

Master Services Agreement

Between

Texas Health Services Authority

And

Contractor

Interface Engine and Integration Services

THSA Contract No. 0000001

TABLE OF CONTENTS

	Page
1. INTRODUCTION	8
1.1 Provision, Performance and Management by Contractor.	8
1.2 Contractor's Experience and Qualifications.	9
1.3 Definitions.....	9
1.4 Other Terms.	9
2. ORDER OF PRECEDENCE	9
3. TERM	10
3.1 Term.	10
4. SERVICES.....	10
4.1 Services.	10
4.2 Termination Assistance Services.	10
4.3 Change Request.	12
4.4 Acceptance.....	13
5. PERFORMANCE STANDARDS	13
5.1 Performance and Service Levels.....	13
5.2 Reimbursements.....	13
5.3 Service Problem Analysis.	13
6. CONTRACTOR PERSONNEL	14
6.1 Contractor Project Manager.....	14
6.2 Contractor Program Manager.	15
6.3 Contractor Personnel Are Not State or THSA Employees.	15
6.4 Responsibility for Contractor Personnel.....	15
6.5 Qualifications of Contractor Personnel.....	16

6.6	Removal of Contactor Personnel.	17
6.7	Union Agreements.	17
7.	CONTRACTOR RESPONSIBILITIES	17
7.1	Reports, Data Correction, Re-Performance.	17
7.2	Internal Controls.	18
7.3	Change Control.	20
7.4	Subcontractors.....	21
7.5	Technology Evolution.....	22
8.	THSA RESPONSIBILITIES	22
8.1	Savings Clause.....	22
9.	AUDITS AND BENCHMARKING.....	23
9.1	Audit Rights.....	23
10.	FEES	26
10.1	General.....	26
10.2	Taxes.....	27
11.	INVOICING AND PAYMENT	27
11.1	Invoicing.	27
11.2	Set Off.....	28
11.3	Disputed Charges.....	28
12.	DATA AND OTHER CONFIDENTIAL INFORMATION	29
12.1	Confidentiality.	29
12.2	Data.....	33
12.3	Security Incident.....	34
12.4	Protected Health Information and Data Use.....	36
12.5	Survival.....	36

13.	LICENSE GRANT AND MATERIALS.....	36
13.1	Contractor Owned and Licensed Materials.....	36
14.	REPRESENTATIONS, WARRANTIES AND COVENANTS	38
14.1	Work Standards.....	38
14.2	Software Currency.	38
14.3	Efficiency and Cost Effectiveness.	38
14.4	Intellectual Property.....	38
14.5	Non-Infringement.	39
14.6	General.....	39
14.7	Certifications.....	40
14.8	Inducements; Ethics.....	43
14.9	Malicious Code.....	45
14.10	Compliance with Laws.	45
14.11	Equal Opportunity Compliance.....	46
14.12	Information Furnished to THSA.....	47
14.13	Previous Contracts.....	47
14.14	Completeness of Due Diligence Activities.....	47
14.15	Interoperability.....	47
14.16	Prohibition on Contracts with Companies Boycotting Israel.	47
14.17	Financial Condition.....	48
15.	INSURANCE AND RISK OF LOSS	48
16.	INDEMNITIES.....	48
16.1	General Indemnity by Contractor.	48
16.2	Intellectual Property Indemnity.	49
16.3	Comparative Fault.....	50

16.4	Infringement and Mitigation.	50
16.5	Indemnification Procedures.	51
16.6	Subrogation.	51
17.	LIABILITY.....	51
17.1	General Intent.....	51
17.2	Force Majeure.	52
17.3	Limitation of Liability.....	52
18.	DISPUTE RESOLUTION	54
18.1	Informal Dispute Resolution.....	54
18.2	Jurisdiction.....	55
18.3	Continued Performance.	55
18.4	Governing Law.	55
19.	TERMINATION.....	56
19.1	Termination for Cause.	56
19.2	Termination for Convenience.	57
19.3	Termination Upon Contractor Change of Control.	57
19.4	THSA Rights Upon Contractor’s Bankruptcy.	57
19.5	Termination for Adverse Change in Contractor’s Financial Condition.....	58
19.6	Step-In Rights.	58
19.7	Absolute Right.	59
19.8	Lack of Sufficient Funds or Statutory Authority.	59
19.9	General Termination Rights.....	60
19.10	Effect of Termination.....	60
20.	GENERAL.....	60
20.1	No Waiver of Sovereign Immunity.....	60

20.2	RFP Errors and/or Omissions.	60
20.3	Abandonment or Default.....	60
20.4	Place of Performance.	61
20.5	Binding Nature and Assignment.....	61
20.6	Entire Agreement; Amendment.	61
20.7	Notices.	62
20.8	Counterparts.....	62
20.9	Headings.	63
20.10	Relationship of Parties.	63
20.11	Severability.	63
20.12	Consents and Approval.	63
20.13	Waiver of Default; Cumulative Remedies.....	63
20.14	Survival.....	64
20.15	Publicity.....	64
20.16	Export.....	64
20.17	No Third Party Beneficiaries.	64
20.18	Covenant Against Pledging.....	64
20.19	Solicitation and Hiring of Employees.....	65
20.20	Further Assurances.....	65
20.21	Liens.....	65
20.22	Covenant of Good Faith, Commercially Reasonable Efforts.	65
20.23	Best Price Guarantee.....	65
20.24	Acknowledgment.	66
20.25	References.....	66
20.26	Guaranty.....	66

TABLE OF EXHIBITS:

Exhibit 1	Definitions
Exhibit 2	Statement of Work
Exhibit 3	Service Level Agreement
Exhibit 4	Pricing and Financial Provisions
Exhibit 5	Business Associate Agreement
Exhibit 6	Data Use Agreement

MASTER SERVICES AGREEMENT

This Master Services Agreement (this “**Agreement**”) is entered by and between the Texas Health Services Authority (“**THSA**”), with its principal place of business at 901 South Mopac Expressway, Building 1, Suite 300, Austin, TX 78746, and _____ (“**Contractor**”), a _____ corporation, with its principal place of business at _____, effective as of the full execution of this Agreement by THSA and Contractor (the “**Effective Date**”).

