

Part VI
IT Contract Terms and Conditions

1. DEFINITIONS.

- a. Contract: The integrated documents as defined in **Section 10, Order of Precedence**.
- b. Contracting Officer. The person authorized to administer this Contract for the Office of Attorney General and to make written determinations with respect to the Contract.
- c. Data. Any recorded information, regardless of the form, the media on which it is recorded or the method of recording.
- d. Days. Calendar days, unless specifically indicated otherwise.
- e. Developed Works. All of the fully or partially complete property, whether tangible or intangible prepared by the Contractor for ownership by the Commonwealth in fulfillment of the requirements of this Contract, including but not limited to: documents; sketches; drawings; designs; works; papers; files; reports; computer programs; documentation; data; records; software; samples; literary works and other works of authorship. Developed Works include all material necessary to exercise all attributes of ownership or of the license granted in **Section 46, Ownership of Developed Works**.
- f. Documentation. All materials required to support and convey information about the Services or Supplies required by this Contract, including, but not limited to: written reports and analyses; diagrams maps, logical and physical designs; system designs; computer programs; flow charts; and disks and/or other machine-readable storage media.
- g. Expiration Date: The last valid date of the Contract, as indicated in the Contract documents to which these IT Contract Terms and Conditions are attached.
- h. Purchase Order: Written authorization for Contractor to proceed to furnish Supplies or Services.
- i. Proposal. Contractor's final response to the Solicitation issued by the Office of Attorney General, as accepted by the Office of Attorney General.
- j. Services. All Contractor activity necessary to satisfy the Contract.
- k. Software. A collection of one or more programs, databases or microprograms fixed in any tangible medium of expression that comprises a sequence of

instructions (source code) to carry out a process in, or convertible into, a form executable by an electronic computer (object code).

- l. Solicitation. A Request for Proposals issued by the Office of Attorney General to procure Services or Supplies, e.g., Request for Proposal; Request for Quotation; Supplier Pricing Request; or Invitation for Bid, including all attachments and addenda thereto.
- m. Supplies. All tangible and intangible property including, but not limited to materials and equipment, provided by the Contractor to satisfy the Contract.

2. TERM OF CONTRACT

- (a) Term. 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.
- (b) Effective Date: The Effective Date shall be one of the following:
 - (i) the date the Contract has been fully executed by the Contractor and all approvals required by Commonwealth contracting procedures have been obtained; or
 - (ii) the date stated in the Contract, whichever is later.

3. COMMENCEMENT OF PERFORMANCE

- (a) General. The Contractor shall not commence performance and the Commonwealth shall not be liable to pay the Contractor for any supply furnished or work performed or expenses incurred, until both of the following have occurred:
 - (i) the Effective Date has occurred; and
 - (ii) the Contractor has received a Purchase Order or other written notice to proceed signed by the Contracting Officer.
- (b) Prohibition Prior to Effective Date. No Commonwealth employee has the authority to verbally direct the commencement of any Service or delivery of any Supply under this Contract prior to the date performance may commence. The Contractor hereby waives any claim or cause of action for any Service performed or Supply delivered prior to the date performance may commence.

4. EXTENSION OF CONTRACT TERM

The Commonwealth reserves the right, upon notice to the Contractor, to extend the term of the Contract for up to three (3) months upon the same terms and conditions.

5. ELECTRONIC SIGNATURES

- (a) The Contract and/or Purchase Orders may be electronically signed by the Commonwealth.
 - (i) *Contract.* “Fully Executed” at the top of the first page of the Contract output indicates that the signatures of all the individuals required to bind the Commonwealth to the terms of the Contract have been obtained. If the Contract output form does not have “Fully Executed” at the top of the first page, the Contract has not been fully executed.
 - (ii) *Purchase Orders.* The electronically-printed name of the Purchasing Agent on the Purchase Order indicates that all approvals required by Commonwealth contracting procedures have been obtained.
- (b) The Commonwealth and the Contractor specifically agree as follows:
 - (i) *Written signature not required.* No handwritten signature shall be required in order for the Contract or Purchase Order to be legally enforceable.
 - (ii) *Validity; admissibility.* The parties agree that no writing shall be required in order to make the Contract or Purchase Order legally binding, notwithstanding contrary requirements in any law or regulation. The parties hereby agree not to contest the validity or enforceability of the Contract executed electronically, or acknowledgement issued electronically, under the provisions of a statute of frauds or any other applicable law relating to whether certain agreements be in writing and signed by the party bound thereby. Any genuine Contract or acknowledgement executed or 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 a genuine Contract or acknowledgements under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Contract or acknowledgement were not in writing or signed by the parties. A Contract or acknowledgment shall be deemed to be genuine for all purposes if it is transmitted to the location designated for such documents.
 - (iii) *Verification.* 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.

6. PURCHASE ORDERS

- (a) Purchase Orders. The Commonwealth may issue Purchase Orders against the Contract or issue a Purchase Order as the Contract. These Purchase 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. **Each Purchase Order will be deemed to incorporate the terms and conditions set forth in the Contract.**
- (b) Electronic transmission. 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.
- (c) Receipt. Receipt of the electronic or facsimile transmission of the Purchase Order shall constitute receipt of a Purchase Order.
- (d) Received next business day. Purchase Orders received by the Contractor after 4:00 p.m. will be considered received the following business day.
- (e) Commonwealth Purchasing Card. Purchase Orders under \$10,000 in total amount may also be made in person or by telephone using a Commonwealth Purchasing Card. When an order is placed by telephone, the Commonwealth shall provide the employee name, credit card number, and expiration date of the card. The Contractor agrees to accept payment through the use of a Commonwealth Purchasing card.

7. CONTRACT SCOPE

The Contractor agrees to furnish the requested Services and Supplies to the Commonwealth as such Services and Supplies are defined in this Contract.

8. ACCESS TO COMMONWEALTH FACILITIES.

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.

9. NON-EXCLUSIVE CONTRACT

The Commonwealth reserves the right to purchase Services and Supplies within the scope of this Contract through other procurement methods whenever the Commonwealth deems it to be in its best interest.

10. ORDER OF PRECEDENCE

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:

- (a) The documents containing the parties' signatures;
- (b) These IT Contract Terms and Conditions;
- (c) The Proposal; and
- (d) The Solicitation.

11. CONTRACT INTEGRATION

- (a) Final contract. This Contract constitutes the final, complete, and exclusive Contract between the parties, containing all the terms and conditions agreed to by the parties.
- (b) Prior representations. 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) Conditions precedent. There are no conditions precedent to the performance of this Contract except as expressly set forth herein.
- (d) Sole applicable terms. No contract terms or conditions are applicable to this Contract except as they are expressly set forth herein.
- (e) Other terms unenforceable. The Contractor may not require the Commonwealth or any user of the Services or Supplies acquired within the scope of this Contract to sign, click through, or in any other way agree to any terms associated with use of or interaction with those Services and/or Supplies, unless the Commonwealth has approved the terms in writing in advance under this Contract, and the terms are consistent with this Contract. Further, changes to terms may be accomplished only by processes set out in this Contract; no quotations, invoices, business forms or other documentation, or terms referred to therein, shall become part of this Contract merely by their submission to the Commonwealth or their ordinary use in meeting the requirements of this Contract. Any terms imposed upon the Commonwealth or a user in contravention of this **Subsection 11(e)** must be removed at the direction of the Commonwealth, and shall not be enforced or enforceable against the Commonwealth or the user.

12. PERIOD OF PERFORMANCE

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

13. INDEPENDENT PRIME CONTRACTOR

- (a) Independent contractor. In performing its obligations under the Contract, the Contractor will act as an independent contractor and not as an employee or agent of the Commonwealth.
- (b) Sole point of contact. The Contractor will be responsible for all Services and Supplies 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.

14. SUBCONTRACTS

The Contractor may subcontract any portion of the Services or Supplies described in this Contract to third parties selected by Contractor and approved in writing by the Commonwealth, whose approval shall not be unreasonably withheld. Notwithstanding the above, if Contractor has disclosed the identity of subcontractor(s) together with the scope of work to be subcontracted in its Proposal, award of the Contract is deemed approval of all named subcontractors 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 request of the Commonwealth, the Contractor must provide the Commonwealth with an unredacted copy of the subcontract agreement between the Contractor and the subcontractor. The Commonwealth reserves the right, for good cause, to require that the Contractor remove a subcontractor from the project. The Commonwealth will not be responsible for any costs incurred by the Contractor in replacing the subcontractor if good cause exists.

15. OTHER CONTRACTORS

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 Services and/or its provision of Supplies with such additional work as may be required. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other contractor or by Commonwealth employees. This **Section 15** shall be included in the Contracts of all contractors with which this Contractor will be required to cooperate. The

Commonwealth shall equitably enforce this **Section 15** as to all contractors to prevent the imposition of unreasonable burdens on any contractor.

16. ENHANCED MINIMUM WAGE

- (a) Enhanced Minimum Wage. Contractor/Lessor agrees to pay no less than \$10.15 per hour to its employees for all hours worked directly performing the services called for in this Contract/Lease, and for an employee's hours performing ancillary services necessary for the performance of the contracted services or lease when such employee spends at least twenty per cent (20%) of their time performing ancillary services in a given work week.
- (b) Adjustment. Beginning January 1, 2017, and annually thereafter, Contractor/Lessor shall pay its employees described in **Subsection 16(a)** above an amount that is no less than the amount previously in effect; increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication as determined by the United States Bureau of Labor Statistics; and rounded to the nearest multiple of \$0.05. The applicable adjusted amount shall be published in the Pennsylvania Bulletin by March 1 of each year to be effective the following July 1.
- (c) Exceptions. These Enhanced Minimum Wage Provisions shall not apply to employees:
 - (i) exempt from the minimum wage under the *Minimum Wage Act of 1968*;
 - (ii) covered by a collective bargaining agreement;
 - (iii) required to be paid a higher wage under another state or federal law governing the services, including the *Prevailing Wage Act* and *Davis-Bacon Act*; or
 - (iv) required to be paid a higher wage under any state or local policy or ordinance.
- (d) Notice. Contractor/Lessor shall post these Enhanced Minimum Wage Provisions for the entire period of the contract conspicuously in easily-accessible and well-lighted places customarily frequented by employees at or near where the contracted services are performed.
- (e) Records. Contractor/Lessor must maintain and, upon request and within the time periods requested by the Commonwealth, furnish all employment and wage records necessary to document compliance with these Enhanced Minimum Wage Provisions.

- (f) Sanctions. Failure to comply with these Enhanced Minimum Wage Provisions may result in the imposition of sanctions, which may include, but shall not be limited to, termination of the contract or lease, nonpayment, debarment or referral to the Office of General Counsel for appropriate civil or criminal referral.
- (g) Subcontractors. Contractor/Lessor shall include the provisions of these Enhanced Minimum Wage Provisions in every subcontract so that these provisions will be binding upon each subcontractor.

17. COMPENSATION

- (a) General. The Contractor shall be required to perform at the price(s) quoted in the Contract. All items shall be performed within the time period(s) specified in the Contract. The Contractor shall be compensated only for items supplied and Services performed to the satisfaction of the Commonwealth.
- (b) Travel. The Contractor shall not be allowed or paid travel or per diem expenses except as specifically set forth in the Contract.

18. BILLING REQUIREMENTS

Unless the Contractor has been authorized by the Commonwealth for Evaluated Receipt Settlement or Vendor Self-Invoicing, the Contractor shall include in all of its invoices the following minimum information:

- (a) Vendor name and “Remit to” address, including SAP Vendor number;
- (b) Bank routing information, if ACH;
- (c) SAP Purchase Order number;
- (d) Delivery Address;
- (e) Description of the supplies/services delivered in accordance with SAP Purchase Order (include purchase order line number if possible);
- (f) Quantity provided;
- (g) Unit price;
- (h) Price extension;
- (i) Total price; and
- (j) Delivery date of supplies or services.

If an invoice does not contain the minimum information set forth in this **Section 18**, the Commonwealth may return the invoice as improper. If the Commonwealth returns an invoice as improper, the time for processing a payment will be suspended until the Commonwealth receives a correct invoice. The Contractor may not receive payment until the Commonwealth has received a correct invoice.

19. PAYMENT

- (a) Payment Date. The Commonwealth shall put forth reasonable efforts to make payment by the required payment date. The required payment date is:
 - (i) the date on which payment is due under the terms of the Contract;
 - (ii) thirty (30) 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); or
 - (iii) the payment date specified on the invoice if later than the dates established by **Paragraphs 19(a)(i) and (ii)** above.
- (b) Delay; Interest. 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, [72 P. S. § 1507](#), (relating to interest penalties on Commonwealth accounts) and accompanying regulations [4 Pa. Code §§ 2.31—2.40](#).
- (c) 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.
- (d) Electronic Payments
 - (i) The Commonwealth will make contract payments through the Automated Clearing House (ACH). Within **ten (10) days** of award of the Contract, the Contractor must submit or must have already submitted its ACH information within its user profile in the Commonwealth’s procurement system (SRM).
 - (ii) The Contractor must submit a unique invoice number with each invoice submitted. The unique invoice number will be listed on the Commonwealth’s ACH remittance advice to enable the Contractor to properly apply the Commonwealth’s payment to the invoice submitted.

- (iii) It is the responsibility of the Contractor to ensure that the ACH information contained in SRM is accurate and complete. Failure to maintain accurate and complete information may result in delays in payments.

20. ASSIGNABILITY

- (a) Subject to the terms and conditions of this **Section 20**, the Contract is binding upon the parties and their respective successors and assigns.
- (b) The Contractor may not assign, in whole or in part, the Contract or its rights, duties, obligations, or responsibilities hereunder without the prior written consent of the Commonwealth, which consent may be withheld at the sole and absolute discretion of the Commonwealth.
- (c) For the purposes of the Contract, the term “assign” shall include, but shall not be limited to, the sale, gift, assignment, encumbrance, pledge, or other transfer of any ownership interest in the Contractor provided, however, that the term shall not apply to the sale or other transfer of stock of a publicly traded company.
- (d) 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.
- (e) 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.
- (f) 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.

21. INSPECTION AND ACCEPTANCE

- (a) Developed Works and Services:
 - (i) Acceptance. Acceptance of any Developed Work or Service will occur in accordance with an acceptance plan (Acceptance Plan) submitted by the Contractor and approved by the Commonwealth. Upon approval of the

Acceptance Plan by the Commonwealth, the Acceptance Plan becomes part of this Contract.

- (ii) Software Acceptance Test Plan. For contracts where the development of Software, the configuration of Software or the modification of Software is being inspected and accepted, the Acceptance Plan must include a Software Acceptance Test Plan. The Software Acceptance Test Plan will provide for a final acceptance test, and may provide for interim acceptance tests. Each acceptance test will be designed to demonstrate that the Software conforms to the functional specifications, if any, and the requirements of this Contract. Contractor shall notify the Commonwealth when the Software is completed and ready for acceptance testing. The Commonwealth will not unreasonably delay commencement of acceptance testing.
 - (1) If software integration is required at the end of the project, as set out in the Solicitation, the Commonwealth's acceptance of the Software shall be final unless at the time of final acceptance, the Software does not meet the acceptance criteria set forth in the Contract.
 - (2) If software integration is not required at the end of the project, as set out in the Solicitation, the Commonwealth's acceptance of the Software shall be complete and final.
- (iii) Certification of Completion. Contractor shall certify, in writing, to the Commonwealth when an item in the Acceptance Plan is completed and ready for acceptance. Unless otherwise agreed to by the Commonwealth in the Acceptance Plan, the acceptance period shall be **10 business days** for interim items and **30 business days** for final items. Following receipt of Contractor's certification of completion of an item, the Commonwealth shall, either:
 - (1) Provide the Contractor with Commonwealth's written acceptance of the work product; or
 - (2) Identify to Contractor, in writing, the failure of the work product to comply with the specifications, listing all such errors and omissions with reasonable detail.
- (iv) Deemed Acceptance. If the Commonwealth fails to notify the Contractor in writing of any failures in the work product within the applicable acceptance period, the work product shall be deemed accepted.
- (v) Correction upon Rejection. Upon the Contractor's receipt of the Commonwealth's written notice of rejection, which must identify the

reasons for the failure of the work product to comply with the specifications, the Contractor shall have **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 item, certifying to the Commonwealth, in writing, that the failures have been corrected, and that the items have been brought into compliance with the specifications. Upon receipt of such corrected and resubmitted items and certification, the Commonwealth shall have **30 business days** to test the corrected items to confirm that they are in compliance with the specifications. If the corrected items are in compliance with the specifications, then the Commonwealth shall provide the Contractor with its acceptance of the items in the completed milestone.

(vi) Options upon Continued Failure. If, in the opinion of the Commonwealth, the corrected items still contain material failures, the Commonwealth may either:

- (1) Repeat the procedure set forth above; or
- (2) Proceed with its rights under **Section 27, Termination**, except that the cure period set forth in **Section 27(c)** may be exercised in the Commonwealth's sole discretion.

(b) Supplies.

- (i) *Inspection prior to Acceptance.* No Supplies received by the Commonwealth shall be deemed accepted until the Commonwealth has had a reasonable opportunity to inspect the Supplies.
- (ii) *Defective Supplies.* Any Supplies discovered to be defective or that fail to conform to the specifications may be rejected upon initial inspection or at any later time if the defects contained in the Supplies or the noncompliance with the specifications were not reasonably ascertainable upon the initial inspection.

- (1) The Contractor shall remove rejected item(s) from the premises without expense to the Commonwealth within **15 days** after notification.
- (2) Rejected Supplies left longer than **30 days** will be regarded as abandoned, and the Commonwealth shall have the right to dispose of them as its own property and shall retain that portion of the proceeds of any sale which represents the Commonwealth's costs and expenses in regard to the storage and sale of the Supplies.

- (3) Upon notice of rejection, the Contractor shall immediately replace all such rejected Supplies with others conforming to the specifications and which are not defective. If the Contractor fails, neglects or refuses to do so, the Commonwealth may procure, in such manner as it determines, supplies similar or identical to the those that Contractor failed, neglected or refused to replace, and deduct from any monies due or that may thereafter become due to the Contractor, the difference between the price stated in the Contract and the cost thereof to the Commonwealth.

