to by the Covered Entity, at the request of Covered Entity or of the individual, in the time and manner designated by Covered Entity, in accordance with 45 CFR 164.526 and 45 CFR § 164.504(e)(2)(ii)(F).
- (f) **Provide Accounting.** Business Associate agrees to document and make available to Covered Entity or to the individual, any information necessary to provide an accounting of disclosures in accordance with 45 CFR §164.528 and 45 CFR § 164.504 (e)(2)(ii)(G), within 30 days of receipt of a request for an accounting, in the manner designated by the Covered Entity.
- (g) **Access To Books And Records.** Business Associate hereby agrees to make its internal practices, books, and records relating to the use or disclosure of PHI

received from, or created or received by Business Associate on behalf of the Covered Entity, available to the Secretary of Health and Human Services or designee for purposes of determining compliance with the HIPAA Privacy Regulations. 45 CFR § 164.504(e)(2)(ii)(H).

- (h) **Return Or Destruction Of PHI.** At termination of this Appendix, Business Associate hereby agrees to return or destroy all PHI received from, or created or received by Business Associate on behalf of Covered Entity. Business Associate agrees not to retain any copies of the PHI after termination of this Appendix. If return or destruction of the PHI is not feasible, Business Associate agrees to extend the protections of this Appendix to limit any further use or disclosure until such time as the PHI may be returned or destroyed. If Business Associate elects to destroy the PHI, it shall certify to Covered Entity that the PHI has been destroyed. 45 CFR §164.504(e)(2)(ii)(I).
- (i) **Mitigation Procedures.** Business Associate agrees to establish and to provide to the Program and Department upon request, procedures for mitigating, to the maximum extent practicable, any harmful effect from the use or disclosure of PHI in a manner contrary to this Appendix or the HIPAA Privacy Regulations. 45 CFR § 164.530(f). Business Associate further agrees to mitigate any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of this Appendix.
- (j) **Sanction Procedures.** Business Associate agrees that it must develop and implement a system of sanctions for any employee, subcontractor or agent who violates this Appendix or the HIPAA Privacy Regulations. 45 CFR § 164.530(e)(1).
- (k) **Property Rights.** The PHI shall be and remain the property of Covered Entity. Business Associate agrees that it acquires no title or rights to the PHI, including any de-identified information, as a result of its relationship with the program or department.
- (l) **Grounds For Breach.** Any non-compliance by Business Associate with this Appendix or the HIPAA Privacy Regulations will automatically be considered to be grounds for breach pursuant to the underlying Contract, if Business Associate knew or reasonably should have known of such non-compliance and failed to immediately take reasonable steps to cure the non-compliance.
- (m) **Termination by Commonwealth.** Business Associate authorizes termination of the underlying Contract by the Commonwealth if the Commonwealth determines, in its sole discretion, that the Business Associate has violated a material term of this Appendix.
- (n) **Privacy Practices.** The Program or Department shall provide and Business Associate shall immediately begin using, any form, including but not limited to,

any for used for Consent, Notice of Privacy Practices, Accounting for Disclosures, or Authorization, designated as effective by the Program or Department at any given time. The Program and Department retain the right to change the applicable privacy practices and documents. The Business Associate must implement changes as soon as practicable, but not later than 45 days from the date of notice of the change.

**6. OBLIGATIONS OF COVERED ENTITY:**

- (a) **Provision of Notice of Privacy Practices.** Covered Entity shall provide Business Associate with the notice of privacy practices that the Covered Entity produces in accordance with 45 CFR §164.520, as well as changes to such notice.
- (b) **Permissions.** Covered Entity shall provide Business Associate with any changes in, or revocation of, permission by individual to use or disclose PHI, if such change affect Business Associate's permitted or required uses and disclosures.
- (c) **Restrictions.** Covered Entity shall notify Business Associate of any restriction to the use or disclosure of PHI that the Covered Entity has agreed to in accordance with 45 CFR §164.522.