WHEREAS, the THSA is established in Texas Health and Safety Code Chapter 182 as a public-private partnership for the purpose of promoting, implementing, and facilitating the secure electronic exchange of health information in the State of Texas;

WHEREAS, THSA’s current state-level health information network, HIETexas, is managed by the THSA;

WHEREAS, THSA seeks an individual(s)/entity(ies) (vendor(s)) to develop / implement / manage a comprehensive interface engine solution and associated professional services to support health information exchange across Texas healthcare providers;

WHEREAS, for the purpose of engaging a vendor, THSA has issued the Request for Proposals on the THSA website, Request for Proposals No. 0000001 “Request for Proposals for a THSA Interface Engine and Integration Services” (the “**RFP**”);

WHEREAS, after evaluation of the responses to the RFP (each a “**Response**”), THSA determined, and Contractor demonstrated, that Contractor is capable of providing and completing the Services in a successful, on-time manner, within budget, and in the manner documented in this Agreement; and

WHEREAS, THSA desires to procure from Contractor, and Contractor desires to provide to THSA, on the terms and conditions of this Agreement, the Services described herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and for other good and valid consideration, the receipt and sufficiency of which are hereby acknowledged, THSA and Contractor (collectively, the “**Parties**” and each, a “**Party**”) hereby agree as follows:

1. INTRODUCTION

1.1 Provision, Performance and Management by Contractor.

THSA desires that certain Services be provided, performed, and managed by Contractor as described in this Agreement. Contractor has carefully reviewed the terms of this Agreement and desires to provide, perform and manage such Services for THSA in accordance with the terms herein.

1.2 Contractor's Experience and Qualifications.

Contractor represents and warrants that it is an established provider of the Services as awarded under this Agreement and has the skills, qualifications, expertise, financial resources and experience necessary to provide the Services described in this Agreement in accordance with the terms herein.

1.3 Definitions.

Capitalized terms used in this Agreement shall have the meanings set forth in **Exhibit 1**, unless otherwise defined in the context of the provision. Words having well-known technical or trade meanings but not otherwise defined in this Agreement shall be accorded such meaning unless expressly defined otherwise herein.

1.4 Other Terms.

- (a) **Construction.** The terms defined in this Agreement shall, where appropriate in the context so written, be deemed to apply to the plural as well as the singular of such terms. Unless otherwise expressly stated, the words “**herein**,” “**hereof**,” and “**hereunder**” and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section, Subsection, Exhibit, Attachment or other subdivision. Article, Section, Subsection, Exhibit and Attachment references refer to the articles, sections and subsections of, and exhibits and attachments to, this Agreement. The words “**include**” and “**including**” shall not be construed as terms of limitation. Unless otherwise modified, the words “**day**,” “**month**,” and “**year**” mean, respectively, calendar day, calendar month and calendar year. The words “**notice**” and “**notification**” and their derivatives mean notice or notification in writing. All references to this Agreement shall include the Exhibits, Statement of Work, Accepted Change Requests, and any other Attachments to this Agreement unless otherwise provided.
- (b) **Requirement of Writing.** To the extent that Contractor is required under this Agreement to obtain THSA's approval, consent, or agreement, such approval, consent, or agreement shall be in writing and must be signed by, or directly transmitted by electronic mail from, THSA CEO, or their designee. Except as expressly set forth herein, THSA's failure to respond to a requested approval, consent or agreement shall be construed as THSA's rejection of same.

2. ORDER OF PRECEDENCE

Unless otherwise expressly stated in the Statement of Work, in the event of a conflict between or among the various documents comprising this Agreement, the following order of precedence shall control:

- (a) **Article 1** through **Article 20** of this Agreement;
- (b) **Exhibit 1** (Definitions);

- (c) **Exhibit 2** (Statement of Work);
- (d) **Exhibit 3** (Service Level Agreement);
- (e) **Exhibit 4** (Pricing and Financial Provisions);
- (f) **Exhibit 5** (Business Associate Agreement); and
- (g) **Exhibit 6** (Data Use Agreement).

3. TERM

3.1 Term.

- (a) **Initial Term.** The term of this Agreement shall commence as of 12:00:00 a.m., Central Standard Time, on the Effective Date, and continue in full force and effect until 11:59:59 p.m., Central Standard Time, on the date that is three (3) years from the Effective Date, unless this Agreement is terminated earlier as provided herein, in which case the term of this Agreement shall end at 11:59:59 p.m., Central Standard Time, on the effective date of such termination (the “**Initial Term**”).
- (b) **Extension.** The Term shall automatically renew and extend for successive one (1) year periods thereafter (each, a “**Renewal Term**”) unless either Party provides notice of non-renewal at least three (3) months before the end of the then current Term. The Initial Term and any Renewal Term shall constitute the “**Term**”.

4. SERVICES

4.1 Services.

Contractor will provide the following Services:

- (a) Implementation Services and Production Services, performed in accordance with the Statement of Work, attached hereto as **Exhibit 2**; and
- (b) delivery, response, maintenance, monitoring, support, and other services as set forth in the Statement of Work or the Service Level Agreement.

4.2 Termination Assistance Services.

Upon notice of termination, Contractor shall promptly deliver to THSA all requested Data in an SQL format or in another format agreed to by the Parties. Contractor shall take all steps required or reasonably requested to make an orderly transition of the Services to THSA’s designees in migrating such Data.