22. DEFAULT

- (a) The Commonwealth may, subject to the provisions of **Section 23, Notice of Delays**, and **Section 65, Force Majeure**, 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 **Section 27, Termination**) the whole or any part of this Contract for any of the following reasons:
 - (i) Failure to begin Services within the time specified in the Contract or as otherwise specified;
 - (ii) Failure to perform the Services with sufficient labor, equipment, or material to insure the completion of the specified Services in accordance with the Contract terms;
 - (iii) Unsatisfactory performance of the Services;
 - (iv) Failure to meet requirements within the time periods(s) specified in the Contract;
 - (v) Multiple failures over time of a single service level agreement or a pattern of failure over time of multiple service level agreements;
 - (vi) Failure to provide a Supply or Service that conforms with the specifications referenced in the Contract;
 - (vii) Failure or refusal to remove material, or remove, replace or correct any Supply rejected as defective or noncompliant;
 - (viii) Discontinuance of Services without approval;
 - (ix) Failure to resume a Service, which has been discontinued, within a reasonable time after notice to do so;
 - (x) Insolvency;

- (xi) Assignment made for the benefit of creditors;
- (xii) Failure or refusal, within **10 days** after written notice by the Contracting Officer, to make payment or show cause why payment should not be made, of any amounts due subcontractors for materials furnished, labor supplied or performed, for equipment rentals or for utility services rendered;
- (xiii) Failure to protect, repair or make good any damage or injury to property;
- (xiv) Material breach of any provision of this Contract;
- (xv) Any breach by Contractor of the security standards or procedures of this Contract;
- (xvi) Failure to comply with representations made in the Contractor's Proposal;
or
- (xvii) Failure to comply with applicable industry standards, customs and practice.

23. 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 promptly 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 **Section 26, Changes**.

24. CONDUCT OF SERVICES

- (a) Following the Effective Date 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) In determining whether or not the Contractor has performed with due diligence under the Contract, it is agreed and understood that the Commonwealth may measure the amount and quality of the Contractor's effort against the representations made in the Contractor Proposal. 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 with due diligence, 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 **Section 29, Contract Controversies**.

25. 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 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.
- (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.

26. CHANGES

- (a) At any time during the performance of the Contract, the Commonwealth or the Contractor may request a change to the Contract. 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 of any charges for 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 changes to the Contract, the parties must complete and execute a change order to modify the Contract and implement the change. The change order will be evidenced by a writing in accordance with the Commonwealth's change order procedures. No work may begin on the change order until the Contractor has received the executed change order. If the parties are not able to agree upon the results of the investigation or the necessary changes to the Contract, a Commonwealth-initiated change request will be implemented at Commonwealth's option and the Contractor shall perform the Services; and either party may elect to have the matter treated as a dispute between the parties under **Section 29, Contract Controversies**. During the

pendency of any such dispute, Commonwealth shall pay to Contractor any undisputed amounts.

- (b) Changes outside the scope of this Contract shall be accomplished through the Commonwealth's 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.

27. TERMINATION

(a) For Convenience

- (i) The Commonwealth may terminate the Contract or a Purchase Order issued against the Contract, in whole or in part, without cause by giving Contractor **30 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.

In the event of termination hereunder, Contractor shall receive payment for the following:

- (1) all Services performed consistent with the terms of the Contract prior to the effective date of termination;
- (2) all actual and reasonable costs incurred by Contractor as a result of the termination of the Contract; and

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.

Failure to agree on any termination costs shall be a dispute handled in accordance with **Section 29, Contract Controversies** of this Contract.

- (ii) The Contractor shall cease Services 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 termination date set forth in said notice, or as may be otherwise provided for in said Notice of Termination, and for such services performed during the **30-day** notice period, if such services are requested by the Commonwealth, for the collection, assembling, and transmitting to the Commonwealth of at least all materials, manuals, magnetic media, studies, drawings, computations,

maps, supplies, and survey notes including field books, which were obtained, prepared, or developed as part of the Services required under this Contract.

- (iii) The above 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.

(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 or full performance in a subsequent fiscal year period, the Commonwealth shall have the right to terminate the Contract in whole or in part. The Contractor shall be reimbursed in the same manner as that described in **Subsection 27(a)** 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 materially fails to perform its obligations under the Contract and does not cure such failure within **30 days** 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 the written notice specifying such failure, and diligently and continuously proceed to complete the cure. The Contracting Officer shall provide any notice of default or written cure notice for Contract terminations.

- (i) Subject to **Section 38, Limitation of Liability**, in the event the Commonwealth terminates this Contract in whole or in part as provided in this **Subsection 27(c)**, 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 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 **Section 27**.
- (ii) Except with respect to defaults of subcontractors, 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. 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 promptly in writing of its inability to perform because of a cause beyond the control of the Contractor.

- (iii) Nothing in this **Subsection 27(c)** shall abridge the Commonwealth's right to suspend, debar or take other administrative action against the Contractor.
- (iv) 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 **Subsection 27(a)**.
- (v) If this Contract is terminated as provided by this **Subsection 27(c)**, the Commonwealth may, in addition to any other rights provided in this **Subsection 27(c)**, and subject to the terms of this Contract, require the Contractor to deliver to the Commonwealth in the manner and to the extent directed by the Contracting Officer, such Software, Data, Developed Works, Documentation and other materials as the Contractor has specifically produced or specifically acquired for the performance of such part of the Contract as has been terminated.
- (d) The rights and remedies of the Commonwealth provided in this **Section 27** 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 **Section 27** 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 **Section 29, Contract Controversies**, the Contractor's exclusive remedy shall be to seek damages in the Board of Claims.

28. BACKGROUND CHECKS

- (a) The Contractor, at its expense, must arrange for a background check for each of its employees, as well as the employees of any of its subcontractors, who will have access to Commonwealth IT facilities, either through on-site access or through remote access. Background checks are to be conducted via the Request for Criminal Record Check form and procedure found at <http://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx>. The background check must be conducted prior to initial access and on an annual basis thereafter.

- (b) Before the Commonwealth will permit access to the Contractor, the Contractor must provide written confirmation that the background checks have been conducted. If, at any time, it is discovered that an employee of the Contractor or an employee of a subcontractor of the Contractor has a criminal record that includes a felony or misdemeanor involving terroristic behavior, 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 unless the Commonwealth consents to the access, in writing, prior to the access. The Commonwealth may withhold its consent in its sole discretion. Failure of the Contractor to comply with the terms of this **Section 28** on more than one occasion or Contractor's failure to cure any single failure to the satisfaction of the Commonwealth may result in the Contractor being deemed in default of its Contract.
- (c) The Commonwealth specifically reserves the to conduct or require background checks over and above that described herein.

29. CONTRACT CONTROVERSIES

- (a) Pursuant to Section 1712.1 of the [Commonwealth Procurement Code](#), 62 Pa. C. S. § 1712.1, in the event of a claim arising from the Contract, the Contractor, within **six (6) months** after the cause of action accrues, must 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. If the Contractor fails to file a claim or files an untimely claim, the Contractor is deemed to have waived its right to assert a claim in any forum.
- (b) The Contracting Officer 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 Contracting Officer shall send his/her written determination to the Contractor. If the Contracting Officer fails to issue a final determination within the **120 days** (unless extended by consent of the parties), the claim shall be deemed denied. The Contracting Officer's determination shall be the final order of the purchasing agency.
- (c) Within **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. Pending a final judicial resolution of a controversy or claim, the Contractor shall proceed diligently with the performance of the Contract in a manner consistent with the determination of the contracting officer and the

Commonwealth shall compensate the Contractor pursuant to the terms of the Contract.

30. DATA SECURITY

- (a) As part of the Services, Contractor shall implement and maintain the Commonwealth's safeguards against the disclosure, destruction, loss or alteration of the Commonwealth Data in the possession of Contractor in accordance with the terms of this Contract and with Commonwealth's other security policies and procedures provided, in writing, to Contractor. In any event, Contractor, as part of the Services, is required to meet or exceed the most stringent of any applicable federal or state law, statute, rule or regulation applicable to Contractor's and/or Contractor's Subcontractor's possession of, or access to, any Commonwealth Data (which includes **Section 30(d)**, herein). All changes or additions to any such Commonwealth security policies or procedure or any changes to any applicable federal or state law, statute, rule or regulation shall be implemented by Contractor. Any changes or additions which result in a material additional cost to Contractor shall be subject to the Change Control Procedures. To the degree such change applies to other Contractor customers, Contractor will mitigate the Commonwealth's economic exposure to additional cost by equitably spreading the additional cost of compliance to its multiple customers.
- (b) All of Contractor's activities relating to the safeguarding of Commonwealth Data shall be subject to periodic review and monitoring by Commonwealth and related federal agencies, and Contractor shall cooperate fully with all such reviews and monitoring. In addition to, and not in limitation of, any restrictions set forth elsewhere in this Contract, Contractor shall have operational access to the Commonwealth Data only on an as-needed basis.
- (c) At no cost to the Commonwealth, and as part of the Services, Contractor shall, upon request at any time during the term of this Contract, or upon termination, cancellation, cessation of Termination Assistance, expiration or other conclusion of the Contract, Contractor shall (1) promptly return to the Commonwealth, in a form that is freely accessible to the Commonwealth and not in a Contractor proprietary format, all or the requested portion of the Commonwealth Data then in Contractor's possession or under its control, or (2) erase or destroy such Commonwealth Data. If the Commonwealth requests Contractor to destroy the Data, the Commonwealth shall have the right to conduct an audit to ensure the Data has been destroyed. This provision shall also apply to all Commonwealth Data that is in the possession of Subcontractors of Contractor. Contractor shall complete such return or destruction within ten (10) days of the request or after the conclusion of this Contract. Within such ten (10) day period, Contractor shall certify in writing to Commonwealth that such return or destruction has been completed. Contractor shall make available to the Commonwealth for a complete and secure (i.e. encrypted and appropriately authenticated) download file of the Commonwealth Data in XML format, or such other format as specified by the

Commonwealth, including all schema and transformation definitions and/or delimited text files with documented, detailed schema definitions along with attachments in their native format. Contractor shall be available to answer questions about data schema, transformations, and other elements required to fully understand and utilize the Commonwealth's Data file. Unless the Commonwealth agrees or specifies otherwise, the Contractor shall also deliver to the Commonwealth any copies, duplicates, summaries, abstracts or other representations of any such Commonwealth Data or any part thereof, in whatever form, then in the Contractor's possession or control in accordance with the "NIST Guidelines for Media Sanitization" (SP 800-88).

- (d) At all times during the Term, Contractor shall provide all Services, and use all resources related thereto, in accordance with the Commonwealth's security requirements, including the prevention and detection of fraud, abuse, or other inappropriate use or access of systems and networks by all appropriate means, including network management and maintenance applications and tools, and the use of appropriate encryption technologies. If the Contractor incurs additional costs as a result of changes to Commonwealth's security requirements, it may follow the process set out in **Section 26, Changes** of this Agreement. In addition, all Contractor Personnel (including personnel of any Subcontractors) shall be subject to and shall at all times conform to the Commonwealth's laws, rules, and requirements for the protection of premises, materials, equipment, and personnel, as they have been previously disclosed to Contractor in writing, including those set forth in the *Appendices* to the Solicitation. Any violations or disregard of these rules shall be cause for denial of access by such personnel to the Commonwealth's property. Contractor shall exercise due care and diligence to prevent any injury to person or damage to property while on the Commonwealth's premises.

31. CONFIDENTIALITY, PRIVACY AND COMPLIANCE

- (a) General. The Contractor agrees to protect the confidentiality of the Commonwealth's confidential information. The Commonwealth agrees to protect the confidentiality of Contractor's confidential information. Information is deemed confidential only when the party claiming confidentiality designates the information as "confidential" in such a way as to give notice to the other party (for example, notice may be communicated by describing the information, and the specifications around its use or disclosure, in the Solicitation or in the Proposal). Neither party may assert that information owned by the other party is such party's confidential information. Notwithstanding the foregoing, all Commonwealth Data is Confidential Information unless otherwise indicated.
- (b) Copying; Disclosure; Termination. The parties agree that confidential information shall not be copied, in whole or in part, or used or disclosed except when essential for authorized activities under this Contract and, in the case of

disclosure, where the recipient of the confidential information has agreed to be bound by confidentiality requirements no less restrictive than those set forth herein. Each copy of confidential information shall be marked by the party making the copy with any notices appearing in the original. Upon expiration or termination of this Contract or any license granted hereunder, the receiving party will return to the disclosing party, or certify as to the destruction of, all confidential information in the receiving party's possession, other than one copy (where permitted by law or regulation), which may be maintained for archival purposes only, and which will remain subject to this Contract's security, privacy, data retention/destruction and confidentiality provisions. A material breach of these requirements may result in termination for default pursuant to **Subsection 27(c)**, in addition to other remedies available to the non-breaching party.

- (c) Insofar as information is not otherwise protected by law or regulation, the obligations stated in this **Section 31** do not apply to information:
- (i) already known to the recipient at the time of disclosure other than through the contractual relationship;
 - (ii) independently generated by the recipient and not derived from the information supplied by the disclosing party;
 - (iii) known or available to the public, except where such knowledge or availability is the result of unauthorized disclosure by the recipient of the proprietary information;
 - (iv) disclosed to the recipient without a similar restriction by a third party who has the right to make such disclosure; or
 - (v) required to be disclosed by the recipient by law, regulation, court order, or other legal process.

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 the Commonwealth in connection with services provided to the Commonwealth under this Contract.

- (d) The Contractor shall use the following process when submitting information to the Commonwealth it believes to be confidential and/or proprietary information or trade secrets:
- (i) Prepare and submit an un-redacted version of the appropriate document;
 - (ii) Prepare and submit a redacted version of the document that redacts the information that is asserted to be confidential or proprietary information or

a trade secret. The Contractor shall use a redaction program that ensures the information is permanently and irreversibly redacted; and

- (iii) Prepare and submit a signed written statement that identifies confidential or proprietary information or trade secrets and that states:
 - (1) the attached material contains confidential or proprietary information or trade secrets;
 - (2) the Contractor is submitting the material in both redacted and un-redacted format, if possible, in accordance with [65 P.S. § 67.707\(b\)](#); and
 - (3) the Contractor is requesting that the material be considered exempt under [65 P.S. § 67.708\(b\)\(11\)](#) from public records requests.
- (e) Disclosure of Recipient or Beneficiary Information Prohibited. The Contractor 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 the Contract for any purpose not connected with the Contractor's responsibilities, except with consent pursuant to applicable law or regulations. All material associated with direct disclosures of this kind (including the disclosed information) shall be provided to the Commonwealth prior to the direct disclosure.
- (f) Compliance with Laws. Contractor will comply with all applicable laws or regulations related to the use and disclosure of information, including information that constitutes Protected Health Information (PHI) as defined by the *Health Insurance Portability and Accountability Act* (HIPAA). Further, by signing this Contract, the Contractor agrees to the terms of the Business Associate Agreement, which is incorporated into this Contract as Exhibit A. It is understood that Exhibit A is only applicable if and to the extent indicated in the Contract.
- (g) Additional Provisions. Additional privacy and confidentiality requirements may be specified in the Contract.
- (h) Restrictions on Use. All Data and all intellectual property provided to the Contractor pursuant to this Contract or collected or generated by the Contractor on behalf of the Commonwealth pursuant to this Contract shall be used only for the work of this Contract. No Data, intellectual property, Documentation or Developed Works may be used, disclosed, or otherwise opened for access by or to the Contractor or any third party unless directly related to and necessary under the Contract.

32. PCI SECURITY COMPLIANCE

- (a) General. By providing the Services under this Contract, the Contractor may create, receive, or have access to credit card records or record systems containing cardholder data including credit card numbers (collectively the “Cardholder Data”). Contractor shall comply with the Payment Card Industry Data Security Standard (“PCI DSS”) requirements for Cardholder Data that are prescribed by the payment brands (including, but not limited to, Visa, MasterCard, American Express, and Discover), as they may be amended from time to time. Contractor acknowledges and agrees that Cardholder Data may only be used for assisting in completing a card transaction, for fraud control services, for loyalty programs, or as specifically agreed to by the payment brands, for purposes of this Contract or as required by applicable law or regulations.
- (b) Compliance with Standards. Contractor shall conform to and comply with the PCI DSS standards as defined by The PCI Security Standards Council at: https://www.pcisecuritystandards.org/security_standards/index.php. Contractor shall monitor these PCI DSS standards and will promptly notify the Commonwealth if its practices should not conform to such standards. Contractor shall provide a letter of certification to attest to meeting this requirement within **seven (7) days** of Contractor’s receipt of the annual PCI DSS compliance report.

33. DATA BREACH OR LOSS

- (a) Contractor shall comply with all applicable data protection, data security, data privacy and data breach notification laws, including but not limited to the [*Breach of Personal Information Notification Act*](#), as amended, 73 P.S. §§ 2301—2329.
- (b) For Data and Confidential Information in the possession, custody, and control of the Contractor or its employees, agents, and/or subcontractors:
 - (i) The Contractor shall report unauthorized access, use, release, loss, destruction or disclosure of Data or Confidential Information (“Incident”) to the Commonwealth within **two (2) hours** of when the Contractor knows of or reasonably suspects such Incident, and the Contractor must immediately take all reasonable steps to mitigate any potential harm or further access, use, release, loss, destruction or disclosure of such Data or Confidential Information.
 - (ii) Contractor shall provide timely notice to all individuals that may require notice under any applicable law or regulation as a result of an Incident. The notice must be pre-approved by the Commonwealth. At the Commonwealth’s request, Contractor shall, at its sole expense, provide credit monitoring services to all individuals that may be impacted by any Incident requiring notice.
 - (iii) Contractor shall be solely responsible for any costs, losses, fines, or damages incurred by the Commonwealth due to Incidents.

- (c) As to Data and Confidential Information fully or partially in the possession, custody, or control of the Contractor and the Commonwealth, the Contractor shall diligently perform all of the duties required in this **Section 33** in cooperation with the Commonwealth, until the time at which a determination of responsibility for the Incident, and for subsequent action regarding the Incident, is made final.

34. INSURANCE

- (a) General. Unless otherwise indicated in the Solicitation, the Contractor shall maintain at its expense and require its subcontractors to procure and maintain, as appropriate, the following types and amounts of insurance, issued by companies acceptable to the Commonwealth and authorized to conduct such business under the laws of the Commonwealth:
 - (i) Workers' Compensation Insurance for all of the Contractor's employees and those of any subcontractor engaged in performing Services in accordance with the *Worker's Compensation Act*, 77 P.S. §§ 1—2708, as amended.
 - (ii) Public liability and property damage insurance to protect the Commonwealth, the Contractor, and any and all subcontractors from claims for damages for personal injury (including bodily injury), sickness or disease, accidental death, and damage to property, including loss of use resulting from any property damage which may arise from its operations under this Contract, whether such operation be by the Contractor, by any subcontractor, or by anyone directly or indirectly employed by either. The limits of such insurance shall be in an amount not less than \$500,000 per person and \$5,000,000 per occurrence, personal injury and property damage combined. Such policies shall be occurrence based rather than claims-made policies and shall name the Commonwealth of Pennsylvania as an additional insured, as its interests may appear. The insurance shall not contain any endorsements or any other form designed to limit and restrict any action by the Commonwealth as an additional insured against the insurance coverages in regard to the Services performed for the Commonwealth.
 - (iii) Professional and Technology-Based Services Liability Insurance (insuring against damages and claim expenses as a result of claims arising from any actual or alleged wrongful acts in performing cyber and technology activities) in the amount of \$5,000,000, per accident/occurrence/annual aggregate.
 - (iv) Professional Liability/Errors and Omissions Insurance in the amount of \$15,000,000, per accident/occurrence/annual aggregate, covering the

Contractor, its employees, agents, contractors, and subcontractors in the performance of all services.

- (v) Network/Cyber Liability Insurance (including coverage for Professional and Technology-Based Services Liability if not covered under Company's Professional Liability/Errors and Omissions Insurance referenced above) in the amount of \$5,000,000, per accident/occurrence/annual aggregate, covering the Contractor, its employees, agents, contractors, and subcontractors in the performance of all services.
- (vi) Completed Operations Insurance in the amount of \$5,000,000, per accident/occurrence/annual aggregate, covering the Contractor, its employees, agents, contractors, and subcontractors in the performance of all services.
- (vii) Comprehensive crime insurance in an amount of not less than \$15,000,000 per claim.
- (b) Certificate of Insurance. Prior to commencing Services under the Contract, and annually thereafter, the Contractor shall provide the Commonwealth with a copy of each current certificate of insurance. These certificates shall contain a provision that coverages afforded under the policies will not be canceled or changed in such a way to cause the coverage to fail to comply with the requirements of this **Section 34** until at least **30 days** prior written notice has been given to the Commonwealth.
- (c) Insurance coverage length. The Contractor agrees to maintain such insurance for the life of the Contract.

35. 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 must also certify, in writing, 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 fifteen (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

36. 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.

37. 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. 23-7400001-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 Section

37 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.

38. LIMITATION OF LIABILITY

- (a) General. The Contractor's liability to the Commonwealth under this Contract shall be limited to the value of this Contract (including any amendments). This limitation will apply, except as otherwise stated in this **Section 38**, regardless of the form of action, whether in contract or in tort, including negligence. This limitation does not, however, apply to any damages:
 - (i) for bodily injury;
 - (ii) for death;
 - (iii) for intentional injury;
 - (iv) for damage to real property or tangible personal property for which the Contractor is legally liable;
 - (v) under **Section 42, Patent, Copyright, Trademark and Trade Secret Protection**;
 - (vi) under **Section 33, Data Breach or Loss**; or
 - (vii) under **Section 41, Virus, Malicious, Mischievous or Destructive Programming**.
- (b) The Contractor will not be liable for consequential or incidental damages, except for damages as set forth in **Section 38(a)**, or as otherwise specified in the Contract.

39. COMMONWEALTH HELD HARMLESS

- (a) 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—732-506, as amended, 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.

40. SOVEREIGN IMMUNITY

No provision of this Contract may be construed to waive or limit the sovereign immunity of the Commonwealth of Pennsylvania or its governmental sub-units.

41. VIRUS, MALICIOUS, MISCHIEVOUS OR DESTRUCTIVE PROGRAMMING

- (a) The Contractor shall be liable for any damages incurred 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. The Contractor's liability shall cease if the Commonwealth has not fully complied with its own software security standards.
- (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 results 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, 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, at any time, 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.

42. 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*](#), as amended, 71 P.S. § 732-101—732-506, the Office of Attorney General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG, however, in its sole discretion and under the terms it deems appropriate, may 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 that prevents the Commonwealth from continuing to use the Developed Works 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 provide support to the Contractor in defending any such claim, the Contractor shall reimburse the Commonwealth for all 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, at its expense, will 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. The Contractor also agrees to certify that work produced for the Commonwealth under this contract shall be free and clear from all claims of any nature.
- (c) If the defense of the suit is delegated to the Contractor, the Contractor shall pay all damages and costs awarded therein against the Commonwealth. 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, in the Contractor's opinion, the products, materials, reports, studies, or computer programs furnished hereunder are likely to or do become subject to a claim of infringement of a United States patent, copyright, or trademark, or for a misappropriation of trade secret, 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:
 - (i) any amounts paid by the Commonwealth less a reasonable amount based on the acceptance and use of the deliverable;
 - (ii) any license fee less an amount for the period of usage of any software; and
 - (iii) the prorated portion of any service fees representing the time remaining in any period of service for which payment was made.
- (g) Notwithstanding the above, the Contractor shall have no obligation for:

- (i) modification of any product, service, or deliverable provided by the Commonwealth;
 - (ii) any material provided by the Commonwealth to the Contractor and incorporated into, or used to prepare, a product, service, or deliverable;
 - (iii) use of the product, service, or deliverable in other than its specified operating environment;
 - (iv) 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;
 - (v) infringement of a non-Contractor product alone;
 - (vi) the Commonwealth's distribution, marketing or use beyond the scope contemplated by the Contract; or
 - (vii) the Commonwealth's failure to use corrections or enhancements made available to the Commonwealth by the Contractor at no charge.
- (h) The obligation to indemnify the Commonwealth, under the terms of this Section, shall be the Contractor's sole and exclusive obligation for the infringement or misappropriation of intellectual property.

43. CONTRACT CONSTRUCTION

The provisions of this Contract shall be construed in accordance with the provisions of all applicable laws and regulations of the Commonwealth. However, by executing this Contract, the Contractor agrees that it has and will continue to abide by the intellectual property laws and regulations of the United States of America.

44. USE OF CONTRACTOR AND THIRD PARTY PROPERTY

- (a) Definitions.
 - (i) "Contractor Property" refers to Contractor-owned tangible and intangible property.
 - (ii) "Third Party" refers to a party that licenses its property to Contractor for use under this Contract.

- (iii) “Third Party Property” refers to property licensed by the Contractor for use in its work under this Contract.

- (b) Contractor Property shall remain the sole and exclusive property of the Contractor. Third Party Property shall remain the sole and exclusive property of the Third Party. The Commonwealth acquires rights to the Contractor Property and Third Party Property as set forth in this Contract.
 - (i) Where the Contractor Property or Third Party Property is integrated into the Supplies or Services which are not Developed Works), or the Contractor Property is otherwise necessary for the Commonwealth to attain the full benefit of the Supplies or Services in accordance with the terms of the Contract, the Contractor hereby grants to the Commonwealth a non-exclusive, fully-paid up, worldwide license to reproduce, distribute, publicly perform, display, view, access and use the Contractor Property. These rights are granted for a duration and to an extent necessary to meet the requirements under this Contract. If the Contractor requires a separate license agreement, such license terms shall include the aforementioned rights, be acceptable to the Commonwealth and include the applicable provisions set forth in these terms at **Exhibit B, Software License Requirements Agreement Template**.

 - (ii) If Third Party Property is integrated into the Supplies or Services which are not Developed Works, or the Third Party Property is otherwise necessary for the Commonwealth to attain the full benefit of the Supplies or Services in accordance with the terms of the Contract, the Contractor shall gain the written approval of the Commonwealth prior to the use of the Third Party Property or the integration of the Third Party Property into the Supplies or Services. Third Party Property approved by the Commonwealth is hereby licensed to the Commonwealth as necessary to meet the Contract requirements.
 - (1) If the Third Party requires a separate license agreement, the license terms shall be acceptable to the Commonwealth and include the applicable provisions set forth in these terms at **Exhibit B, Software License Requirements Agreement Template**.

 - (2) If the use or integration of the Third Party Property is not approved in writing under this Section, the Third Party Property shall be deemed to be licensed under **Paragraph 44(b)(i)** above.

 - (iii) If the Contract expires or is terminated for default pursuant to **Section 27(c)** before the Contract requirements are complete, all rights are granted for a duration and for purposes necessary to facilitate Commonwealth’s or a Commonwealth-approved vendor’s completion of the Supplies, Services or Developed Works under this Contract. The Contractor, in the form

used by Contractor in connection with the Supplies, Services, or Developed Works, shall deliver to Commonwealth the object code version of such Contractor Property, the Third Party Property and associated licenses immediately prior to such expiration or termination to allow the Commonwealth to complete such work.

- (iv) Where third party users are reasonably anticipated by the Contract, all users are granted the right to access and use Contractor Property for the purposes of and within the scope indicated in the Contract.
- (c) The Commonwealth will limit its agents and contractors' use and disclosure of the Contractor Property as necessary to perform work on behalf of the Commonwealth.
- (d) The parties agree that the Commonwealth, by acknowledging Contractor Property, does not agree to any terms and conditions of the Contractor Property agreements that are inconsistent with or supplemental to this Contract.
- (e) Reports: When a report is provided under this Contract, but was not developed specifically for the Commonwealth under this Contract, the ownership of the report will remain with the Contractor, provided, however, that the Commonwealth has the right to use, copy and distribute the report within the executive agencies of the Commonwealth.

45. USE OF COMMONWEALTH PROPERTY

“Commonwealth Property” refers to Commonwealth-owned Software, Data and property (including intellectual property) and third party owned Software and property (including intellectual property) licensed to the Commonwealth.

- (a) Confidentiality of Commonwealth Property. All Commonwealth Property provided to the Contractor pursuant to this Contract or collected or generated by the Contractor on behalf of the Commonwealth pursuant to this Contract shall be considered confidential information under **Section 31, Confidentiality, Privacy, and Compliance**.
- (b) License grant and restrictions. During the term of this Contract, Commonwealth grants to Contractor and its subcontractors for the limited purpose of providing the Services covered under this Contract, a limited, nonexclusive, nontransferable, royalty-free right (subject to the terms of any third party agreement to which the Commonwealth is a party) to access, use, reproduce, and modify Commonwealth Property in accordance with the terms of the Contract. The Commonwealth's license to Contractor is limited by the terms of this Contract.
 - (i) The Contractor hereby assigns to the Commonwealth its rights, if any, in any derivative works resulting from Contractor's modification of the

Commonwealth Intellectual Property. Contractor agrees to execute any documents required to evidence this assignment and to waive any moral rights and rights of attribution provided for in Section 106A of Title 17 of the United States Code, the *Copyright Act of 1976*, as amended.

- (ii) Neither Contractor nor any of its subcontractors may decompile or reverse engineer, or attempt to decompile or reverse engineer, any of the Commonwealth Intellectual Property. Commonwealth hereby represents that it has the authority to provide the license grant and rights set forth in this **Section 45**.
- (c) Reservation of rights. All rights, not expressly granted here to Contractor are reserved by the Commonwealth.
- (d) Termination of Commonwealth license grant.
 - (i) Rights Cease: Upon the expiration or termination for any reason of Contractor's obligation to provide the Services under this Contract, all rights granted to Contractor under this **Section 45** shall immediately cease.
 - (ii) Return Commonwealth Property: Contractor shall, at no cost to Commonwealth, deliver to Commonwealth all of the Commonwealth Intellectual Property (including any related source code then in Contractor's possession or under its control) in the form in use as of the Effective Date of such expiration or termination (except that Commonwealth Data shall be turned over in a form acceptable to the Commonwealth).
 - (iii) List of utilized Commonwealth Property/Destruction: Within **15 days** after termination, Contractor shall provide the Commonwealth with a current copy of the list of Commonwealth Intellectual Property in use as of the 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, in writing; provided, however, that Contractor may retain one archival copy of such Commonwealth Software and tools, until final resolution of any actively asserted pending disputes between the Parties, such retention being for the sole purpose of resolving such disputes.
- (e) Effect of license grant termination. Consistent with the provisions of this **Section 45**, Contractor shall refrain from manufacturing, copying, marketing, distributing or using any Commonwealth Software or Commonwealth Tools or any other work which incorporates the Commonwealth Software or Commonwealth Tools.
- (f) Commonwealth Property Protection.

- (i) Contractor acknowledges Commonwealth's exclusive right, title and interest, including without limitation copyright and trademark rights, in and to Commonwealth Data, Commonwealth Software, Commonwealth Tools and the Developed Works developed under the provisions of this Contract, and Contractor shall not, directly or indirectly, do or cause to be done any act or thing contesting or in any way impairing or tending to impair any part of said right, title, and interest, and shall not use or disclose the Commonwealth Data, Commonwealth Software, Commonwealth Tools or the Developed Works without Commonwealth's written consent, which consent may be withheld by the Commonwealth for any reason.
- (ii) Contractor shall not, in any manner, represent that Contractor has any ownership interest in the Commonwealth Data, Commonwealth Software, Commonwealth Tools, or the Developed Works.

46. OWNERSHIP OF DEVELOPED WORKS

Unless otherwise specified in the Contract's Statement of Work, ownership of all Developed Works shall be in accordance with the provisions set forth in this **Section 46**.

(a) Rules for usage for Developed Works.

- (i) Property of Contractor: If Developed Works modify, improve, contain, or enhance application software programs or other materials generally licensed by the Contractor, then such Developed Works shall be the property of the Contractor, and Contractor hereby grants Commonwealth an irrevocable, nonexclusive, worldwide, fully paid-up license (to include source code and relevant documentation) in perpetuity to use, modify, execute, reproduce, display, perform, prepare derivative works from and distribute, within the Commonwealth, such Developed Works.
 - (1) For purposes of distribution under the license grant created by this **Section 46**, Commonwealth includes any government agency, department, instrumentality, division, unit or other office that is part of the Commonwealth of Pennsylvania, together with the State System of Higher Education (including any of its universities), any county, borough, commonwealth, city, municipality, town, township special purpose district, or other similar type of governmental instrumentality located within the geographical boundaries of the Commonwealth of Pennsylvania.
 - (2) If federal funds are used in creation of the Developed Works, the Commonwealth also includes any other state government as well as the federal government.

- (ii) Property of Commonwealth/licensor: If the Developed Works modify, improve or enhance application software or other materials not licensed to the Commonwealth by the Contractor, then such modifications, improvements and enhancements shall be the property of the Commonwealth or its licensor.

- (b) Copyright Ownership.
 - (i) Works made for hire; general: Except as indicated in **Paragraph 46(a)(i)**, above, Developed Works developed as part of the scope of work for the Project, including Developed Works developed by subcontractors, are the sole and exclusive property of the Commonwealth and shall be considered “works made for hire” under the *Copyright Act of 1976*, as amended, 17 United States Code.

 - (ii) Assignment: In the event that the Developed Works do not fall within the specifically enumerated works that constitute works made for hire under the United States copyright laws, Contractor agrees to assign and, upon their authorship or creation, expressly and automatically assigns, all copyright interests, proprietary rights, trade secrets, and other right, title, and interest in and to such Developed Works to Commonwealth. Contractor further agrees that it will have its subcontractors assign, and upon their authorship or creation, expressly and automatically assigns all copyright interest, proprietary rights, trade secrets, and other right, title, and interest in and to the Developed Works to the Commonwealth.

 - (iii) Rights to Commonwealth: Commonwealth shall have all rights accorded an owner of copyright under the United States copyright laws including, but not limited to, the exclusive right to reproduce the Developed Works in multiple copies, the right to distribute copies by sales or other transfers, the right to register all copyrights in its own name as author in the United States and in foreign countries, the right to prepare derivative works based upon the Developed Works and the right to display the Developed Works.

 - (iv) Subcontracts: The Contractor further agrees that it will include the requirements of this **Section 46** in any subcontractor or other agreement with third parties who in any way participate in the creation or development of Developed Works.

 - (v) Completion or termination of Contract: Upon completion or termination of this Contract, Developed Works shall immediately be delivered by Contractor to the Commonwealth.

 - (vi) Warranty of non-infringement: Contractor represents and warrants that the Developed Works are original and do not infringe any copyright,

patent, trademark, or other intellectual property right of any third party and are in conformance with the intellectual property laws and regulations of the United States.

- (c) Patent ownership. Contractor and its subcontractors shall retain ownership to patentable items, patents, processes, inventions or discoveries (collectively, the Patentable Items) made by the Contractor during the performance of this Contract. Notwithstanding the foregoing, the Commonwealth shall be granted a nonexclusive, nontransferable, royalty free license to use or practice the Patentable Items. Commonwealth may disclose to third parties any such Patentable Items made by Contractor or any of its subcontractors under the scope of work for the Project that have been previously publicly disclosed. Commonwealth understands and agrees that any third party disclosure will not confer any license to such Patentable Items.
- (d) Federal government interests. Certain funding under this Contract may be provided by the federal government. Accordingly, the rights to Developed Works or Patentable Items of Contractors or subcontractors hereunder will be further subject to government rights as set forth in 37 C.F.R. § 401, as amended, and other applicable law or regulations.
- (e) Usage rights. Except as otherwise covered by this **Section 46**, either Party, in the ordinary course of conducting business, may use any ideas, concepts, know-how, methodologies, processes, components, technologies, algorithms, designs, modules or techniques relating to the Services.
- (f) Contractor's copyright notice obligations. Contractor will affix the following Copyright Notice to the Developed Works developed under this **Section 46** and all accompanying documentation: "*Copyright © [year] by the Commonwealth of Pennsylvania. All Rights Reserved.*" This notice shall appear on all versions of the Developed Works delivered under this Contract and any associated documentation. It shall also be programmed into any and all Developed Works delivered hereunder so that it appears at the beginning of all visual displays of such Developed Works.

47. SOURCE CODE AND ESCROW ITEMS OBLIGATIONS

- (a) Source Code. Simultaneously with delivery of the Developed Works to Commonwealth, Contractor shall deliver a true, accurate and complete copy of all source codes relating to the Developed Works.
- (b) Escrow. To the extent that Developed Works and/or any perpetually-licensed software include application software or other materials generally licensed by the Contractor, Contractor agrees to place in escrow with an escrow agent copies of the most current version of the source code for the applicable software that is

included as a part of the Services, including all updates, improvements, and enhancements thereof from time to time developed by Contractor.

- (c) Escrow agreement: An escrow agreement must be executed by the parties, with terms acceptable to the Commonwealth prior to deposit of any source code into escrow.
- (d) Obtaining source code. Contractor agrees that upon the occurrence of any event or circumstance which demonstrates with reasonable certainty the inability or unwillingness of Contractor to fulfill its obligations to Commonwealth under this Contract, Commonwealth shall be able to obtain the source code of the then-current source codes related to Developed Works and/or any Contractor Property placed in escrow under **Section 47(b)** from the escrow agent.

48. LOCATION, STATUS AND DISPOSITION OF DATA

Unless the Solicitation specifies otherwise:

- (a) All Data must be stored within the United States.
- (b) The Contractor shall be responsible for maintaining the privacy, security and integrity of Data in the Contractor's or its subcontractors' possession.
- (c) All Data shall be provided to the Commonwealth upon request, in a form acceptable to the Commonwealth and at no cost.
- (d) Any Data shall be destroyed by the Contractor at the Commonwealth's request.
- (e) Any Data shall be held for litigation or public records purposes by the Contractor at the Commonwealth's request, and in accordance with the security, privacy and accessibility requirements of this Contract.

49. PUBLICATION RIGHTS AND/OR COPYRIGHTS

- (a) Except as otherwise provided in **Section 46, Ownership of Developed Works**, the Contractor shall not publish any of the results of the work 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 the Contract, 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.