- (a) **General.** Upon THSA's request following an Assistance Event, Contractor shall provide Termination Assistance Services directly to THSA, its successors or assigns and any of their designee(s).
- (i) **Period of Provision.** Contractor shall provide Termination Assistance Services commencing on the date that THSA determines there shall be an Assistance Event and continuing for up to twelve (12) months after the effective date of such Assistance Event, as designated by THSA, subject to further extensions as permitted by Section 4.2(a)(iii). For avoidance of doubt, Termination Assistance Services performed by Contractor (A) during the Term of this Agreement shall be performed without any Charges, except as set forth in Section 4.2(d); (B) after the Term of this Agreement shall be performed with Charges as set forth in Exhibit 4.
- (ii) **Notice of an Assistance Event.** THSA shall provide Contractor with written notice of an Assistance Event. Such notice shall include a description of the Services that are to be terminated or discontinued, and the anticipated effective date of the Assistance Event. THSA 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 THSA to Contractor.
- (iii) **Suspension and Extension of Services.** THSA may, at any time upon ten (10) Business Days' written notice to Contractor, elect to (i) suspend the period of performance of any Termination Assistance Services (in whole or in part) and, upon fifteen (15) Business Days' written notice to Contractor, restart the period for performance of any Termination Assistance Services, or (ii) extend the period for performance of the Termination Assistance Services (in whole or in part); provided that the total of all such delays or extensions shall not cause Contractor to provide the Termination Assistance Services for more than twenty-four (24) months.
- (iv) **Firm Commitment.** Contractor shall provide Termination Assistance Services regardless of the reason for the Assistance Event.
- (v) **Performance.** Contractor shall perform Termination Assistance Services with at least the same degree of accuracy, quality, completeness, timeliness, responsiveness, and resource efficiency as the accepted industry standards of first tier providers of services that are the same as or similar to the Services. If any period for performing any Termination Assistance Services extends beyond the expiration or the effective date of any termination of this Agreement, the provisions of this Agreement 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 THSA and/or its designee(s), and upon THSA's request, shall provide any and all information and reasonable assistance requested by THSA

including (i) the Services required to continue without interruption or adverse effect, or (ii) the orderly transfer of the Services (or replacement or supplemental services) to THSA and/or its designee(s).

- (c) **General Support.** As part of the Termination Assistance Services, Contractor shall (i) within thirty (30) days from receipt of notice of an Assistance Event, develop and provide THSA and/or its designee(s) with a written plan for the migration of the Services to THSA and/or its designee(s), which plan shall include capacity planning, process planning, facilities planning, human resources planning, technology planning, telecommunications planning and other planning necessary to effect the transition (“**Termination Assistance Plan**”), (ii) upon THSA’s Acceptance of the applicable Termination Assistance Plan, perform all Services necessary to implement the Termination Assistance Plan, (iii) analyze and report on the space required for Data and the Software needed to provide the Services, (iv) assist in the execution of a parallel operation, data migration and testing process until the successful completion of the transition to THSA and/or its designee(s), (v) create and provide copies of Data in the format and on the media reasonably requested by THSA and/or its designee(s), and (vi) provide other technical and process assistance, documentation and information as requested by THSA and/or its designee(s).
- (d) **Rates and Charges.** Except as provided in this **Section 4.2(d)**, Contractor shall provide all Termination Assistance Services at the Charges set forth in the Pricing and Financial Provisions contained in **Exhibit 4**. To the extent THSA requests that Contractor perform only a portion (but not all) of the Services included in a particular Charge, the amount to be paid by THSA shall be equitably adjusted downward in proportion to the portion of the Services that Contractor shall not be providing.
- (e) **Resources.** Contractor shall maintain capability at all times during the Term to, on at least thirty (30) days’ notice, deploy all necessary resources to perform any Termination Assistance Services.
- (f) **Information.** Upon receipt of written request by THSA following the occurrence of any breach by Contractor under this Agreement or in the event that THSA elects to evaluate re-procurement of all or any portions of Services, Contractor shall promptly (but not less than ten (10) Business Days following receipt of such request) deliver to THSA reports, data and information that THSA deems necessary, including all reports, data and information specified in **Section 5.3**. For the avoidance of doubt, Contractor shall deliver all such reports, data and information regardless of whether THSA has provided notice of or otherwise declared an Assistance Event.

4.3 Change Request.

If THSA requests that Contractor performs any New Services within the scope of the RFP that are reasonably related to the Services or other services generally provided by

Contractor, Contractor shall promptly prepare a Change Request for THSA's consideration in accordance with the change process outlined in the Integrated Change Management Plan developed pursuant to the Statement of Work. Although THSA will pay for agreed upon additional Charges related to a Change Request, THSA will not pay for the preparation of a Change Request.

4.4 Acceptance.

THSA shall determine, in its reasonable judgment, pursuant to the provisions of the Statement of Work, when a Deliverable shall be Accepted. Unless otherwise requested by THSA, each Deliverable shall be provided by Contractor and subject to THSA's "Acceptance" pursuant to the Statement of Work.

5. PERFORMANCE STANDARDS

5.1 Performance and Service Levels.

Contractor will perform the Services under the Statement of Work in accordance with the applicable Service Level Requirements along with calculation methodologies and other detailed terms as detailed in the Statement of Work, the Deliverable Expectation Document, or the Service Level Agreement, as the case may be. Contractor shall provide THSA with detailed Reports on Contractor's compliance with the Statement of Work and the Service Levels upon the frequency set forth in the Statement of Work or the Service Level Agreement, as the case may be. In addition, any changes to the Statement of Work or the Service Levels are subject to THSA's prior written approval. In the absence of any modifications, the performance targets, Service Level Requirements, and measurement intervals in the Service Level Agreement shall apply to all Contract Years. Nothing in this **Section 5.1** shall be deemed to supersede the Service Levels set forth in the Service Level Agreement.

5.2 Reimbursements.

Contractor recognizes that THSA is paying Contractor to deliver the Services at specified Service Levels in the manner set forth in the Service Level Agreement. If Contractor fails to meet such Service Levels, Contractor shall pay to THSA the relevant Service Level Reimbursements in recognition of the diminished value of the Services resulting from Contractor's failure to meet the agreed upon level of performance, and not as a penalty. Under no circumstances shall the imposition of Service Level Reimbursements be construed as THSA's sole or exclusive remedy for any failure to meet the Service Levels; provided, however, that any dispute relating thereto must be submitted to the dispute resolution process outlined in **Section 18** of this Agreement.

5.3 Service Problem Analysis.

- (a) **Notification of Problems.** If Contractor becomes aware of any Problem, then Contractor will immediately inform THSA in writing of such situation and promptly (but not more than two (2) days from the time in which Contractor first becomes aware of any such situation) provide THSA with a reasonably

detailed description of such acts, omissions, failures or other events and the impact or expected impact, and the Contractor Program Manager and THSA will meet to formulate and implement an action plan to minimize or eliminate the impact of such situation.

- (b) **Corrective Action Plan.** In the event that either (i) THSA reasonably determines that a Problem has occurred or a Problem reasonably likely could occur or (ii) Contractor has determined that a Problem has occurred or a Problem reasonably likely could occur, then THSA or Contractor, as applicable, shall promptly (but not more than two (2) days from the time in which such Party first becomes aware of any such situation) notify the other Party of such failure or anticipated failure (a “**CAP Notice**”). Concurrently with delivery or receipt of such CAP Notice, as applicable, Contractor shall (A)(1) immediately take steps to mitigate any harmful effects of such failure within its control, (2) upon THSA’s approval, correct the problem as soon as practicable, (3) continuously, and when requested by THSA, advise THSA of the progress and status of remedial efforts being undertaken with respect to such problem, and (4) demonstrate to THSA that all reasonable action has been taken to prevent a recurrence of the immediate failure; (B) promptly upon resolution of the Problem (and in any event, within five (5) days after resolution of the Problem) perform a Root Cause Analysis (to include the following: date, time, description of the Problem, who is impacted and the duration of the impact, cause of the problem, actions taken to correct the problem, and any changes to processes or systems to prevent reoccurrence of the problem); (C) report to THSA on the nature and scope of the problems identified; and (D) prepare a Corrective Action Plan to correct the source of the Problems and take all actions necessary to prevent its recurrence, including providing all additional resources necessary to resolve such failure. Following delivery of a Corrective Action Plan and Acceptance of such Corrective Action Plan by THSA, Contractor shall, within the timeline set forth in the Corrective Action Plan, (x) promptly correct the source of the problems in accordance with the Corrective Action Plan, (y) advise THSA of the progress of correction efforts at stages determined by THSA, and (z) demonstrate to THSA that all reasonable action has been taken to prevent a recurrence of the failure.

6. CONTRACTOR PERSONNEL

6.1 Contractor Project Manager.

Contractor shall designate a Contractor Project Manager. The Contractor Project Manager shall (i) be a full-time employee of Contractor, (ii) devote his or her full time and effort to managing the Implementation Services, (iii) remain in this position until Contractor completes the Implementation Services in accordance with the Statement of Work (except as the result of voluntary resignation or involuntary termination for cause, illness, disability, or death, or other leave of absence protected by applicable Law (e.g., the Family and Medical Leave Act)), (iv) serve as the single point of accountability for the Implementation Services, (v) be the single point of contact to whom all THSA

communications concerning the Implementation Services and the Statement of Work may be addressed, (vi) have authority to act on behalf of Contractor in all day-to-day matters pertaining to the Implementation Services and the Statement of Work, and (vii) have day-to-day responsibility for ensuring timely delivery of all Deliverables and performance of the Implementation Services in accordance with the Statement of Work.

6.2 Contractor Program Manager.

Contractor shall designate a Contractor Program Manager. The Contractor Program Manager shall (a) be a full-time employee of Contractor, (b) devote sufficient effort to manage the Services, (c) remain in this position for a minimum period of one (1) year from the Commencement Date (except as a result of voluntary resignation or involuntary termination for cause, death or disability, or other leave of absence protected by applicable Law (e.g., the Family and Medical Leave Act)), (d) serve as the single point of accountability for the Services, (e) be the single point of contact to whom all communications from THSA concerning this Agreement or the Services may be addressed, (f) have authority to act on behalf of Contractor in all day-to-day matters pertaining to this Agreement, (g) have day-to-day responsibility for service delivery, billing and relationship management, and (h) have day-to-day responsibility for ensuring customer satisfaction and attainment of all Service Levels.

6.3 Contractor Personnel Are Not State or THSA Employees.

The Parties intend to create an independent contractor relationship and nothing in this Agreement shall operate and be construed as making the State and THSA, on the one hand, and Contractor, on the other hand, partners, joint venturers, principals, joint employers, agents or employees of or with the other. No officer, director, employee, agent, Affiliate of, or contractor or subcontractor retained by, Contractor to perform Services hereunder shall be deemed to be an officer, director, employee, agent, Affiliate, contractor or subcontractor of the State or THSA for any purpose. Contractor, and not the State or THSA, has the right, power, authority and duty to supervise and direct the activities of the Contractor Personnel and to compensate such Contractor Personnel for any Services performed by them hereunder. Except as expressly provided in this Agreement, neither Contractor nor any of Contractor's employees, agents or Subcontractors may act in any sense as agents or representatives of THSA or the State. Contractor, and not the State or THSA, shall be fully responsible and therefore solely liable for all acts and omissions of Contractor Personnel in any way associated with or related to this Agreement, the Services, THSA Sites, Contractor Sites, THSA Confidential Information, or Equipment, including any and all acts and omissions constituting negligence, gross negligence, willful misconduct and/or fraud.