50. CHANGE OF OWNERSHIP OR INSOLVENCY

In the event that the Contractor should change ownership for any reason whatsoever, the Commonwealth shall have the exclusive option of continuing under the terms and conditions of this Contract with the Contractor or its successors or assigns for the full remaining term of this Contract, or continuing under the terms and conditions of this Contract with the Contractor or its successors or assigns for such period of time as is necessary to replace the products, materials, reports, studies, or computer programs, or immediately terminating this Contract. Nothing in this **Section 50** limits the Commonwealth's exercise of any rights that the Commonwealth may have under **Section 27, Termination**.

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. COMPLIANCE WITH LAWS

- (a) The Contractor shall comply with all federal, state and local laws, regulations and policies applicable to its Services, 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 shall modify this Contract, via **Section 26, Changes**, to the extent reasonably necessary to:
 - (i) Ensure that such Services will be in full compliance with such laws, regulations and policies; and
 - (i) Modify the rates applicable to such Supplies or Services, unless otherwise indicated in the Solicitation.

53. 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 **Subsection 53(a)**.

54. EXAMINATION OF RECORDS

- (a) The Contractor agrees to maintain, using its standard procedures, and in accordance with Generally Accepted Accounting Principles, books, records, documents, and other evidence pertaining to the charges under this Contract to the extent and in such detail as will properly reflect all charges for which reimbursement is claimed under the provisions of this Contract.
- (b) The Contractor agrees to make available at the office of the Contractor at all reasonable times, and upon reasonable written notice, during the term of this Contract and the period set forth in **Subsection 54(c)**, any of the records for inspection, audit, or reproduction by any authorized Commonwealth representative. To the extent allowed by applicable laws or regulations, the Commonwealth agrees to maintain any documents so provided in accordance with the confidentiality provisions in **Section 31, Confidentiality, Privacy and Compliance**.
- (c) The Contractor shall preserve and make available its records for a period of **three (3) years** from the date of final payment under this Contract:
 - (i) If this Contract is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of **three (3) years** from the date of any resulting final settlement.
 - (ii) Non-privileged records which relate to litigation or the settlement of claims arising out of the performance of this Contract, or charges under this Contract as to which exception has been taken by the auditors, shall be

retained by the Contractor until such litigation, claims, or exceptions have been finally resolved.

- (d) Except for documentary evidence retained pursuant to **Paragraph 54(c)(ii)**, the Contractor may in fulfillment of its obligation to retain its records as required by this **Section 54** substitute photographs, microphotographs, or other authentic reproductions of such records, after the expiration of **two (2) years** following the last day of the month of reimbursement to the Contractor of the invoice or voucher to which such records relate, unless a shorter period is authorized by the Commonwealth with the concurrence of its auditors.
- (e) The provisions of this **Section 54** shall be applicable to and included in each subcontract hereunder.

55. SINGLE AUDIT ACT OF 1984

In compliance with the [Single Audit Act of 1984](#), as amended, the Contractor agrees to the following:

- (a) 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).
- (b) 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](#), as amended, 31 U.S.C. § 7501, *et seq.*, and all rules and regulations promulgated pursuant to the Act.
- (c) 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.
- (d) 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](#), as amended.

56. AGENCY-SPECIFIC SENSITIVE AND CONFIDENTIAL COMMONWEALTH DATA (IF APPLICABLE)

- (a) Contractor understands that its level of access may allow it to view or access highly sensitive and confidential Commonwealth and third party data. This data is subject to various state and federal laws, regulations and policies that vary from agency to agency, and from program to program within an agency. If applicable, prior to deployment of the Supplies on any Commonwealth agency facilities, the Contractor must receive and sign off on particular instructions and limitations as

dictated by that Commonwealth agency, including but not limited to, as necessary, HIPAA Business Associate Agreements, a sample of which is attached to these terms as **Exhibit A**. This sign-off document (a sample of which is attached to these terms as Attachment 3 to **Exhibit A**, will include a description of the nature of the data which may be implicated based on the nature of the Contractor's access, and will incorporate the Business Associate Agreement if it is applicable.

- (b) Contractor hereby certifies and warrants that, after being informed by the Commonwealth agency of the nature of the data which may be implicated and prior to the installation of the Supplies), the Contractor is and shall remain compliant with all applicable state and federal laws, regulations and policies regarding the data's protection, and with the requirements memorialized in every completed and signed sign-off document. Every sign-off document completed by a Commonwealth agency and signed by at least one signatory authorized to bind the Contractor is valid and is hereby integrated and incorporated by reference into this Contract via Purchase Orders issued under this Contract.
- (c) This **Section 56** does not require a Commonwealth agency to exhaustively list the laws, regulations or policies to which implicated data is subject; the Commonwealth agency is obligated only to list the nature of the data implicated by the Contractor's access, to refer the Contractor to its privacy and security policies, and to specify requirements that are not otherwise inherent in compliance with applicable laws, regulations and policies.
- (d) The requirements of this **Section 56** are in addition to and not in lieu of other requirements of this Contract, its Exhibits, Appendices and Attachments, having to do with data privacy and security, including but not limited to the requirement that the Contractor comply with all applicable Commonwealth ITPs.
- (e) Contractor shall conduct additional background checks, in addition to those required in **Section 28, Background Checks**, as may be required by a Commonwealth agency in its sign-off documents. The Contractor shall educate and hold its agents, employees, contractors and subcontractors to standards at least as stringent as those contained in this Contract. The Contractor shall provide information regarding its agents, employees, contractors and subcontractors to the Commonwealth upon request.

57. FEDERAL REQUIREMENTS

If applicable, the Contractor must receive and sign off on particular federal requirements that a Commonwealth agency may be required to include when utilizing federal funds to procure the Supplies and Services. The Commonwealth agency will inform the Contractor whether they must execute a sign-off document as required by the federal government.

58. 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. 394), *as amended*, 35 P.S. § 691.601 *et seq*; the Pennsylvania Solid Waste Management Act, Act of July 7, 1980 (P.L. 380, No. 97), *as amended*, 35 P.S. § 6018.101 *et seq*; and the Dam Safety and Encroachment Act, Act of November 26, 1978 (P.L. 1375, No. 325), *as amended*, 32 P.S. § 693.1.

59. NONDISCRIMINATION CLAUSE/SEXUAL HARASSMENT CLAUSE

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, each 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) The Contractor and each subcontractor 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) The Contractor and each subcontractor 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, within the time periods requested by the Commonwealth, furnish all necessary employment documents and records and permit access to their books, records, and accounts by the contracting agency and the Bureau of Diversity, Inclusion and Small Business Opportunities (BDISBO), for purpose of ascertaining compliance with provisions of this Nondiscrimination/Sexual Harassment Clause. Within fifteen (15) days after award of any contract, the Contractor shall be required to complete, sign and submit Form STD-21, the "Initial Contract Compliance Data" form. If the contract is a construction contract, then the Contractor shall be required to complete, sign and submit Form STD-28, the "Monthly Contract Compliance Report for Construction Contractors," each month no later than the 15th of the month following the reporting period beginning with the initial job conference and continuing through the completion of the project. Those contractors who

have fewer than five employees or whose employees are all from the same family or who have completed the Form STD-21 within the past 12 months may, within the fifteen (15) days, request an exemption from the Form STD-21 submission requirement from the contracting agency.

- (f) The Contractor shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that those provisions applicable to subcontractors 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.

60. CONTRACTOR INTEGRITY PROVISIONS

It is essential that those who seek to contract with the Commonwealth of Pennsylvania observe high standards of honesty and integrity. They must conduct themselves in a manner that fosters public confidence in the integrity of the Commonwealth procurement process.

In furtherance of this policy, Contractor agrees to the following:

- (a) Contractor shall maintain the highest standards of honesty and integrity during the performance of this contract and shall take no action in violation of state or federal laws or regulations or any other applicable laws or regulations, or other requirements applicable to Contractor or that govern contracting with the Commonwealth.
- (b) Contractor shall establish and implement a written business integrity policy, which includes, at a minimum, the requirements of these provisions as they relate to Contractor employee activity with the Commonwealth and Commonwealth employees, and which is distributed and made known to all Contractor employees.
- (c) Contractor, its affiliates, agents and employees shall not influence, or attempt to influence, any Commonwealth employee to breach the standards of ethical conduct for Commonwealth employees set forth in the [Public Official and Employees Ethics Act, 65 Pa. C. S. §§ 1101, et seq.](#); [the State Adverse Interest Act, 71 P.S. § 776.1, et seq.](#); and the [Governor's Code of Conduct, Executive Order 1980-18, 4 Pa. Code § 7.151, et seq.](#), or to breach any other state or federal law or regulation.
- (d) Contractor, its affiliates, agents and employees shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any

other person at the direction or request of any Commonwealth official or employee.

- (e) Contractor, its affiliates, agents and employees shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any other person, the acceptance of which would violate the [*Governor's Code of Conduct, Executive Order 1980-18, 4 Pa. Code § 7.151, et seq.*](#) or any statute, regulation, statement of policy, management directive or any other published standard of the Commonwealth.
- (f) Contractor, its affiliates, agents and employees shall not, 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 Commonwealth official or employee.
- (g) Contractor, its affiliates, agents, employees, or anyone in privity with him or her shall not accept or agree to accept from any person, any gratuity in connection with the performance of work under the contract, except as provided in the contract.
- (h) Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on this project, unless the financial interest is disclosed to the Commonwealth in writing and the Commonwealth consents to Contractor's financial interest prior to Commonwealth execution of the contract. Contractor shall disclose the financial interest to the Commonwealth at the time of bid or proposal submission, or if no bids or proposals are solicited, no later than Contractor's submission of the contract signed by Contractor.
- (i) Contractor, its affiliates, agents and employees shall not disclose to others any information, documents, reports, data, or records provided to, or prepared by, Contractor under this contract without the prior written approval of the Commonwealth, except as required by the [*Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104*](#), or other applicable law or as otherwise provided in this contract. Any information, documents, reports, data, or records secured by Contractor from the Commonwealth or a third party in connection with the performance of this contract shall be kept confidential unless disclosure of such information is:
 - (i) Approved in writing by the Commonwealth prior to its disclosure; or
 - (ii) Directed by a court or other tribunal of competent jurisdiction unless the contract requires prior Commonwealth approval; or
 - (iii) Required for compliance with federal or state securities laws or the requirements of national securities exchanges; or

- (iv) Necessary for purposes of Contractor's internal assessment and review; or
 - (v) Deemed necessary by Contractor in any action to enforce the provisions of this contract or to defend or prosecute claims by or against parties other than the Commonwealth; or
 - (vi) Permitted by the valid authorization of a third party to whom the information, documents, reports, data, or records pertain: or
 - (vii) Otherwise required by law.
- (j) Contractor certifies that neither it nor any of its officers, directors, associates, partners, limited partners or individual owners has not been officially notified of, charged with, or convicted of any of the following and agrees to immediately notify the Commonwealth agency contracting officer in writing if and when it or any officer, director, associate, partner, limited partner or individual owner has been officially notified of, charged with, convicted of, or officially notified of a governmental determination of any of the following:
- (i) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property.
 - (ii) Commission of fraud or a criminal offense or other improper conduct or knowledge of, approval of or acquiescence in such activities by Contractor or any affiliate, officer, director, associate, partner, limited partner, individual owner, or employee or other individual or entity associated with:
 - (1) obtaining;
 - (2) attempting to obtain; or
 - (3) performing a public contract or subcontract.

Contractor's acceptance of the benefits derived from the conduct shall be deemed evidence of such knowledge, approval or acquiescence.
 - (iii) Violation of federal or state antitrust statutes.
 - (iv) Violation of any federal or state law regulating campaign contributions.
 - (v) Violation of any federal or state environmental law.

- (vi) Violation of any federal or state law regulating hours of labor, minimum wage standards or prevailing wage standards; discrimination in wages; or child labor violations.
- (vii) Violation of the *Act of June 2, 1915* (P.L. 736, No. 338), known as the *Workers' Compensation Act, 77 P.S. 1 et seq.*
- (viii) Violation of any federal or state law prohibiting discrimination in employment.
- (ix) Debarment by any agency or department of the federal government or by any other state.
- (x) Any other crime involving moral turpitude or business honesty or integrity.

Contractor acknowledges that the Commonwealth may, in its sole discretion, terminate the contract for cause upon such notification or when the Commonwealth otherwise learns that Contractor has been officially notified, charged, or convicted.

- (k) If this contract was awarded to Contractor on a non-bid basis, Contractor must, (as required by Section 1641 of the *Pennsylvania Election Code*) file a report of political contributions with the Secretary of the Commonwealth on or before February 15 of the next calendar year. The report must include an itemized list of all political contributions known to Contractor by virtue of the knowledge possessed by every officer, director, associate, partner, limited partner, or individual owner that has been made by:
 - (i) Any officer, director, associate, partner, limited partner, individual owner or members of the immediate family when the contributions exceed an aggregate of one thousand dollars (\$1,000) by any individual during the preceding year; or
 - (ii) Any employee or members of his immediate family whose political contribution exceeded one thousand dollars (\$1,000) during the preceding year.

To obtain a copy of the reporting form, Contractor shall contact the Bureau of Commissions, Elections and Legislation, Division of Campaign Finance and Lobbying Disclosure, Room 210, North Office Building, Harrisburg, PA 17120.

- (l) Contractor shall comply with requirements of the [*Lobbying Disclosure Act, 65 Pa. C. S. § 13A01, et seq.*](#), and the regulations promulgated pursuant to that law. Contractor employee activities prior to or outside of formal Commonwealth procurement communication protocol are considered lobbying and subjects the

Contractor employees to the registration and reporting requirements of the law. Actions by outside lobbyists on Contractor's behalf, no matter the procurement stage, are not exempt and must be reported.

- (m) When Contractor has reason to believe that any breach of ethical standards as set forth in law, the Governor's Code of Conduct, or in these provisions has occurred or may occur, including but not limited to contact by a Commonwealth officer or employee which, if acted upon, would violate such ethical standards, Contractor shall immediately notify the Commonwealth contracting officer or Commonwealth Inspector General in writing.
- (n) Contractor, by submission of its bid or proposal and/or execution of this contract and by the submission of any bills, invoices or requests for payment pursuant to the contract, certifies and represents that it has not violated any of these contractor integrity provisions in connection with the submission of the bid or proposal, during any contract negotiations or during the term of the contract.
- (o) Contractor shall cooperate with the Office of Inspector General in its investigation of any alleged Commonwealth employee breach of ethical standards and any alleged Contractor non-compliance with these provisions. Contractor agrees to make identified Contractor employees available for interviews at reasonable times and places. Contractor, upon the inquiry or request of the Office of Inspector General, 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 Contractor's integrity and compliance with these provisions. Such information may include, but shall not be limited to, Contractor's business or financial records, documents or files of any type or form that refers to or concern this contract.
- (p) For violation of any of these Contractor Integrity Provisions, the Commonwealth may terminate this and any other contract with Contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all additional costs and expenses incurred in obtaining another contractor to complete performance under this contract, and debar and suspend Contractor from doing business with the Commonwealth. These rights and remedies are cumulative, and the use or non-use 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.
- (q) For purposes of these Contractor Integrity Provisions, the following terms shall have the meanings found in this Paragraph (q).
 - (i) "Confidential information" means information that a) is not already in the public domain; b) is not available to the public upon request; c) is not or does not become generally known to Contractor from a third party without an obligation to maintain its confidentiality; d) has not become generally

known to the public through an act or omission of Contractor; or e) has not been independently developed by Contractor without the use of confidential information of the Commonwealth.

- (ii) “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 pre-qualification, bid, proposal, or contractual terms, the Commonwealth shall be deemed to have consented by virtue of execution of this contract.
- (iii) “Contractor” means the individual or entity that has entered into this contract with the Commonwealth, including those directors, officers, partners, managers, and owners having more than a five percent interest in Contractor.
- (iv) “Financial interest” means:
 - (1) Ownership of more than a five percent interest in any business; or
 - (2) Holding a position as an officer, director, trustee, partner, employee, or holding any position of management.
- (v) “Gratuity” means tendering, giving or providing anything of more than nominal monetary value including, but not limited to, cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind. The exceptions set forth in the *Governor’s Code of Conduct, Executive Order 1980-18*, the 4 Pa. Code § 7.153(b), shall apply.
- (vi) “Immediate family” means a spouse and any unemancipated child.
- (vii) “Non-bid basis” means a contract awarded or executed by the Commonwealth with Contractor without seeking bids or proposals from any other potential bidder or offeror.
- (viii) “Political contribution” means any payment, gift, subscription, assessment, contract, payment for services, dues, loan, forbearance, advance or deposit of money or any valuable thing, to a candidate for public office or to a political committee, including but not limited to a political action committee, made for the purpose of influencing any election in the Commonwealth of Pennsylvania or for paying debts incurred by or for a candidate or committee before or after any election.

61. ASSIGNMENT OF RIGHTS UNDER THE ANTITRUST LAWS

The Contractor and the Commonwealth recognize 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 subject to this Contract.

62. WARRANTIES

Except as otherwise set forth in the Contract, the Contractor warrants that the Services, Supplies and Developed Works will conform in all material respects to the functional specifications for the Services, Supplies and Developed Works and/or the requirements of the Contract. The warranty period for the Services, Supplies and Developed Works shall be **90 days** from final acceptance. If third-party Services, Supplies or Developed Works are subject to a warranty that exceeds **90 days** from final acceptance, the longer warranty period shall apply. The Contractor shall correct any non-conformity within the warranty period specified herein.

- (a) Disruption. The Contractor hereby represents and warrants to the Commonwealth that the Contractor will not cause, or take any action that, directly or indirectly, may cause a disruption of the Commonwealth's operations.
- (b) Nonconformity. In the event of any nonconformity with the foregoing warranties, the Commonwealth will provide written notification of such nonconformity to the Contractor and the Contractor, at no cost to the Commonwealth, shall within ten **(10) days'** notice of the nonconformity, commence work to remedy the nonconformity and shall work diligently, at no charge to the Commonwealth, until such time as the deliverable conforms, in all material respects, to the Service requirements and/or the functional specifications of the Developed Works set forth in this Contract. The Contractor shall have no obligation with respect to nonconformities arising out of:
 - (i) Modifications to Developed Works made by the Commonwealth;
 - (ii) Use of the Developed Works not in accordance with the documentation or specifications applicable thereto;
 - (iii) Failure by the Commonwealth to implement any corrections or enhancements made available by the Contractor;
 - (iv) Combination of the Developed Works with any items not supplied or approved by the Contractor; or
 - (v) Failure of any software licensed under a separate license agreement to conform to its specifications or documentation.