6.4 Responsibility for Contractor Personnel.

- (a) Contractor Personnel and Subcontractors shall be paid exclusively by Contractor for all Services performed. Contractor is responsible for and must comply with all requirements and obligations related to such employees, agents or Subcontractors under THSA, State or federal law, including minimum wage,

social security, unemployment insurance, State and federal Income Tax and workers' compensation obligations.

- (b) Contractor assumes sole and full responsibility for its acts and the acts of the Contractor Personnel and Subcontractors relating to the performance of this Agreement. Contractor expressly agrees that THSA does not and shall not assume any liability for the actions of, or judgments rendered against, the Contractor or any Contractor Personnel. THSA's liability to the Contractor Personnel, if any, shall be governed by Chapter 101, Texas Civil Practice & Remedies Code.
- (c) Contractor agrees that any claim on behalf of any person arising out of employment, alleged employment, agency or subcontract (including claims of discrimination against Contractor, its officers, its agents or its Subcontractors) is the sole responsibility of Contractor and is not the responsibility of THSA. Contractor agrees that any person who alleges a claim arising out of employment, alleged employment, agency, or subcontract by Contractor (including claims of discrimination against Contractor, its officers, its agents or its Subcontractors) will not be entitled to any compensation, rights, or benefits from THSA (including tenure rights, medical and hospital care, sick and annual/vacation leave, severance pay, or retirement benefits).
- (d) Contractor shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2s to common-law employees. Contractor is responsible for both federal and State unemployment insurance coverage and standard workers' compensation insurance coverage. Contractor shall comply with all federal and State tax Laws and withholding requirements. THSA shall not be liable to Contractor or its employees for any unemployment or workers' compensation coverage, or federal or State withholding requirements.

6.5 Qualifications of Contractor Personnel.

- (a) Contractor shall be responsible for verifying that all Contractor Personnel (A) meet the criteria for Contractor Personnel under this Agreement, and (B) have not been convicted of or accepted responsibility for a felony or a misdemeanor involving a dishonest or violent act, and are not otherwise disqualified from performing their assigned Services under applicable Laws.
- (b) Contractor shall comply with the requirements of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and the Immigration Act of 1990 (8 U.S.C. § 1101, et seq.) and any and all subsequent immigration laws and amendments.
- (c) **Background and/or Criminal History Investigations.** Prior to the date any Contractor Personnel are assigned to THSA's account, Contractor shall conduct and deliver electronically to THSA, via a secure electronic method, at

Contractor's expense, proof that Contractor Personnel passed a background check in accordance with Criminal Justice Information Services requirements ("CJIS"). Contractor will exercise reasonable care and diligence to ensure that Contractor does not assign individuals to the Contractor Personnel who are not legally authorized to work in the U.S. or who, based on the results of any background checks or criminal history investigations, may present a threat to the safety or security of any person or any Data, facilities, operations, or assets. Upon request by THSA, Contractor shall perform a substance abuse screening at THSA's expense.

6.6 Removal of Contactor Personnel.

Contractor shall immediately remove (or cause to be removed) any Contractor Personnel either upon the request of THSA or upon knowledge that Contractor Personnel are known to be or reasonably suspected of engaging in activities that may present a threat to the safety or security of any person or any Data, facilities, operations, or assets.

6.7 Union Agreements.

Contractor shall provide THSA not less than ninety (90) days' notice of the expiration of any collective bargaining agreement with unionized Contractor Personnel if the expiration of such agreement or any resulting labor dispute could potentially interfere with or disrupt or impact the activities or operations of THSA or Contractor's ability to timely perform the Services in accordance with this Agreement.

7. CONTRACTOR RESPONSIBILITIES

7.1 Reports, Data Correction, Re-Performance.

- (a) **Reports.** In addition to any other reports required by this Agreement, Contractor shall provide THSA with (i) those reports described and required to be provided in the Statement of Work, (ii) those reports described and required to be provided in the Service Level Agreement, and (iii) such additional reports as THSA may reasonably identify from time to time to be generated and delivered by Contractor on an ad hoc or periodic basis and which Contractor agrees to provide (all such reports, the "**Reports**").
- (b) **Correction of Errors.** Contractor shall promptly, but not more than five (5) days from the time in which Contractor first becomes aware of any errors or inaccuracies with respect to the Reports, correct any such errors or inaccuracies as part of the Services and at no additional cost to THSA, or provide THSA with an alternative Report.
- (c) **System Documentation.** Upon at least fifteen (15) Business Days' notice from THSA (but no more than twice in a Contract Year), Contractor will meet with representatives of THSA and any of its designees to (i) explain how the Services are provided, and (ii) provide such training and documentation as THSA may require for THSA to (A) provide services that interact with or interface with the

Services, and (B) understand and operate the Software. Upon THSA's request from time to time, Contractor will deliver to THSA a full description of the processes, tools and environmental configuration related to the Services.

7.2 Internal Controls.

- (a) **General.** Contractor shall develop and implement Quality Assurance and to the extent applicable any customized Service-specific internal control (e.g., financial and accounting controls, organizational controls, input/output controls, system modification controls, processing controls, system design controls and access controls) processes and procedures, including implementing tools and methodologies, to perform the Services in an accurate and timely manner (and confirm that they are so performed and accounted for) in accordance with (i) the Service Levels and other requirements of this Agreement, (ii) generally accepted accounting principles (applied in accordance with generally accepted auditing standards), (iii) accepted industry standards of first tier providers of services that are the same as or similar to the Services, (iv) the Laws applicable to THSA (without limiting the obligations of the Parties under **Section 14.10**), and (v) the industry standards, described in **Section 7.2(b)**, applicable to THSA and the performance of the Services. Such processes, procedures and controls shall include verification, checkpoint reviews, testing, acceptance and other procedures for THSA to assure the quality and timeliness of Contractor's performance. Without limiting the generality of the foregoing, Contractor shall:
 - (i) Maintain a strong control environment in day-to-day operations to assure that the following fundamental control objectives are met: (A) financial, billing and operational information is valid, timely, complete and accurate; (B) operations are performed efficiently and achieve effective results, consistent with the requirements of this Agreement; (C) assets and Data are safeguarded in accordance with Contractor's internal (and in all events reasonable) practices (but without expanding Contractor's obligations under **Section 12.2(b)**); and (D) actions and decisions of Contractor are in compliance with Laws (without limiting the obligation of the Parties under **Section 14.10**) and the terms of this Agreement;
 - (ii) Build the following basic control activities into work processes: (A) accountability clearly defined and understood; (B) access properly controlled; (C) adequate supervision; (D) financial transactions properly authorized; (E) financial transactions properly recorded; (F) financial transactions recorded in proper accounting period; (G) policies, procedures and responsibilities documented; (H) adequate training and education of Contractor Personnel; and (I) adequate separation of duties among the Parties;
 - (iii) Develop and execute a process to perform (and confirm performance of) periodic control self-assessments with respect to all Services (such self-

assessments to be performed at least annually unless and until THSA approves less frequent self-assessments) and provide the results of such self-assessments to THSA upon request;

- (iv) Maintain an internal audit function set forth in the change management plan developed as part of the Statement of Work to sufficiently monitor the processes, internal controls and Systems used to provide the Services in accordance with the Service Level Requirements (i.e., perform audits, track control measures, communicate status to management, drive corrective action, etc.);
- (v) Provide copies and complete and accurate summaries of any internal audit reports related to the Services to THSA;
- (vi) Conduct investigations of suspected fraudulent activities within Contractor's organization. Contractor shall promptly (but not more than two (2) days from the time in which Contractor first becomes aware of any such situation) notify THSA of any such suspected fraudulent activity and provide THSA with a reasonable summary of the results of any such investigation as they relate to THSA and such supplemental materials as THSA may reasonably request. At Contractor's request, THSA shall provide reasonable assistance to Contractor in connection with any such investigation;
- (vii) Maintain disaster avoidance procedures designed to safeguard Data and THSA's other Confidential Information. The force majeure provision shall not limit Contractor's obligation under this subsection;
- (viii) Utilize a high-availability fail-over system at a data center facility in the United States that is geographically remote from the primary system on which the Services are hosted (the "**Secondary Backup Facility**"). Except for its location and housing facility, the fail-over system shall (A) be, from the Authorized User's perspective, identical in all respects to the primary system, (B) have hardware and software, network connectivity, power supplies, backup generators, and other similar equipment and services that operate independently of the primary system, (C) have current Data stored on the primary system, and (D) have the ability to provide the Services during the performance of routine and remedial maintenance or any outage or failure of the primary system. Contractor shall operate, monitor and maintain such fail-over system so that it may be activated within two (2) hours or less of any failure of the Services to be Available;
- (ix) Conduct contemporaneous backups of Data and perform or cause to be performed other periodic backups of Data and store such backup of Data at the Secondary Backup Facility. On written notice from THSA, Contractor shall provide THSA with a copy of the backed up Data in such machine readable format utilized by Contractor. No backup of Data shall be counted

in allotting or calculating any data storage actually used or permitted to be used by THSA or any associated payment or fee; and

- (x) In accordance with the Statement of Work, provide to THSA the description of its Disaster Recovery Plan. Contractor shall maintain the Disaster Recovery Plan for the Services and implement such Disaster Recovery Plan in the event of any unplanned interruption of the Services. Contractor shall actively test, review, and update the Disaster Recovery Plan at least on an annual basis using industry best practices, and provide THSA with copies of all reports and summaries resulting from any testing of or pursuant to the Disaster Recovery Plan within ten (10) Business Days after Contractor's receipt or preparation thereof. Contractor shall provide THSA with copies of all such updates to the Disaster Recovery Plan within ten (10) Business Days of its adoption. If Contractor fails to reinstate the Services within the period of time set forth in the Disaster Recovery Plan, THSA may pursue any remedies available hereunder.
- (b) **Industry Standards, Certifications and Compliance.** Contractor shall comply with industry standards and certifications applicable to the Services, including CJIS.

7.3 Change Control.

- (a) **Prohibition on Unauthorized Changes.** Contractor shall not, without THSA's prior written approval, make any change that may (i) increase THSA's total cost of receiving the Services; (ii) require material changes to, or have an adverse impact on, any Authorized User's operations, facilities, processes, systems, software, utilities, tools or equipment; (iii) require THSA or any Authorized Users to install, at its cost or expense, a new version, release, upgrade of or replacement for any Software or Equipment or to modify any Software or Equipment; (iv) have an adverse impact on the functionality, interoperability, performance, accuracy, speed, responsiveness, quality or resource efficiency of the Services; (v) have an adverse impact on the cost, either actual or planned, to THSA of terminating this Agreement, in whole or in part, or on THSA's rights to in-source or use third parties; (vi) have an adverse impact on THSA's or any Authorized User's environment (including its flexibility to deal with future changes, interoperability and its stability); (vii) introduce new technology to (A) THSA's or any Authorized User's environment or operations or (B) Contractor's environment, to the extent that such introduction has or may have an adverse impact on THSA's or any Authorized User's environment; (viii) have an adverse impact on the functionality, interoperability, performance, accuracy, speed, responsiveness, quality, cost or resource efficiency of the Services; (ix) increase the risk of Contractor not being able to provide the Services in accordance with this Agreement; or (x) violate or be inconsistent with THSA Standards or applicable Laws. If Contractor desires to make such a change, it shall provide to THSA a written risk assessment and mitigation plan.