- (c) Industry standards. The Contractor hereby represents and warrants to the Commonwealth that the Services shall be performed in accordance with industry standards using the utmost care and skill.
- (d) Right to perform. The Contractor hereby represents and warrants to the Commonwealth that the Contractor has the necessary legal rights, including licenses to third party products, tools or materials, to perform the Services and deliver the Developed Works under this Contract.
- (e) Sole warranties. THE FOREGOING EXPRESS WARRANTIES ARE THE CONTRACTOR'S SOLE AND EXCLUSIVE WARRANTIES AND NO OTHER WARRANTIES, EXPRESS OR IMPLIED, SHALL APPLY, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

63. LIQUIDATED DAMAGES

- (a) By accepting this Contract, the Contractor agrees to the delivery requirements of this Contract. If a Contract schedule is not met, 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 **Section 63** and agree that the Contractor shall pay such amount as liquidated damages, not as a penalty.
- (b) The amount of liquidated damages for failure to meet Milestones is set forth in **Appendix J (Service Level Agreements)**.
- (c) If, **Appendix J (Service Level Agreements)** indicates that Contractor may earn back liquidated damages, then Contractor shall have the time specified in **Appendix J (Service Level Agreements)**, as indicated, to meet the Acceptance Criteria for the Milestone and earn back the Milestone Credit. If Contractor fails to meet the Acceptance Criteria within 30 days following the 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 **Subsection 63(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 or failure is caused by the Commonwealth, as described in **Appendix J (Service Level Agreements)**, no liquidated damages will be applied.

64. SERVICE LEVELS

- (a) The Contractor shall comply with the procedures and requirements of the Service Level Agreements as contained in the Contractor's proposal response to **Section III-4** of the RFP and **Appendix J (Service Level Agreements)**, which are made part of this Contract.
- (b) Where there are expressly defined Service Levels, Contractor shall measure and report its performance against these standards on at least a monthly basis, except as may otherwise be agreed between the parties. 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.
- (c) The Commonwealth's acceptance of any financial credit incurred by the Contractor in favor of the Commonwealth for a Service Level default ("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 other claims for liquidated damages, injunctive relief and termination rights; provided however, Service Level Credits paid would be credited against any such claims for damages.

65. FORCE MAJEURE

Neither party will incur any liability to the other if its performance of any obligation under this Contract is prevented or delayed by causes beyond its control and without the fault or negligence of either party. Causes beyond a party's control may include, but are not limited to, acts of God or war, changes in controlling law, regulations, orders or the requirements of any governmental entity, severe weather conditions, civil disorders,

natural disasters, fire, epidemics and quarantines, general strikes throughout the trade, and freight embargoes.

The Contractor shall notify the Commonwealth orally within **5 days** and in writing within **10 days** of the date on which the Contractor becomes aware, or should have reasonably become aware, that such cause would prevent or delay its performance. Such notification shall (i) describe fully such cause(s) and its effect on performance, (ii) state whether performance under the contract is prevented or delayed and (iii) if performance is delayed, state a reasonable estimate of the duration of the delay. The Contractor shall have the burden of proving that such cause(s) delayed or prevented its performance despite its diligent efforts to perform and shall produce such supporting documentation as the Commonwealth may reasonably request. After receipt of such notification, the Commonwealth may elect to cancel the Contract, or to extend the time for performance as reasonably necessary to compensate for the Contractor's delay.

In the event of a declared emergency by competent governmental authorities, the Commonwealth by notice to the Contractor, may suspend all or a portion of the Contract.

66. PUBLICITY/ADVERTISEMENT

The Contractor shall not issue news releases, internet postings, advertisements, endorsements, or any other public communication without prior written approval of the Commonwealth, and then only in coordination with the Commonwealth. This includes the use of any trademark or logo.

67. TERMINATION ASSISTANCE

- (a) **General.** Upon expiration of the Contract and/or upon the Commonwealth's request, Contractor shall provide Termination Assistance Services directly to the Commonwealth, or to any replacement provider designated by the Commonwealth, any successors or assigns of such entities or any of their designee(s). Contractor shall take all necessary and appropriate actions to accomplish a complete, timely, and seamless transition of any terminated Services from Contractor to the Commonwealth, or to any replacement provider designated by the Commonwealth, without material interruption of or material adverse impact on the terminated Services or any other services provided by a third party or Services that Contractor shall continue to provide (each transition, an "Assistance Event"). Contractor shall cooperate with the Commonwealth and any new contractor and otherwise promptly take all steps required or reasonably requested to assist the Commonwealth in effecting a complete and timely Termination Assistance Services of any terminated Services. Contractor shall provide all information regarding the terminated Services or as otherwise needed for Termination Assistance Services, including Data conversion, interface specifications, and related professional services. Contractor shall provide for the prompt and orderly conclusion of all terminated Services, as the Commonwealth may direct, including completion or partial completion of projects, documentation of work in process, and other measures to assure an orderly transition to the

Commonwealth or the Commonwealth's designee. Contractor's obligation to provide the Termination Assistance Services shall not cease until an Assistance Event satisfactory to the Commonwealth, including the performance by Contractor of all asset-transfers and other obligations of Contractor provided in this **Section 67**, has been completed in accordance with mutually agreed to completion or acceptance criteria or if no agreed acceptance criteria exist, then to the Commonwealth's reasonable satisfaction.

- (1) **Period of Provision.** Contractor shall provide Termination Assistance Services commencing on the date a determination is made by the Commonwealth that there shall be an Assistance Event.
- (2) **Notice of an Assistance Event.** The Commonwealth will provide Contractor with written notice of an Assistance Event. Such notice will include a description of the Services that are to be terminated or discontinued, the affected Commonwealth Agencies, and the anticipated effective date of the Assistance Event. The Commonwealth may modify or update any of the information provided in the initial notice of an Assistance Event from time to time by a supplemental notice from the Commonwealth to Contractor.
- (3) **Extension of Services.** The Commonwealth may elect, upon thirty (30) days prior notice to Contractor, to extend the period for performance of Termination Assistance Services (in whole or in part), in its sole discretion, provided that the total of all such extensions shall not result in Termination Assistance Services being performed beyond twenty-four (24) months following the effective date of the applicable Assistance Event without Contractor's consent. In each case, if the Commonwealth provides less than thirty (30) days prior notice of an extension, Contractor shall nonetheless use reasonable efforts to comply with the Commonwealth's request and provide the requested Services.
- (4) **Firm Commitment.** Contractor shall provide Termination Assistance Services regardless of the reason for the Assistance Event.
- (5) **Performance.** Contractor shall provide all Termination Assistance Services subject to and in accordance with the terms and conditions of this Contract. Contractor shall perform Termination Assistance Services with at least the same degree of accuracy, quality, completeness, timeliness, responsiveness and resource efficiency as it is or was required to provide the same or similar Services in accordance with this Contract. The quality and level of performance

of Termination Assistance Services provided by Contractor shall continue to meet or exceed the Service Levels and shall not be degraded or deficient in any respect. Service Level Credits shall be assessed for any failure to meet Service Levels during any period in which Termination Assistance Services are provided. If any period for performing any Termination Assistance Services extends beyond the expiration or the effective date of any termination of this Contract, the provisions of this Contract shall remain in full effect for the duration of such period.

- (b) **Scope.** As part of the Termination Assistance Services, Contractor shall timely transfer the control and responsibility for Services previously performed by or for Contractor to the Commonwealth and/or its designee(s), and upon Commonwealth request, shall execute any documents reasonably necessary to effect such transfers. Contractor shall also provide any and all information and assistance requested by the Commonwealth required for:
- (1) the systems and processes associated with the Services to operate and be maintained and enhanced efficiently;
 - (2) the Services to continue without interruption or adverse effect; and
 - (3) the orderly transfer of the Services (or replacement or supplemental services) to the Commonwealth and/or its designee(s).
- (c) **General Support.** Contractor shall:
- (1) assist the Commonwealth and/or its designee(s) in developing a written plan for the migration of the Services to the Commonwealth and/or its designee(s), which plan shall include (as requested by the Commonwealth) capacity planning, process planning, facilities planning, human resources planning, technology planning, telecommunications planning and other planning necessary to effect the transition,
 - (2) perform programming and consulting services as requested to assist in implementing the transition plan,
 - (3) train personnel designated by the Commonwealth and/or its designee(s) in the use of any processes or associated Equipment, materials, systems or tools used in connection with the provision of the Services as needed for such personnel to assume responsibility for performance of the Services,

- (4) provide a catalog of all processes, materials, the Commonwealth data, equipment, software, third party contracts and tools used to provide the Services,
- (5) assist in the execution of a parallel operation, data migration and testing process until the successful completion of the transition to the Commonwealth and/or its designee(s),
- (6) create and provide copies of any Commonwealth data Contractor's possession in the format and on the media requested by the Commonwealth and/or its designee(s),
- (7) provide other technical and process assistance, documentation and information as requested by the Commonwealth and/or its designee(s).

(d) **Personnel.**

- (1) **List of Contractor Personnel.** Contractor shall promptly provide to the Commonwealth a list, organized by location, and of the Contractor Personnel dedicated (fifty percent (50%) or more to the performance of the Services that are implicated by each Assistance Event. Such list shall, specify each such Contractor Personnel's job title and job responsibilities. The Commonwealth agrees not to disseminate any personally identifiable information contained in such list without Contractor's consent. Contractor shall not terminate, reassign or otherwise remove from the performance of the Services any such dedicated Contractor Personnel until after the end of the applicable Termination Assistance Services period unless such Contractor Personnel (1) voluntarily resigns from Contractor, (2) is dismissed by Contractor for cause or replaced as a result of unsatisfactory performance in respect of his or her duties and responsibilities to Contractor or Commonwealth pursuant to this Contract, 3) is unable to work due to his or her death or disability or 4) is not required by Contractor to provide the Termination Assistance Services.
- (2) **Right to Hire.** The Commonwealth shall be permitted, without interference (including through counter-offers) from Contractor (subject to this **Section 67**), to meet with, solicit and hire, effective after the later of (i) the date of the Commonwealth's notice of an Assistance Event and (ii) the completion of the Termination Assistance Services requiring such Contractor Personnel, any Contractor Personnel dedicated to the performance of the Services during the twelve (12) month period prior to the date of the Commonwealth's notice of an Assistance Event who are implicated

by that Assistance Event. Contractor hereby waives its rights, if any, under contracts with such Contractor Personnel restricting the ability of such Contractor Personnel to be recruited or hired by the Commonwealth (including waiving any right to restrict such personnel via non-compete agreements or other contractual means). Contractor shall provide the Commonwealth with reasonable assistance in their efforts to meet with, solicit and hire such Contractor Personnel, and shall give the Commonwealth and/or its designee(s) reasonable access to such Contractor Personnel for interviews, evaluations and recruitment. The Commonwealth shall endeavor to conduct the above-described activities in a manner that is not unnecessarily disruptive of Contractor's performance of its obligations under this Contract.

- (e) **Rates and Charges.** Except as provided in this Subsection and **Section 67(j)**, Contractor shall provide all Termination Assistance Services at no additional charge. The parties anticipate that Termination Assistance Services requested by the Commonwealth shall be provided by Contractor using Contractor Personnel already assigned to the performance of the Services and without adversely affecting Contractor's ability to meet its performance obligations. If such Termination Assistance Services cannot be provided using the dedicated resources without adversely affecting Contractor's ability to meet the Service Levels, charges for such Termination Assistance Services the Contractor may request a change via **Section 26, Changes**. Contractor shall maintain capability on at least thirty (30) days' notice at all times during the Term to deploy all necessary resources to perform any Termination Assistance Services.
- (f) **Information.** At the Commonwealth's request, Contractor shall provide to and/or make available for the Commonwealth review, at Contractor's sole cost and expense, any and all reports, data and information that the Commonwealth deems necessary in order to evaluate all options related to an Assistance Event. Contractor shall provide all such reports, data and information regardless of whether the Commonwealth has provided notice of or otherwise declared an Assistance Event.
- (g) **Breach.** Contractor acknowledges and agrees that, upon any breach or threatened breach by Contractor of its obligations under this **Section 67**, Commonwealth shall be entitled to seek injunctive relief, including an order of specific performance. The provisions of this **Section 67** will survive any expiration of the Term and any termination of this Contract.

68. NOTICE

Any written notice to any party under this Agreement shall be deemed sufficient if delivered personally, or by facsimile, telecopy, electronic or digital transmission (provided such delivery is confirmed), or by a recognized overnight courier service (e.g.,

DHL, Federal Express, etc.), with confirmed receipt, or by certified or registered United States mail, postage prepaid, return receipt requested, sent to the address such party may designate by notice given pursuant to this **Section 68**.

69. RIGHT-TO-KNOW LAW

- (a) The Pennsylvania [*Right-to-Know Law, 65 P.S. §§ 67.101—3104, as amended*](#), (“RTKL”) applies to this Contract. For the purpose of this **Section 69**, the term “the Commonwealth” shall refer to the contracting Commonwealth organization.
- (b) If the Commonwealth needs the Contractor’s assistance in any matter arising out of the RTKL that is related to this Contract, it shall notify the Contractor using the legal contact information provided in this Contract. The Contractor, at any time, may designate a different contact for such purpose upon reasonable prior written notice to the Commonwealth.
- (c) Upon written notification from the Commonwealth that it requires the Contractor’s assistance in responding to a request under the RTKL for information related to this Contract that may be in the Contractor’s possession, constituting, or alleged to constitute, a public record in accordance with the RTKL (“Requested Information”), the Contractor shall:
 - (1) Provide the Commonwealth, within **10 days** after receipt of written notification, access to, and copies of, any document or information in the Contractor’s possession arising out of this Contract that the Commonwealth reasonably believes is Requested Information and may be a public record under the RTKL; and
 - (2) Provide such other assistance as the Commonwealth may reasonably request, in order to comply with the RTKL with respect to this Contract.
- (d) If the Contractor considers the Requested Information to include a request for a Trade Secret or Confidential Proprietary Information, as those terms are defined by the RTKL, or other information that the Contractor considers exempt from production under the RTKL, the Contractor must notify the Commonwealth and provide, within **seven (7) days** of receiving the written notification, a written statement signed by a representative of the Contractor explaining why the requested material is exempt from public disclosure under the RTKL.
- (e) The Commonwealth will rely upon the written statement from the Contractor in denying a RTKL request for the Requested Information unless the Commonwealth determines that the Requested Information is clearly not protected from disclosure under the RTKL. Should the Commonwealth determine that the Requested Information is clearly not exempt from disclosure, the Contractor shall provide the Requested Information within **five (5) business days** of receipt of written notification of the Commonwealth’s determination.

- (f) If the Contractor fails to provide the Requested Information within the time period required by these provisions, the Contractor shall indemnify and hold the Commonwealth harmless for any damages, penalties, costs, detriment or harm that the Commonwealth may incur as a result of the Contractor's failure, including any statutory damages assessed against the Commonwealth.
- (g) The Commonwealth will reimburse the Contractor for any costs associated with complying with these provisions only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable.
- (h) The Contractor may file a legal challenge to any Commonwealth decision to release a record to the public with the Office of Open Records, or in the Pennsylvania Courts, however, the Contractor shall indemnify the Commonwealth for any legal expenses incurred by the Commonwealth as a result of such a challenge and shall hold the Commonwealth harmless for any damages, penalties, costs, detriment or harm that the Commonwealth may incur as a result of the Contractor's failure, including any statutory damages assessed against the Commonwealth, regardless of the outcome of such legal challenge. As between the parties, the Contractor agrees to waive all rights or remedies that may be available to it as a result of the Commonwealth's disclosure of Requested Information pursuant to the RTKL.
- (i) The Contractor's duties relating to the RTKL are continuing duties that survive the expiration of this Contract and shall continue as long as the Contractor has Requested Information in its possession.

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 **Section 29, 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. CONTROLLING TERMS AND CONDITIONS

The terms and conditions of this Contract shall be the exclusive terms of agreement between the Contractor and the Commonwealth. Other terms and conditions or additional terms and conditions included or referenced in the Contractor's website, quotations, invoices, business forms, click-through agreements, or other documentation

shall not become part of the parties' agreement and shall be disregarded by the parties, unenforceable by the Contractor, and not binding on the Commonwealth.

72. SMALL DIVERSE BUSINESS/SMALL BUSINESS COMMITMENT

Contractor shall meet and maintain the commitments to small diverse businesses in the Small Diverse Business and Small Business ("SDB/SB") portion of its Proposal. Any proposed change to a SDB/SB commitment must be submitted to the DGS Bureau of Diversity, Inclusion and Small Business Opportunities ("BDISBO"), which will make a recommendation as to a course of action to the Commonwealth Contracting Officer. Contractor shall complete the Prime Contractor's Quarterly Utilization Report and submit it to the Commonwealth Contracting Officer and BDISBO within **10 business days** at the end of each calendar quarter that the Contract is in effect.

73. WARRANTIES AND AGREEMENTS

(a) Contractor represents and warrants 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 state in which it is incorporated
- (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.

(b) Contractor agrees that:

- (1) Contractor has not disclosed any Confidential Information of Commonwealth.
- (2) The Contractor Software does not and will not, 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.

- (3) 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.
 - (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.
 - (4) 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.
 - (5) 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.
- (c) 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 Subcontractors and to allow Contractor and Contractor Subcontractors to use in accordance with the terms of this Contract any Commonwealth Software so disclosed to Contractor.

74. REQUIREMENTS FOR INFORMATION IN LEGAL PROCEEDINGS

- (a) If the Commonwealth notifies Contractor, or Contractor is otherwise aware, that particular Commonwealth Confidential Information may be within attorney-client or work-product privileges of the Commonwealth, then regardless of any applicable exclusions, Contractor (i) shall not disclose such Confidential

Information or take any other action that would result in waiver of such privileges and (ii) shall instruct all Contractor Personnel who may have access to such communications to maintain privileged material as strictly confidential and otherwise protect the Commonwealth privileges.

- (b) To the extent requested by the Commonwealth, Contractor shall comply with the Commonwealth's litigation response plan, including policies and procedures to prepare for and respond to discovery requests, subpoenas, investigatory demands, and other requirements for information related to legal and regulatory proceedings, as such plan may be revised from time to time, including preparing for and complying with requirements for preservation and production of data in connection with legal and regulatory proceedings and government investigations. Upon receipt of any request, demand, notice, subpoena, order or other legal information request relating to legal proceedings or investigations by third parties relating to any materials, the Confidential Information or related systems in Contractor possession, Contractor shall immediately notify the Commonwealth and provide the Commonwealth with a copy of all documentation of such legal information request, to the extent Contractor legally may do so and shall cooperate with the Commonwealth in responding to such request, demand, notice, subpoena, order or other legal information request.
- (c) Contractor's cost of complying with this section shall be at no additional charge to the Commonwealth to the extent that compliance can be accomplished with Contractor's then existing resources. If additional resources are required for compliance, they will be agreed upon by the parties in accordance with the Change Control Procedures, provided, however, that Contractor will not be entitled for payment under this **Section 74** with regard to items for which the Contractor is required to indemnify the Commonwealth.