- (b) **Financial Responsibility for Changes.** Unless otherwise set forth in this Agreement or otherwise expressly approved by THSA in writing, Contractor shall bear all charges, fees and costs associated with any change desired by Contractor, including all charges, fees and costs associated with (i) the design, installation, implementation, testing and rollout of such change, (ii) any modification or enhancement to, or substitution for, any impacted process or associated Materials, Equipment, System or Services, and (iii) any increase in the cost to THSA or to Authorized Users of operating, maintaining or supporting any impacted process or associated Materials, Equipment, System or Services.
- (c) **Scheduled Downtime.** Contractor shall notify THSA of all scheduled outages within the time frame afforded in the Service Level Agreement (“**Scheduled Downtime**”). All such scheduled outages shall be in accordance with the Infrastructure Services Plan (as set forth in the Statement of Work). Contractor may request THSA’s approval for extensions of the Scheduled Downtime, which approval may be granted in THSA’s sole discretion.
- (d) **Implementation of Changes.** Contractor shall schedule and implement all changes made in accordance with this **Section 7.3** so as not to materially (i) disrupt or adversely impact the operations of THSA, (ii) degrade the Services or any other services then being received by THSA, or (iii) interfere with THSA’s ability to obtain the full benefit of the Services or any other services then being received by THSA.

7.4 Subcontractors.

- (a) **Use of Subcontractors.** Contractor shall not subcontract any of its responsibilities under this Agreement without THSA’s prior written approval, which may be withheld in THSA’s sole discretion. Prior to entering into a subcontract with a Third Party for the Services, Contractor shall (i) deliver to THSA a copy of the proposed subcontract or, at THSA’s reasonable discretion, a detailed description of scope and material terms of the proposed subcontract (other than charges thereunder, except to the extent such charges are the basis on which Charges are based), (ii) give THSA reasonable notice of the components of the Services affected, the scope of the proposed subcontract, the identity and qualifications of the proposed Subcontractor and the reasons for subcontracting the work in question, and (iii) obtain THSA’s prior written approval of such Subcontractor.
- (b) **Right to Revoke Approval.** THSA may revoke its prior approval of a Subcontractor and direct Contractor to replace any Subcontractor in accordance with this **Section 7.4(b)** at no additional cost to THSA, if (i) Contractor fails to obtain the rights set forth in **Section 7.4(c)** with respect to such Subcontractor, or (ii) in THSA’s discretion, there are other reasonable grounds for removal. Contractor shall, as soon as possible, remove and replace such Subcontractor. Contractor shall continue to perform its obligations under this Agreement,

notwithstanding the removal of a Subcontractor. THSA shall have no responsibility for any termination charges or cancellation fees that Contractor may be obligated to pay to a Subcontractor as a result of the removal of such Subcontractor at THSA's request or the withdrawal or cancellation of the Services then performed by such Subcontractor as permitted under this Agreement.

- (c) **Contractor Responsibility.** Notwithstanding anything in this Agreement to the contrary, Contractor shall be and remain responsible and liable for any failure by any Subcontractor or Subcontractor personnel to perform in accordance with this Agreement or to comply with any duties or obligations imposed on Contractor under this Agreement to the same extent as if such failure to perform or comply was committed by Contractor or Contractor Personnel. Without limiting the foregoing, Contractor warrants and covenants that in no event shall any provision of this Agreement, or any right or benefit of THSA provided for under this Agreement, be reduced, limited or otherwise adversely affected (including through any increase in cost, Charge or expense, including taxes) as a consequence of the performance of any Services by or through Subcontractors.

7.5 Technology Evolution.

Contractor will cause the Services, Software and other assets used to deliver the Services to evolve and be modified, enhanced, supplemented and replaced as necessary for the Services, Software and other assets used to deliver the Services to keep current with a level of technology that is (i) compliant with all Laws applicable to Contractor in the performance of the Services; and (ii) in general use and support by any and all third party software manufacturers used by Contractor to provide Services hereunder.

8. THSA RESPONSIBILITIES

8.1 Savings Clause.

Contractor's failure to timely or otherwise perform its responsibilities under this Agreement (including failure to meet the Service Levels) shall be excused if, and only to the extent that, such Contractor non-performance or untimely performance is caused by (i) the wrongful or tortious actions or omissions of THSA, or (ii) the failure of THSA to perform their obligations under this Agreement, but only if and to the extent that Contractor (A) within three (3) Business Days of becoming aware of such an occurrence, notifies THSA of such wrongful or tortious action or failure to perform and Contractor's inability to perform under such circumstances, (B) provides THSA with reasonable opportunity to correct such wrongful or tortious action or failure to perform and thereby avoid such Contractor non-performance, (C) identifies and pursues commercially reasonable means to avoid or mitigate the impact of such wrongful or tortious action or failure to perform, (D) provides evidence to THSA of Contractor's pursuit of such means to avoid or mitigate the impact, (E) uses commercially reasonable efforts to perform notwithstanding such wrongful or tortious action or failure to perform (with THSA reimbursing Contractor for

its additional reasonable out-of-pocket expenses incurred in connection with such effort; provided, however, that THSA has provided prior written approval of any such additional out-of-pocket expenses), and (F) conducts a Root Cause Analysis and thereby demonstrates that such wrongful or tortious action or failure to perform is the cause of Contractor's non-performance. Contractor acknowledges and agrees that the circumstances described in this **Section 8.1**, together with **Section 17.2**, are the only circumstances in which its failure to perform its responsibilities under this Agreement or to meet the Service Levels shall be excused.