75. RECYCLED MATERIALS

Except as specifically waived by the Department of General Services in writing, any products which are provided to the Commonwealth as a part of the performance of the Contract must meet the minimum percentage levels for total recycled content as specified below.

76. 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.

77. SURVIVAL

Sections 10, 31, 35, 36, 37, 38, 39, 41, 42, 45, 46, 47, 49, 53, 54, 55, 62, 67, 69 and 77 shall survive the expiration or termination of the Contract.

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA
BUSINESS ASSOCIATE AGREEMENT

WHEREAS, the _____ (Covered Entity) and _____ (Business Associate) intend to protect the privacy and security of certain Protected Health Information (PHI) to which Business Associate may have access in order to provide goods or services to or on behalf of Covered Entity, in accordance with the *Health Insurance Portability and Accountability Act of 1996*, as amended, Pub. L. No. 104-191 (HIPAA), the *Health Information Technology for Economic and Clinical Health (HITECH) Act*, as amended, Title XIII of Division A and Title IV of Division B of the *American Recovery and Reinvestment Act of 2009* (ARRA), as amended, Pub. L. No. 111-5 (Feb. 17, 2009) and related regulations, the HIPAA Privacy Rule (Privacy Rule), 45 C.F.R. Parts 160 and 164, as amended, the HIPAA Security Rule (Security Rule), 45 C.F.R. Parts 160, 162 and 164, as amended, 42 C.F.R. §§ 431.301-431.302, 42 C.F.R. Part 2, 45 C.F.R. § 205.50, 42 U.S.C. § 602(a)(1)(A)(iv), 42 U.S.C. § 1396a(a)(7), [35 P.S. § 7607](#), [50 Pa. C.S. § 7111](#), [71 P.S. § 1690.108\(c\)](#), [62 P.S. § 404](#), [55 Pa. Code Chapter 105](#), [55 Pa. Code Chapter 5100](#), the *Pennsylvania Breach of Personal Information Notification Act*, [73 P.S. § 2301--2329](#), all as amended, and other relevant laws, including subsequently adopted provisions applicable to use and disclosure of confidential information, and applicable agency guidance; and,

WHEREAS, Business Associate may receive PHI from Covered Entity, or may create or obtain PHI from other parties for use on behalf of Covered Entity, which PHI may be used or disclosed only in accordance with this Agreement and the standards established by applicable laws and agency guidance; and

WHEREAS, Business Associate may receive PHI from Covered Entity, or may create or obtain PHI from other parties for use on behalf of Covered Entity, which PHI must be handled in accordance with this Agreement and the standards established by HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule and other applicable laws and agency guidance.

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

1. Definitions.

- a. “**Business Associate**” shall have the meaning given to such term under HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule and agency guidance.
- b. “**Covered Entity**” shall have the meaning given to such term under HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule and agency guidance.

- c. “HIPAA” shall mean the *Health Insurance Portability and Accountability Act of 1996*, as amended, Pub. L. No. 104-191.
- d. “HITECH Act” shall mean the *Health Information Technology for Economic and Clinical Health (HITECH) Act*, as amended, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5 (Feb. 17, 2009).
- e. “Privacy Rule” shall mean the standards for privacy of individually identifiable health information in 45 C.F.R. Parts 160 and 164, as amended, and related agency guidance.
- f. “Protected Health Information” or “PHI” shall have the meaning given to such term under HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule (all as amended) and agency guidance.
- g. “Security Rule” shall mean the security standards in 45 C.F.R. Parts 160, 162 and 164, as amended, and related agency guidance.
- h. “Unsecured PHI” shall mean PHI that is not secured through the use of a technology or methodology as specified in HITECH Act regulations, as amended, and agency guidance or as otherwise defined in the HITECH Act, as amended.

2. 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 by or obtained on behalf of Covered Entity for the following stated purposes, except as otherwise stated in this Agreement:

NO OTHER DISCLOSURES OF PHI OR OTHER INFORMATION ARE PERMITTED.

3. BUSINESS ASSOCIATE OBLIGATIONS:

- a. **Limits on Use and Further Disclosure.** Business Associate shall not further use or disclose PHI provided by, or created or obtained on behalf of Covered Entity other than as permitted or required by this Addendum, as requested by Covered Entity, or as required by law and agency guidance.
- b. **Appropriate Safeguards.** Business Associate shall establish and maintain appropriate safeguards to prevent any use or disclosure of PHI other than as

provided for by this Agreement. Appropriate safeguards shall include implementing administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the electronic PHI that is created, received, maintained or transmitted on behalf of the Covered Entity and limiting use and disclosure to applicable minimum necessary requirements as set forth in applicable federal and state statutory and regulatory requirements and agency guidance.

- c. **Reports of Improper Use or Disclosure.** Business Associate hereby agrees that it shall report to _____ at _____, within two (2) days of discovery any use or disclosure of PHI not provided for or allowed by this Agreement.

- d. **Reports on Security Incidents.** In addition to following the breach notification requirements in section 13402 of the *Health Information Technology for Economic and Clinical Health Act of 2009* (“HITECH Act”), as amended, and related regulations, the Privacy Rule, the Security Rule, agency guidance and other applicable federal and state laws, Business Associate shall report to _____ at _____, within two (2) days of discovery any security incident of which it becomes aware. At the sole expense of Business Associate, Business Associate shall comply with all federal and state breach notification requirements, including those applicable to Business Associate and those applicable to Covered Entity. Business Associate shall indemnify the Covered Entity for costs associated with any incident involving the acquisition, access, use or disclosure of Unsecured PHI in a manner not permitted under federal or state law and agency guidance. For purposes of the security incident reporting requirement, inconsequential unsuccessful incidents that occur on a daily basis, such as scans, “pings,” or other unsuccessful attempts to penetrate computer networks or servers containing electronic PHI maintained by Business Associate, need not be reported in accordance with this section, but may instead be reported in the aggregate on a monthly basis.

- e. **Subcontractors and Agents.** At any time PHI is provided or made available to Business Associate subcontractors or agents, Business Associate shall provide only the minimum necessary PHI for the purpose of the covered transaction and shall first enter into a subcontract or contract with the subcontractor or agent that contains substantially the same terms, conditions and restrictions on the use and disclosure of PHI as contained in this Agreement.

- f. **Right of Access to PHI.** Business Associate shall allow, for any PHI maintained in a designated record set, Covered Entity to have access to and copy an individual’s PHI within **five (5) business days** of receiving a written request from the Covered Entity. Business Associate shall provide PHI in the format requested, if it is readily producible in such form and format; or if not, in a readable hard copy form or such other form and format as agreed to by Business Associate and the individual. If the request is for information maintained in one

or more designated record sets electronically and if the individual requests an electronic copy of such information, Business Associate must provide Covered Entity with access to the PHI in the electronic form and format requested by the individual, if it is readily producible in such form and format; or, if not, in a readable electronic form and format as agreed to by the Business Associate and Covered Entity. If any individual requests from Business Associate or its agents or subcontractors access to PHI, Business Associate shall notify Covered Entity within five (5) business days. Business Associate shall further conform with all of the requirements of [45 C.F.R. § 164.524](#) and other applicable laws, including the HITECH Act, as amended, related regulations and agency guidance. Business Associate shall indemnify Covered Entity for costs/damages associated with Business Associate's failure to respond within the time frames set forth in this Section 3(f).

- g. **Amendment and Incorporation of Amendments.** Within five (5) business days of receiving a written request from Covered Entity for an amendment of PHI maintained in a designated record set, Business Associate shall make the PHI available and incorporate the amendment to enable Covered Entity to comply with [45 C.F.R. § 164.526](#), applicable federal and state law, including the HITECH Act, as amended and related regulations, the Privacy Rule, the Security Rule and agency guidance. If any individual requests an amendment from Business Associate or its agents or subcontractors, Business Associate shall notify Covered Entity within five (5) business days.
- h. **Provide Accounting of Disclosures.** Business Associate shall maintain a record of all disclosures of PHI made by Business Associate which are not excepted from disclosure accounting requirements under HIPAA, HITECH and related regulations, the Privacy Rule or the Security Rule (all as amended) in accordance with [45 C.F.R. § 164.528](#) and other applicable laws and agency guidance, including the HITECH Act and related regulations. Such records shall include, for each disclosure, the date of the disclosure, the name and address of the recipient of the PHI, a description of the PHI disclosed, the name of the individual who is the subject of the PHI disclosed, and the purpose of the disclosure. Business Associate shall make such record available to the Covered Entity within five (5) business days of a written request for an accounting of disclosures. Business Associate shall indemnify Covered Entity for costs/damages associated with Business Associate's failure to respond within the time frames set forth in this Section 3(h).
- i. **Requests for Restriction.** Business Associate shall comply with requests for restrictions on disclosures of PHI about an individual if the disclosure is to a health plan for purposes of carrying out payment or health care operations (and is not for treatment purposes), and the PHI pertains solely to a health care item or service for which the service involved was paid in full out-of-pocket. For other requests for restriction, Business associate shall otherwise comply with the

Privacy Rule, as amended, and other applicable statutory and regulatory requirements and agency guidance.

- j. **Access to Books and Records.** Business Associate shall 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 applicable laws and agency guidance.
- k. **Return or Destruction of PHI.** At termination of this Agreement, Business Associate hereby agrees to return or destroy all PHI provided by or obtained on behalf of Covered Entity. Business Associate agrees not to retain any copies of the PHI after termination of this Agreement. If return or destruction of the PHI is not feasible, Business Associate agrees to extend the protections of this Agreement 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.
- l. **Maintenance of PHI.** Notwithstanding Section 3(k) of this Agreement, Business Associate and its subcontractors or agents shall retain all PHI throughout the term of the Agreement and shall continue to maintain the information required under the various documentation requirements of this Agreement (such as those in Section 3(h)) for a period of six (6) years after termination of the Agreement, unless Covered Entity and Business Associate agree otherwise.
- m. **Mitigation Procedures.** Business Associate agrees to establish and to provide to Covered Entity 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 Agreement or the Privacy Rule, as amended. 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 Agreement or applicable laws and agency guidance.
- n. **Sanction Procedures.** Business Associate agrees that it shall develop and implement a system of sanctions for any employee, subcontractor or agent who violates this Agreement, applicable laws or agency guidance.
- o. **Grounds for Breach.** Non-compliance by Business Associate with this Agreement or the Privacy or Security Rules, as amended, is a breach of the Agreement, 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. Commonwealth may elect to terminate Business Associate's contract for such breach.
- p. **Termination by Commonwealth.** Business Associate authorizes termination of this Agreement by the Commonwealth if the Commonwealth determines, in its

sole discretion, that the Business Associate has violated a material term of this Agreement.

- q. **Failure to Perform Obligations.** In the event Business Associate fails to perform its obligations under this Agreement, Covered Entity may immediately discontinue providing PHI to Business Associate. Covered Entity may also, at its option, require Business Associate to submit to a plan of compliance, including monitoring by Covered Entity and reporting by Business Associate, as Covered Entity in its sole discretion determines to be necessary to maintain compliance with this Agreement and applicable laws and agency guidance.
- r. **Privacy Practices.** Covered Entity will provide Business Associate with all applicable forms, including but not limited to, any form used for Notice of Privacy Practices, Accounting for Disclosures, or Authorization, upon the effective date designated by the Program or Covered Entity. Covered Entity may change applicable privacy practices, documents and forms. The Business Associate shall make reasonable endeavors to implement changes as soon as practicable, but not later than 45 days from the date of notice of the change. Business Associate shall otherwise comply with all applicable laws and agency guidance pertaining to notices of privacy practices, including the requirements set forth in [45 C.F.R. § 164.520](#).

4. 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 applicable law and agency guidance, as well as changes to such notice. Covered Entity will post on its website any material changes to its notice of privacy practices by the effective date of the material change.
- b. **Permissions.** Covered Entity shall provide Business Associate with any changes in, or revocation of, permission by individual to use or disclose PHI of which Covered Entity is aware, if such changes affect Business Associate's permitted or required uses and disclosures.
- c. **Restrictions.** Covered Entity shall notify Business Associate in writing of any restriction to the use or disclosure of PHI that the Covered Entity has agreed to in accordance with [45 C.F.R. § 164.522](#), as amended, and other applicable laws and applicable agency guidance, to the extent that such restriction may affect Business Associate's use or disclosure of PHI.
- d. **Requests.** Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under HIPAA, HITECH and related regulations, the Privacy Rule or the Security Rule, all as amended, if done by Covered Entity.

5. MISCELLANEOUS:

- a. **Regulatory References.** A reference in this Addendum to a section in HIPAA, HITECH and related regulations, the Privacy Rule or the Security Rule refers to the most current version of the section in effect or as amended.
- b. **Amendment.** The parties agree to take such action as is necessary to amend this Addendum from time to time in order to ensure compliance with the requirements of the HIPAA, HITECH and related regulations, the Privacy Rule, the Security Rule and any other applicable law, all as amended.
- c. **Conflicts.** In the event that any terms of this Agreement are inconsistent with the terms of the Agreement, then the terms of this Agreement shall control.

Appendix A to Exhibit A, Commonwealth Business Associate Agreement

**Permitted Purposes for the Creation, Receipt, Maintenance, Transmission, Use and/or
Disclosure of Protected Health Information**

1. Purpose of Disclosure of PHI to Business Associate: To allow _____ to meet the requirements of the Underlying Agreement.
2. Information to be disclosed to Business Associate: _____.
3. Use shall Effectuate Purpose of Underlying Agreement: _____ may use and disclose PHI to the extent contemplated by the Underlying Agreement, and as permitted by law with Commonwealth approval.

EXHIBIT B

SOFTWARE LICENSE REQUIREMENTS AGREEMENT TEMPLATE

PA Supplier ID Number: _____

AGREEMENT BETWEEN
THE COMMONWEALTH OF PENNSYLVANIA,
ACTING BY AND THROUGH THE GOVERNOR'S OFFICE OF ADMINISTRATION
AND

This Agreement by and between _____ (Licensor) and the Commonwealth of Pennsylvania, acting by and through the Governor's Office of Administration (Commonwealth) is effective the date the Agreement has been fully executed by the Licensor and by the Commonwealth and all approvals required by Commonwealth contracting procedures have been obtained.

RECITALS:

WHEREAS, this Agreement sets forth the Commonwealth's Software License Requirements; and,

WHEREAS, Licensor's Software License Agreement is attached hereto as Exhibit A, and made a material part hereof by this reference; and,

WHEREAS, this document, including the Software License Agreement attached as Exhibit A, constitutes the Agreement between the Licensor and the Commonwealth; and

WHEREAS, the terms and conditions set out below in these Software License Requirements, supplement, and to the extent a conflict exists, supersede and take precedence over the terms and conditions of the attached Exhibit A, which is incorporated herein by reference.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and intending to be legally bound hereby, the parties hereto covenant and agree as follows:

- 1. Recitals:** The above recitals are hereby incorporated as a material part of these Software License Requirements.
- 2. Enterprise Language:** The parties agree that more than one agency of the Commonwealth may license products under this Agreement, provided that any use of products by any agency must be made pursuant to one or more executed purchase orders

or purchase documents submitted by each applicable agency seeking to use the Licensed Product. Products specified in Attachment 1, along with support and services for said products, shall be referred to as “Licensed Products.”

The parties agree that, if the licensee is a “Commonwealth Agency” as defined by Section 103 of the *Commonwealth Procurement Code*, 62 Pa. C. S. § 103, the terms and conditions of this Agreement apply to any purchase of Licensed Products made by the Commonwealth, and that the terms and conditions of this Agreement become part of the purchase document without further need for execution. The parties agree that the terms of this Agreement supersede and take precedence over the terms included in any purchase order, terms of any shrink-wrap agreement included with the Licensed Products, terms of any click through agreement included with the Licensed Products or any other terms purported to apply to the Licensed Products, including any products eligible for coverage under this Agreement where a legally executed agreement for the same covered product, regardless of version, was not in effect, even if procured by the Commonwealth prior to the effective date of the Agreement. This does not apply to Commonwealth agency agreements executed pursuant to the *Commonwealth Procurement Code*, 62 Pa. C. S. §§ 101—4102, and the *Commonwealth Attorneys’ Act*, 71 P.S. §§ 732-101—732-506.

3. **Choice of Law/Venue/Immunity:** This Agreement shall be interpreted in accordance with and governed by the laws of the Commonwealth of Pennsylvania, without giving effect to its conflicts of law provisions. Except as set forth in Section 23 of this Agreement, 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. No provision in this Agreement shall be construed to limit the sovereign immunity of the Commonwealth.
4. **Indemnification:** The Commonwealth does not have the authority to and shall not indemnify any entity. The Commonwealth agrees to pay for any loss, liability or expense, which arises out of or relates to the Commonwealth’s acts or omissions with respect to its obligations hereunder, where a final determination of liability on the part of the Commonwealth is established by a court of law or where settlement has been agreed to by the Commonwealth. This provision shall not be construed to limit the Commonwealth’s rights, claims or defenses that arise as a matter of law or pursuant to any other provision of this Agreement. This provision shall not be construed to limit the sovereign immunity of the Commonwealth.
5. **Patent, Copyright, Trademark and Trade Secret Protection:**
 - (a) The Licensor shall, at its expense, defend, indemnify and 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 patents, copyrights or trademarks, or for a misappropriation of a United States trade secret arising out of performance of this Agreement (“Claim”), including all Licensed Products provided by the Licensor. For the purposes of this Agreement, “indemnify and hold harmless” shall mean

the Licensor's specific, exclusive, and limited obligation to (a) pay any judgments, fines, and penalties finally awarded by a court of competent jurisdiction, governmental/administrative body or any settlements reached pursuant to Claim and (b) reimburse the Commonwealth for its reasonable administrative costs or expenses, including without limitation reasonable attorney's fees, it necessarily incurs in handling the Claim. The Commonwealth agrees to give Licensor prompt notice of any such claim of which it learns. Pursuant to the *Commonwealth Attorneys Act*, 71 P. S. §§ 732-101—732-506, 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, delegate its right of defense of a Claim. If the OAG delegates the defense to the Licensor, the Commonwealth will cooperate with all reasonable requests of Licensor made in the defense of and/or settlement of a Claim. Licensor shall not, without the Commonwealth's consent, enter into any settlement agreement which (a) states or implies that the Commonwealth has engaged in any wrongful or improper activity other than the innocent use of the material which is the subject of the Claim, (b) requires the Commonwealth to perform or cease to perform any act or relinquish any right, other than to cease use of the material which is the subject of the Claim, or (c) requires the Commonwealth to make a payment which Licensor is not obligated by this Agreement to pay on behalf of the Commonwealth. If OAG delegates such rights to the Licensor, the Commonwealth will cooperate with all reasonable requests of Licensor made in the defense of and/or settlement of a Claim. 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 Licensor that, in the event it requests that the Commonwealth provide support to the Licensor in defending any such Claim, the Licensor shall reimburse the Commonwealth for all necessary expenses (including attorneys' fees, if such are made necessary by the Licensor's request) incurred by the Commonwealth for such support. If OAG does not delegate to Licensor the authority to control the defense and settlement of a Claim, the Licensor's obligation under this Section 5 ceases. The Licensor, at its own expense, shall provide whatever cooperation OAG request in the defense of the suit.

- (b) The Licensor agrees to exercise reasonable due diligence to prevent claims of infringement on the rights of third parties. The Licensor certifies that, in all respects applicable to this Agreement, it has exercised and will continue to exercise due diligence to ensure that all Licensed Products provided under this Agreement 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 a Claim and the authority to control any potential settlements thereof is delegated to the Licensor, the Licensor shall pay all damages and costs finally awarded therein against the Commonwealth or agreed to by Licensor in any settlement. If information and assistance are furnished by the Commonwealth at the Licensor's written request, it shall be at the Licensor's expense, but the

responsibility for such expense shall be only that within the Licensor's written authorization.

- (d) If, in the Licensor's opinion, the Licensed Products furnished hereunder are likely to or do become subject to a claim of infringement of a United States patent, copyright or trademark, or for a misappropriation of trade secret, then without diminishing the Licensor's obligation to satisfy any final award, the Licensor may, at its option and expense:
 - (1) substitute functional equivalents for the alleged infringing Licensed Products; or
 - (2) obtain the rights for the Commonwealth to continue the use of such Licensed Products.
- (e) If any of the Licensed Products provided by the Licensor are in such suit or proceeding held to constitute infringement and the use thereof is enjoined, the Licensor shall, at its own expense and at its option:
 - (1) procure the right to continue use of such infringing products;
 - (2) replace them with non-infringing items; or
 - (3) modify them so that they are no longer infringing.
- (f) If use of the Licensed Products is enjoined and the Licensor is unable to do any of the preceding set forth in Section 5(e) above, the Licensor agrees to, upon return of the Licensed Products, refund to the Commonwealth:
 - (1) the license fee paid for the infringing Licensed Products, less the amount for the period of usage of any software; and
 - (2) the pro-rated portion of any maintenance fees representing the time remaining in any period of services for which payment was made.
- (g) The obligations of the Licensor under this Section 5 continue without time limit and survive the termination of this Agreement.
- (h) Notwithstanding the above, the Licensor shall have no obligation under this Section 5 for:
 - (1) modification of any Licensed Products provided by the Commonwealth or a third party acting under the direction of the Commonwealth;
 - (2) any material provided by the Commonwealth to the Licensor and incorporated into, or used to prepare the product;

- (3) use of the Software after Licensor recommends discontinuation because of possible or actual infringement and has provided one of the remedy's under Section 5(e) or Section 5(f) above;
 - (4) use of the Licensed Products in other than its specified operating environment;
 - (5) the combination, operation, or use of the Licensed Products with other products, services, or deliverables not provided by the Licensor as a system or the combination, operation, or use of the product, service, or deliverable, with any products, data, or apparatus that the Licensor did not provide;
 - (6) infringement of a non-Licensor product alone;
 - (7) the Commonwealth's use of the Licensed Product beyond the scope contemplated by the Agreement; or
 - (8) the Commonwealth's failure to use corrections or enhancements made available to the Commonwealth by the Licensor at no charge.
- (i) The obligation to indemnify the Commonwealth, under the terms of this Section 5, shall be the Licensor's sole and exclusive obligation for the infringement or misappropriation of intellectual property.

6. **Virus, Malicious, Mischievous or Destructive Programming:** Licensor warrants that the Licensed Product as delivered by Licensor does not contain any viruses, worms, Trojan Horses, or other malicious or destructive code to allow unauthorized intrusion upon, disabling of, or erasure of the Licensed Products (each a "Virus"). However, the Licensed Products may contain a key limiting use to the scope and quantity of the license(s) granted, and license keys issued by Licensor for temporary use are time-sensitive.

The Commonwealth's exclusive remedy, and Licensor's sole obligation, for any breach of the foregoing warranty shall be for Licensor to (a) replace the Licensed Products with a copy that does not contain Virus, and (b) if the Commonwealth, has suffered an interruption in the availability of its computer system caused by Virus contained in the Licensed Product, reimburse the Commonwealth for the actual reasonable cost to remove the Virus and restore the Commonwealth's most recent back up copy of data provided that:

- (a) the Licensed Products have been installed and used by the Commonwealth in accordance with the Documentation;
- (b) the Licensed Products has not been modified by any party other than Licensor;

- (c) the Commonwealth has installed and tested, in a test environment which is a mirror image of the production environment, all new releases of the Licensed Products and has used a generally accepted antivirus software to screen the Licensed Products prior to installation in its production environment.

Under no circumstances shall Licensor be liable for damages to the Commonwealth for loss of the Commonwealth's data arising from the failure of the Licensed Products to conform to the warranty stated above.

7. **Limitation of Liability:** The Licensor's liability to the Commonwealth under this Agreement shall be limited the total dollar amount of purchase orders issued for Licensed Products and services covered by this Agreement during the during the twelve (12)-month period prior to the event giving rise to the damage claim. This limitation does not apply to damages for:

- (a) bodily injury;
- (b) death;
- (c) intentional injury;
- (d) damage to real property or tangible personal property for which the Licensor is legally liable;
- (e) Licensor's indemnity of the Commonwealth for patent, copyright, trade secret, or trademark protection as set forth in Section 5; or
- (f) damages related to a breach of the security of a system maintained or managed by the Licensor, including the costs for notification, mitigation and credit monitoring services required due to such breach.

In no event will the Licensor be liable for consequential, indirect, special, or incidental damages unless otherwise specified in the Agreement.

8. **Payment:** The Commonwealth will make purchase through its software reseller as the Commonwealth's agent by way of a purchase order, which shall control with regard to payment amounts and provisions. The Commonwealth's reseller shall purchase Software and services from Licensor, on behalf of the Commonwealth, pursuant to purchase orders to Licensor. Upon acceptance by Licensor of such purchase orders, such purchase orders shall control as to pricing only; additional terms and conditions on such purchase orders are not applicable as the terms of this Agreement and its Exhibits shall control.

The Commonwealth's obligation is to pay its reseller in accordance with its purchase order with the Commonwealth's reseller and Licensor shall look to the Commonwealth's reseller for payment; however, in the event that the Commonwealth's reseller fails to pay

Licensor in accordance with the terms of Exhibit A, the Commonwealth understands and agrees that, other than collection (for which Licensor shall proceed only against the Commonwealth's reseller) Licensor shall notify the Commonwealth of such default and may exercise against the Commonwealth such other remedies as Licensor may have for nonpayment under Exhibit A.

9. Termination:

- (a) Licensor may not terminate this Agreement, or an order from any Commonwealth agency issued pursuant to any of the Exhibits to this Agreement, for non-payment; however, as described under Section 8 above, in the event that the Commonwealth's reseller fails to pay Licensor in accordance with the terms of Exhibit A, the Commonwealth understands and agrees that, other than collection (for which Licensor shall proceed only against such reseller) Licensor may exercise against the specific Commonwealth agency that issued a purchase order such other remedies as Licensor may have for nonpayment under Exhibit A solely as it pertains to the specific Commonwealth agency which issued the purchase order.
- (b) The Commonwealth may terminate this Agreement without cause by giving Licensor 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).

10. Background Checks:

- (a) Upon prior written request by the Commonwealth, Licensor 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 the Commonwealth's IT facilities, either through on site or remote access. Background checks are to be conducted via the Request for Criminal Record Check form and procedure found at <http://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx>. The background check must be conducted prior to initial access by an IT employee and annually thereafter.
- (b) Before the Commonwealth will permit an employee access to the Commonwealth's facilities, Licensor 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 an employee has a criminal record that includes a felony or misdemeanor involving terrorist 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, Licensor 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 Licensor to comply with the terms of this paragraph may result in default of Licensor under its Agreement with the Commonwealth.

- (c) The Commonwealth specifically reserves the right of the Commonwealth to conduct background checks over and above that described herein.
- (d) Access to certain Capitol Complex buildings and other state office buildings is controlled by means of card readers and secured visitors' entrances. Commonwealth contracted personnel who have regular and routine business in Commonwealth worksites may be issued a photo identification or access badge subject to the requirements of the contracting agency and Department of General Services set forth in Enclosure 3 of [Commonwealth Management Directive 625.10 Amended, Card Reader and Emergency Response Access to Certain Capitol Complex Buildings and Other State Office Buildings](#). The requirements, policy and procedures include a processing fee payable by the Contractor for contracted personnel photo identification or access badges.

11. Confidentiality:

- (a) For purposes of this Agreement, "Confidential Information" of a party shall mean (1) with respect to Commonwealth, all data and other information of or in the possession of the 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 Licensor, all information identified in writing by Licensor as confidential or proprietary to Licensor or its subcontractors.
- (b) All Confidential Information of or 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 Agreement, each party shall, however, be permitted to disclose relevant aspects of the other party's Confidential Information to its officers, agents, subcontractors and personnel and to the officers, agents, subcontractors and personnel of its corporate affiliates or subsidiaries to the extent that such disclosure is reasonably necessary for the performance of its duties and obligations under this Agreement; provided, however, that such party shall take all reasonable measures to ensure that Confidential Information of the other party is not disclosed or duplicated in contravention of the provisions of this Agreement by such officers, agents, subcontractors and personnel 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 personnel; 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 imposing equally or more stringent requirements for data privacy and security. The obligations in this Section 11(b) 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 in a timeframe to allow the non-disclosing party to resist the disclosure) and, except to the extent provided otherwise by any applicable law, shall not apply with respect to information which:

- (1) is developed by the other party without violating the disclosing party's proprietary rights,
 - (2) is or becomes publicly known (other than through unauthorized disclosure),
 - (3) is disclosed by the owner of such information to a Third Party free of any obligation of confidentiality,
 - (4) is already known by such party without an obligation of confidentiality other than pursuant to this Agreement or any confidentiality contract entered into before the Effective Date of the Agreement between Commonwealth and Licensor, or
 - (5) is rightfully received by the disclosing party free of any obligation of confidentiality.
- (c) 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.
- (d) Each party shall bear the cost it incurs as a result of compliance with this Section 11. The obligations in this Section 11 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 in a timeframe to allow the non-disclosing party to resist the disclosure).
- (e) The Licensor shall use the following process when submitting information to the Commonwealth it believes to be confidential and/or proprietary information or trade secrets:
- (1) Prepare an un-redacted version of the appropriate document, and
 - (2) Prepare a redacted version of the document that redacts the information that is asserted to be confidential or proprietary information or a trade secret, and
 - (3) Prepare a signed written statement that states:
 1. the attached document contains confidential or proprietary information or trade secrets;
 2. the Licensor is submitting the document in both redacted and un-redacted format in accordance with [65 P.S. § 67.707\(b\)](#); and
 3. the Licensor is requesting that the document be considered exempt under [65 P.S. § 67.708\(b\)\(11\)](#) from public records requests.
 - (4) Submit the two documents with the signed written statement to the Commonwealth.
- (f) When the Agreement expires or terminates, and at any other time at the written request of a party, the other party must promptly return to such party all of such party's Confidential Information and Data (and all copies of this information) that is in the other party's possession or control, in whatever form. With regard to Commonwealth's Confidential Information and/or Data, Licensor will comply with the requirements of Section 11(e), above.
- (g) Additionally, neither the Agreement nor any pricing information related to the Agreement, nor purchase orders issued pursuant to the Agreement, will be deemed confidential.

12. Agency-specific Sensitive and Confidential Commonwealth Data (If applicable)

- (a) Licensor understands that its level of access may allow it to view or access highly sensitive and confidential Commonwealth and third party data. This data is subject to various state and federal laws and policies that vary from agency to agency, and from program to program within an agency. If applicable, prior to deployment of the Licensed Products on any Commonwealth agency facilities, the Licensor must receive and sign off on particular instructions and limitations as dictated by that Commonwealth agency, including but not limited to, as necessary, HIPAA Business Associate Agreements, a sample of which is attached hereto as Attachment 2. This sign-off document (a sample of which is attached hereto as Attachment 3), will include a description of the nature of the data which may be implicated based on the nature of the Licensor's access, and will incorporate the Business Associate Agreement if it is applicable.
- (b) Licensor hereby certifies and warrants that, after being informed by the Commonwealth agency of the nature of the data which may be implicated and prior to the installation of the Licensed Products), the Licensor is and shall remain compliant with all applicable state and federal law and policy regarding the data's protection, and with the requirements memorialized in every completed and signed sign-off document. Every sign-off document completed by a Commonwealth agency and signed by at least one signatory of the Licensor authorized to bind the Licensor is valid and is hereby integrated and incorporated by reference into this Agreement.
- (c) This Section 12 does not require a Commonwealth agency to exhaustively list the law to which implicated data is subject; the Commonwealth agency is obligated only to list the nature of the data implicated by the Licensor's access ,to refer the Licensor to its privacy and security policies, and to specify requirements that are not otherwise inherent in compliance with law and policy.
- (d) The requirements of this Section 12 are in addition to and not in lieu of other requirements of this Agreement, its Exhibits and Attachments, having to do with data privacy and security, including but not limited to the requirement that the Licensor comply with the Commonwealth's *Requirements for Non-Commonwealth Hosting Applications/Services*, and all applicable Commonwealth ITPs, which can be found at <http://www.oa.pa.gov/Policies/Pages/itp.aspx>.
- (e) Licensor shall conduct additional background checks, in addition to those required in Section 10 of this Agreement, as may be required by a Commonwealth agency in its sign-off documents. The Licensor shall educate and hold its agents, employees, contractors and subcontractors to standards at least as stringent as those contained in this Agreement. The Licensor shall provide information regarding its agents, employees, contractors and subcontractors to the Commonwealth upon request.

13. Sensitive Information

- (a) The Licensor shall not publish or otherwise disclose, except to the Commonwealth or the Licensor'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 Agreement for any purpose not connected with the parties' Agreement responsibilities.
- (c) Licensor 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 Agreement including by:
 - (1) Maintaining a valid and up to date registrations and certifications; and
 - (2) Complying with all data protection legislation applicable to cross border data flows of personal data and required security measures for personal data.
- (d) Additionally, neither the Agreement nor any pricing information related to the Agreement, nor purchase orders issued pursuant to the Agreement, will be deemed confidential.

14. Publicity/Advertisement: The Licensor must obtain written Commonwealth approval prior to mentioning the Commonwealth or a Commonwealth agency in an advertisement, endorsement, or any other type of publicity. This includes the use of any trademark or logo.

15. Portability. The parties agree that a Commonwealth agency may move a Licensed Product from machine to machine, whether physical or virtual, and to other locations, where those machines and locations are internal to the Commonwealth or to a Commonwealth contractor, as long as such relocation and the use being made of the Licensed Product comports with the license grant and restrictions. Notwithstanding the foregoing, a Commonwealth agency may move the machine or appliance provided by the Licensor upon which the Licensed Product is installed.

16. 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 Section 16 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.

- 17. Commonwealth Audit Responsibilities:** Commonwealth will maintain, and promptly provide to Reseller upon its request, accurate records regarding use of the Licensed Product by or for the Commonwealth. If the Commonwealth becomes aware of any unauthorized use of all or any part of the Licensed Product, the Commonwealth will notify Reseller promptly, providing reasonable details. The limit of the Commonwealth's responsibility for use of the Licensed Product by more individuals than are permitted by the licensing terms applicable to the Licensed Product shall be to purchase additional licenses and Maintenance and Support (if applicable) for such Licensed Products through the Commonwealth's software reseller.

Commonwealth will perform a self-audit upon the request of Licensor, which request may not occur more often than annually, and report any change in user count (hereinafter "True up number"). Commonwealth shall notify Licensor of the True up number no later than 45 calendar days after the request that the Commonwealth perform a self-audit. If the user count has increased, Commonwealth will make an additional purchase of the Licensed Products through its reseller, which is equivalent to the additional users. This Section 17 sets out the sole software license audit right under this Agreement.

- 18. List of Licensed Products:** Attached hereto and made a part hereof by this reference is Attachment 1, which sets out a list of products that may be licensed under this Agreement. With the consent of Commonwealth, the list of products on Attachment 1 may be updated by Licensor providing Commonwealth with a revised Attachment 1 that adds the new product to the list. In Commonwealth's discretion, its consent may be provided either via written communication directly to the Licensor or by providing a copy of said notice to the Commonwealth's software reseller to update Attachment 1.

No amendment will be required to add a new Licensed Product to the list. If, however, the Licensor desires to add a Licensed Product to the list that requires different license terms, an amendment to this Agreement or a new agreement will be required.

- 19. Right-to-Know Law:**

The Pennsylvania *Right-to-Know Law*, [65 P.S. §§ 67.101—3104](#), as amended, ("RTKL"), applies to this Agreement. For the purpose of these provisions, the term "the Commonwealth" shall refer to the contracting Commonwealth agency.

- 20. Third party software.** If the software utilizes or includes third party software and other copyrighted material and is subject, therefore, to additional licensing terms,

acknowledgements or disclaimers compliance with this Agreement constitutes compliance with those third party terms. The parties agree that the Commonwealth, by acknowledging third party software, does not agree to any terms and conditions of the third party software agreements that are inconsistent with or supplemental to this Agreement.

21. Attorneys' Fees: The Commonwealth will not pay attorneys' fees incurred by or paid by the Licensor.

22. Controversies.

- (a) In the event of a controversy arising from the Agreement or Purchase Order, the Licensor, within six (6) months after the claim accrues, must file a written claim with the contracting officer for a determination. The claim shall state all grounds upon which the Licensor asserts a controversy exists. If the Licensor fails to file a claim or files an untimely claim, the Licensor is deemed to have waived its right to assert a claim in any forum.
- (b) The contracting officer 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 Licensor. The contracting officer shall send his/her written determination to the Licensor. If the contracting officer fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The contracting officer's determination shall be the final order of the purchasing agency.
- (c) Within 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 Licensor may file a statement of claim with the Commonwealth Board of Claims. Pending a final judicial resolution of a controversy or claim, the Licensor shall proceed diligently with the performance of the Agreement in a manner consistent with the determination of the contracting officer and the Commonwealth shall compensate the Licensor pursuant to the terms of the Agreement or Purchase Order.

23. Insurance:

- (a) Licensor shall procure and maintain at its expense or cause to be maintained by any agents, contractors and subcontractors, as appropriate, the following types of insurance or maintain such self-insurance plans as shall be sufficient to insure against any claims, covering Licensor, its employees, agents, contractors and subcontractors:
 - (1) Workers' Compensation Insurance for all of Licensor's employees and those of any subcontractor engaged in performing Services in accordance with the *Workers' Compensation Act* (77 P.S. § 101, *et seq.*).

- (2) Commercial general liability insurance providing coverage from claims for damages for personal injury, death and property of others. The limits of such insurance shall be in an amount not less than \$500,000 per person and \$2,000,000 per occurrence, personal injury and property damage combined. Such policies shall be occurrence based rather than claims-made policies and shall name the Commonwealth of Pennsylvania as an additional insured, as its interests may appear. The insurance shall not contain any endorsements or any other form designed to limit and restrict any action by the Commonwealth as an additional insured against the insurance coverages in regard to the Services performed for the Commonwealth.
 - (3) Professional and Technology-Based Services Liability Insurance (insuring against damages and claim expenses as a result of claims arising from any actual or alleged wrongful acts in performing cyber and technology activities) in the amount of \$5,000,000, per accident/occurrence/annual aggregate.
 - (4) Technology Products Liability/Professional Liability/Errors & Omissions Insurance in the aggregate amount of not less than \$5,000,000.
 - (5) Comprehensive crime insurance in an amount of not less than \$5,000,000 per claim.
 - (6) Information Security and Privacy Liability Insurance including Privacy Notification Costs (including coverage for Technology Professional Liability if not covered under Licensor's Professional Liability/Errors and Omissions Insurance referenced above) in the amount of \$5,000,000, per occurrence.
- (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 Section 23, as applicable, and naming Commonwealth as an additional insured to the extent of Licensor's indemnities contained in this Agreement. Licensor shall have included in all policies of insurance required hereunder a waiver by the insurer of all right of subrogation against Commonwealth in connection with any loss or damage thereby insured against. Such certificates or other documentation will include a provision whereby 30 days' notice must be received by Commonwealth prior to coverage cancellation or alteration of the coverage by either Licensor or its Subcontractors or the applicable insurer. Such cancellation or alteration shall not relieve Licensor of its continuing obligation to maintain insurance coverage in accordance with this Section 23.

- (c) Licensors agree to maintain such insurance for the life of any applicable purchase order issued pursuant to the Agreement.
 - (d) Upon request to and approval by the Commonwealth, Licensors' self-insurance of the types and amounts of insurance set for above shall satisfy the requirements of this provision, provided the Commonwealth may request of Licensors evidence each year, during the term of the purchase order issued under the Agreement, that Licensors have sufficient assets to cover such losses.
- 24. Federal Requirements:** If applicable, in addition to the requirements set forth in Section 12 of this Agreement, the Licensors must receive and sign off on particular federal requirements that a Commonwealth agency may be required to include when utilizing federal funds to procure the Licensed Products. This sign-off document (a sample of which is attached hereto as Attachment 3), in addition to any applicable requirements of Section 12 of this Agreement, will include a description of the required federal provisions, along with the applicable forms necessary for the Licensors to execute, as necessary. The sign-off document, along with attachments, must be attached to the purchase order.
- 25. Signatures:** The fully executed Agreement shall not contain ink signatures by the Commonwealth. The Licensors understand and agree that the receipt of an electronically-printed Agreement with the printed name of the Commonwealth purchasing agent constitutes a valid, binding contract with the Commonwealth. The printed name of the purchasing agent represents the signature of that individual who is authorized to bind the Commonwealth to the obligations contained in the Agreement. The printed name also indicates that all approvals required by Commonwealth contracting procedures have been obtained.
- 26. Entire Agreement.** This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof, and supersedes and integrates all prior discussions, agreements and understandings pertaining thereto. No modification of this Agreement will be effective unless in writing and signed by both Parties.

IN WITNESS WHEREOF, the Parties to this Agreement have executed it, through their respective duly authorized representatives.

Witness:

Licensor:

Signature Date

Signature Date

Printed Name

Printed Name

Title

Title

If a corporation, the Chairman, President, Vice-President, Senior Vice-President, Executive Vice-President, Assistant Vice-President, Chief Executive Officer and Chief Operating Officer must sign; if a sole proprietor, then the owner must sign; if a general or limited partnership, a general partner must sign; if a limited liability company, then a member must sign, unless it is a managed by a manager, then the manager must sign; otherwise a resolution indicating authority to bind the corporation must be attached to this Agreement.

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATION**

See paragraph 25

APPROVED:

See paragraph 25
Comptroller

APPROVED AS TO FORM AND LEGALITY:

See paragraph 25
Office of Chief Counsel

See paragraph 25
Office of General Counsel

See paragraph 25
Office of Attorney General

ATTACHMENT 1

LIST OF LICENSED PRODUCTS

With the consent of the Commonwealth, Licensor may add additional Licensed Products to this attachment by providing Commonwealth with a new copy of this Attachment 1.

Licensed Product:

The Licensed Product includes (list all titles covered by this agreement):

Attachment 2

Business Associate Agreements as provided by Agencies may differ:

COMMONWEALTH OF PENNSYLVANIA SAMPLE BUSINESS ASSOCIATE AGREEMENT

WHEREAS, the _____ (Covered Entity) and _____ (Business Associate) intend to protect the privacy and security of certain Protected Health Information (PHI) to which Business Associate may have access in order to provide goods or services to or on behalf of Covered Entity, in accordance with the *Health Insurance Portability and Accountability Act of 1996*, as amended, Pub. L. No. 104-191 (HIPAA), the *Health Information Technology for Economic and Clinical Health (HITECH) Act*, as amended, Title XIII of Division A and Title IV of Division B of the *American Recovery and Reinvestment Act of 2009* (ARRA), as amended, Pub. L. No. 111-5 (Feb. 17, 2009) and related regulations, the HIPAA Privacy Rule (Privacy Rule), 45 C.F.R. Parts 160 and 164, as amended, the HIPAA Security Rule (Security Rule), 45 C.F.R. Parts 160, 162 and 164, as amended, 42 C.F.R. §§ 431.301-431.302, 42 C.F.R. Part 2, 45 C.F.R. § 205.50, 42 U.S.C. § 602(a)(1)(A)(iv), 42 U.S.C. § 1396a(a)(7), [35 P.S. § 7607](#), [50 Pa. C.S. § 7111](#), [71 P.S. § 1690.108\(c\)](#), [62 P.S. § 404](#), [55 Pa. Code Chapter 105](#), [55 Pa. Code Chapter 5100](#), the *Pennsylvania Breach of Personal Information Notification Act*, [73 P.S. § 2301--2329](#), all as amended, and other relevant laws, including subsequently adopted provisions applicable to use and disclosure of confidential information, and applicable agency guidance; and,

WHEREAS, Business Associate may receive PHI from Covered Entity, or may create or obtain PHI from other parties for use on behalf of Covered Entity, which PHI may be used or disclosed only in accordance with this Agreement and the standards established by applicable laws and agency guidance; and

WHEREAS, Business Associate may receive PHI from Covered Entity, or may create or obtain PHI from other parties for use on behalf of Covered Entity, which PHI must be handled in accordance with this Agreement and the standards established by HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule and other applicable laws and agency guidance.

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

6. Definitions.

- a. “**Business Associate**” shall have the meaning given to such term under HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule and agency guidance.

- b. **“Covered Entity”** shall have the meaning given to such term under HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule and agency guidance.
- c. **“HIPAA”** shall mean the *Health Insurance Portability and Accountability Act of 1996*, as amended, Pub. L. No. 104-191.
- d. **“HITECH Act”** shall mean the *Health Information Technology for Economic and Clinical Health (HITECH) Act*, as amended, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5 (Feb. 17, 2009).
- e. **“Privacy Rule”** shall mean the standards for privacy of individually identifiable health information in 45 C.F.R. Parts 160 and 164, as amended, and related agency guidance.
- f. **“Protected Health Information”** or **“PHI”** shall have the meaning given to such term under HIPAA, the HITECH Act and related regulations, the Privacy Rule, the Security Rule (all as amended) and agency guidance.
- g. **“Security Rule”** shall mean the security standards in 45 C.F.R. Parts 160, 162 and 164, as amended, and related agency guidance.
- h. **“Unsecured PHI”** shall mean PHI that is not secured through the use of a technology or methodology as specified in HITECH Act regulations, as amended, and agency guidance or as otherwise defined in the HITECH Act, as amended.

7. **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 by or obtained on behalf of Covered Entity for the following stated purposes, except as otherwise stated in this Agreement:

NO OTHER DISCLOSURES OF PHI OR OTHER INFORMATION ARE PERMITTED.

8. **BUSINESS ASSOCIATE OBLIGATIONS:**

- a. **Limits on Use and Further Disclosure.** Business Associate shall not further use or disclose PHI provided by, or created or obtained on behalf of Covered Entity

other than as permitted or required by this Addendum, as requested by Covered Entity, or as required by law and agency guidance.

- b. **Appropriate Safeguards.** Business Associate shall establish and maintain appropriate safeguards to prevent any use or disclosure of PHI other than as provided for by this Agreement. Appropriate safeguards shall include implementing administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the electronic PHI that is created, received, maintained or transmitted on behalf of the Covered Entity and limiting use and disclosure to applicable minimum necessary requirements as set forth in applicable federal and state statutory and regulatory requirements and agency guidance.
- c. **Reports of Improper Use or Disclosure.** Business Associate hereby agrees that it shall report to _____ at _____, within two (2) days of discovery any use or disclosure of PHI not provided for or allowed by this Agreement.
- d. **Reports on Security Incidents.** In addition to following the breach notification requirements in section 13402 of the *Health Information Technology for Economic and Clinical Health Act of 2009* (“HITECH Act”), as amended, and related regulations, the Privacy Rule, the Security Rule, agency guidance and other applicable federal and state laws, Business Associate shall report to _____ at _____, within two (2) days of discovery any security incident of which it becomes aware. At the sole expense of Business Associate, Business Associate shall comply with all federal and state breach notification requirements, including those applicable to Business Associate and those applicable to Covered Entity. Business Associate shall indemnify the Covered Entity for costs associated with any incident involving the acquisition, access, use or disclosure of Unsecured PHI in a manner not permitted under federal or state law and agency guidance. For purposes of the security incident reporting requirement, inconsequential unsuccessful incidents that occur on a daily basis, such as scans, “pings,” or other unsuccessful attempts to penetrate computer networks or servers containing electronic PHI maintained by Business Associate, need not be reported in accordance with this section, but may instead be reported in the aggregate on a monthly basis.
- e. **Subcontractors and Agents.** At any time PHI is provided or made available to Business Associate subcontractors or agents, Business Associate shall provide only the minimum necessary PHI for the purpose of the covered transaction and shall first enter into a subcontract or contract with the subcontractor or agent that contains substantially the same terms, conditions and restrictions on the use and disclosure of PHI as contained in this Agreement.
- f. **Right of Access to PHI.** Business Associate shall allow, for any PHI maintained in a designated record set, Covered Entity to have access to and copy an

individual's PHI within **five (5) business days** of receiving a written request from the Covered Entity. Business Associate shall provide PHI in the format requested, if it is readily producible in such form and format; or if not, in a readable hard copy form or such other form and format as agreed to by Business Associate and the individual. If the request is for information maintained in one or more designated record sets electronically and if the individual requests an electronic copy of such information, Business Associate must provide Covered Entity with access to the PHI in the electronic form and format requested by the individual, if it is readily producible in such form and format; or, if not, in a readable electronic form and format as agreed to by the Business Associate and Covered Entity. If any individual requests from Business Associate or its agents or subcontractors access to PHI, Business Associate shall notify Covered Entity within five (5) business days. Business Associate shall further conform with all of the requirements of [45 C.F.R. § 164.524](#) and other applicable laws, including the HITECH Act, as amended, related regulations and agency guidance. Business Associate shall indemnify Covered Entity for costs/damages associated with Business Associate's failure to respond within the time frames set forth in this Section 3(f).

- g. **Amendment and Incorporation of Amendments.** Within five (5) business days of receiving a written request from Covered Entity for an amendment of PHI maintained in a designated record set, Business Associate shall make the PHI available and incorporate the amendment to enable Covered Entity to comply with [45 C.F.R. § 164.526](#), applicable federal and state law, including the HITECH Act, as amended and related regulations, the Privacy Rule, the Security Rule and agency guidance. If any individual requests an amendment from Business Associate or its agents or subcontractors, Business Associate shall notify Covered Entity within five (5) business days.
- h. **Provide Accounting of Disclosures.** Business Associate shall maintain a record of all disclosures of PHI made by Business Associate which are not excepted from disclosure accounting requirements under HIPAA, HITECH and related regulations, the Privacy Rule or the Security Rule (all as amended) in accordance with [45 C.F.R. § 164.528](#) and other applicable laws and agency guidance, including the HITECH Act and related regulations. Such records shall include, for each disclosure, the date of the disclosure, the name and address of the recipient of the PHI, a description of the PHI disclosed, the name of the individual who is the subject of the PHI disclosed, and the purpose of the disclosure. Business Associate shall make such record available to the Covered Entity within five (5) business days of a written request for an accounting of disclosures. Business Associate shall indemnify Covered Entity for costs/damages associated with Business Associate's failure to respond within the time frames set forth in this Section 3(h).
- i. **Requests for Restriction.** Business Associate shall comply with requests for restrictions on disclosures of PHI about an individual if the disclosure is to a

health plan for purposes of carrying out payment or health care operations (and is not for treatment purposes), and the PHI pertains solely to a health care item or service for which the service involved was paid in full out-of-pocket. For other requests for restriction, Business associate shall otherwise comply with the Privacy Rule, as amended, and other applicable statutory and regulatory requirements and agency guidance.

- j. **Access to Books and Records.** Business Associate shall 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 applicable laws and agency guidance.
- k. **Return or Destruction of PHI.** At termination of this Agreement, Business Associate hereby agrees to return or destroy all PHI provided by or obtained on behalf of Covered Entity. Business Associate agrees not to retain any copies of the PHI after termination of this Agreement. If return or destruction of the PHI is not feasible, Business Associate agrees to extend the protections of this Agreement 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.
- l. **Maintenance of PHI.** Notwithstanding Section 3(k) of this Agreement, Business Associate and its subcontractors or agents shall retain all PHI throughout the term of the Agreement and shall continue to maintain the information required under the various documentation requirements of this Agreement (such as those in Section 3(h)) for a period of six (6) years after termination of the Agreement, unless Covered Entity and Business Associate agree otherwise.
- m. **Mitigation Procedures.** Business Associate agrees to establish and to provide to Covered Entity 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 Agreement or the Privacy Rule, as amended. 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 Agreement or applicable laws and agency guidance.
- n. **Sanction Procedures.** Business Associate agrees that it shall develop and implement a system of sanctions for any employee, subcontractor or agent who violates this Agreement, applicable laws or agency guidance.
- o. **Grounds for Breach.** Non-compliance by Business Associate with this Agreement or the Privacy or Security Rules, as amended, is a breach of the Agreement, 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. Commonwealth may elect to terminate Business Associate's contract for such breach.

- p. **Termination by Commonwealth.** Business Associate authorizes termination of this Agreement by the Commonwealth if the Commonwealth determines, in its sole discretion, that the Business Associate has violated a material term of this Agreement.
- q. **Failure to Perform Obligations.** In the event Business Associate fails to perform its obligations under this Agreement, Covered Entity may immediately discontinue providing PHI to Business Associate. Covered Entity may also, at its option, require Business Associate to submit to a plan of compliance, including monitoring by Covered Entity and reporting by Business Associate, as Covered Entity in its sole discretion determines to be necessary to maintain compliance with this Agreement and applicable laws and agency guidance.
- r. **Privacy Practices.** Covered Entity will provide Business Associate with all applicable forms, including but not limited to, any form used for Notice of Privacy Practices, Accounting for Disclosures, or Authorization, upon the effective date designated by the Program or Covered Entity. Covered Entity may change applicable privacy practices, documents and forms. The Business Associate shall make reasonable endeavors to implement changes as soon as practicable, but not later than 45 days from the date of notice of the change. Business Associate shall otherwise comply with all applicable laws and agency guidance pertaining to notices of privacy practices, including the requirements set forth in [45 C.F.R. § 164.520](#).

9. 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 applicable law and agency guidance, as well as changes to such notice. Covered Entity will post on its website any material changes to its notice of privacy practices by the effective date of the material change.
- b. **Permissions.** Covered Entity shall provide Business Associate with any changes in, or revocation of, permission by individual to use or disclose PHI of which Covered Entity is aware, if such changes affect Business Associate's permitted or required uses and disclosures.
- c. **Restrictions.** Covered Entity shall notify Business Associate in writing of any restriction to the use or disclosure of PHI that the Covered Entity has agreed to in accordance with [45 C.F.R. § 164.522](#), as amended, and other applicable laws and applicable agency guidance, to the extent that such restriction may affect Business Associate's use or disclosure of PHI.

- d. **Requests.** Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under HIPAA, HITECH and related regulations, the Privacy Rule or the Security Rule, all as amended, if done by Covered Entity.

10. MISCELLANEOUS:

- a. **Regulatory References.** A reference in this Addendum to a section in HIPAA, HITECH and related regulations, the Privacy Rule or the Security Rule refers to the most current version of the section in effect or as amended.
- b. **Amendment.** The parties agree to take such action as is necessary to amend this Addendum from time to time in order to ensure compliance with the requirements of the HIPAA, HITECH and related regulations, the Privacy Rule, the Security Rule and any other applicable law, all as amended.
- c. **Conflicts.** In the event that any terms of this Agreement are inconsistent with the terms of the Agreement, then the terms of this Agreement shall control.

Appendix A to Exhibit A, Commonwealth Business Associate Agreement

Permitted Purposes for the Creation, Receipt, Maintenance, Transmission, Use and/or Disclosure of Protected Health Information

4. Purpose of Disclosure of PHI to Business Associate: To allow _____ to meet the requirements of the Underlying Agreement.
5. Information to be disclosed to Business Associate: _____.
6. Use shall Effectuate Purpose of Underlying Agreement: _____ may use and disclose PHI to the extent contemplated by the Underlying Agreement, and as permitted by law with Commonwealth approval.

Attachment 3

**Sign-Off Document No. _____, under Agreement No. _____
Between
[Licensor _____]. and the Commonwealth of PA, [Agency]
[Licensor _____] Agency-level Deployment**

This document becomes, upon its execution by the signatories named below, a legally valid, binding part of Software License Requirements Agreement No. _____ between the Commonwealth and _____ (Licensor), and is subject to the terms of that Agreement.

1. Scope of Deployment (need not be entire agency):
2. Nature of Data implicated or potentially implicated:
3. Agency Policies to which Licensor. is subject (incorporated by reference):
4. Background checks (describe if necessary):
5. Additional requirements (describe with specificity):
6. Is Licensor a Business Associate (yes or no)?

If yes, the attached Business Associates Agreement, as completed by the Agency, is applicable and is hereby incorporated into this Sign-Off Document by reference.

Agency Contact Person signature and Date: _____

**[Licensor _____]
Authorized Signatory and Date:** _____