9. AUDITS AND BENCHMARKING

9.1 Audit Rights.

- (a) **Contract Records.** Contractor shall maintain complete and accurate contract records of, and supporting documentation for, all Charges, all Data and all transactions, authorizations, changes, implementations, soft document accesses, work papers, reports, filings, returns, analyses, procedures, controls, records, data or information created, generated, collected, processed or stored by Contractor in the performance of its obligations under this Agreement ("**Contract Records**"). Contractor shall maintain such Contract Records in accordance with applicable Laws and the terms of this Agreement. Contractor shall retain Contract Records in a reasonably accessible format during the Term and thereafter for a period of seven (7) years after the termination of the contract or the resolution of all billing questions, until completion of all audits, or until pending litigation has been completely and fully resolved, whichever occurs last (the "**Audit Period**").
- (b) **Operational Audits.** During the Audit Period and upon reasonable notice to Contractor, Contractor shall provide to THSA (and to any internal and external auditors, inspectors, regulators and other representatives that THSA may designate from time to time, including customers, vendors, licensees and other third parties to the extent THSA is legally or contractually obligated to submit to audits by such Entities), the State Comptroller Claims Division and the State Auditor's Office and any successor governmental authorities (collectively, "**THSA Auditors**") access at reasonable hours to Contractor Personnel, the Contractor Sites at or from which Services are then being provided, and Contract Records and other pertinent information, all to the extent relevant to the Services and Contractor's obligations under this Agreement; provided, however, that any such THSA Auditors agree to protect Contractor's Confidential Information subject to applicable public information Laws. Such access shall be provided for the purpose of performing audits, evaluations, and inspections to (i) verify the integrity of Data, (ii) examine the systems that process, store, support and transmit Data (including system capacity, performance and utilization), (iii) examine Contractor's internal controls (e.g., financial controls, human resources controls, organizational controls, input/output controls, system modification controls, processing controls, system design controls and access controls) and the security, disaster recovery

and back-up practices and procedures, (iv) examine Contractor's performance of the Services, (v) verify Contractor's reported performance against the applicable Service Levels, (vi) examine Contractor's measurement, monitoring and management tools, and (vii) enable THSA to meet applicable legal, regulatory and contractual requirements. Contractor shall, in an expeditious manner to facilitate the timely completion of such audit, (A) provide any assistance reasonably requested by any THSA Auditors in conducting any such audit, including installing and operating audit software on systems dedicated to the provision of the Services, and (B) make reasonably requested Contractor Personnel, records and information available to THSA Auditors. Any such audits shall be at THSA's expense.

- (c) **Financial Audits.** During the Audit Period, upon reasonable prior notice, Contractor shall provide to THSA Auditors access at reasonable hours to Contractor Personnel and Contract Records that directly relate to all financial-related transactions that occur under this Agreement; provided, however, that any such THSA Auditors agree to protect Contractor's Confidential Information subject to applicable public information Laws. Such access shall be provided for the purpose of performing audits, evaluations, and inspections to verify the accuracy and completeness of all financial-related transactions that occur under this Agreement. Contractor shall, in an expeditious manner to facilitate the timely completion of such audit, (A) provide any assistance reasonably requested by THSA Auditors in conducting any such audit, and (B) make reasonably requested Contractor Personnel, records and information available to THSA Auditors. If any such audit reveals a material breach of this Agreement, Contractor and THSA shall resolve such dispute in accordance with the dispute resolution provision set forth in **Section 18** of this Agreement.

(d) **Cybersecurity Audits.**

- (i) At least once per Contract Year, Contractor shall conduct an audit of its SaaS Services, in accordance with the AICPA's Statement on Standards for Attestation Engagements ("SSAE") No. 18, Type 2. Contractor has attained, and will maintain, Type II SSAE compliance, or its equivalent, during the Term of this Agreement. Upon execution of a mutually agreeable Non-Disclosure Agreement, Contractor will provide THSA with a summary of the SSAE-18 compliance report or its equivalent. Every year thereafter, for so long as the Non-Disclosure Agreement is in effect and in which THSA makes a written request, Contractor will provide that same information.
- (ii) Contractor conducts annual penetration testing of either the production network and/or web application to be performed. Contractor will maintain industry standard intrusion detection and prevention systems to monitor malicious activity in the network and to log and block any such activity. Contractor will provide THSA with a written or electronic record of the actions taken by Contractor in the event that any unauthorized access

to THSA's database(s) is detected as a result of Contractor's security protocols. Contractor will undertake an additional security audit, on terms and timing to be mutually agreed to by the Parties, at THSA's written request. THSA may not attempt to bypass or subvert security restrictions in the SaaS Services or environments related to Contractor's Software. Unauthorized attempts to access files, passwords or other confidential information, and unauthorized vulnerability and penetration test scanning of Contractor's network and systems (hosted or otherwise) is prohibited without the prior written approval of Contractor's IT security officer.

- (e) **Audits by Governmental Authorities.** Notwithstanding any other provision of this Agreement, Contractor authorizes the THSA Auditors to perform any audits required by applicable Laws.
- (f) **General Procedures.**
 - (i) Contractor shall obtain audit rights equivalent to those specified in this **Section 9.1** from all Subcontractors (and in all events shall obtain such audit rights from all Subcontractors as required under applicable Law) and shall cause such rights to extend to THSA Auditors.
 - (ii) In performing audits, THSA Auditors shall endeavor to avoid unnecessary disruption of Contractor's operations and unnecessary interference with Contractor's ability to perform the Services in accordance with the Service Levels.
 - (iii) THSA Auditors shall be given adequate private workspace in which to perform an audit, including access to photocopiers, telephones, Internet connectivity, facsimile machines, computer hook-ups and any other facilities or equipment needed for the performance of the audit.
 - (iv) As requested by THSA, Contractor shall provide THSA Auditors access to on-line view and notification components of any measurement and monitoring tools used by Contractor in connection with its delivery of the Services.
 - (v) Contractor recognizes that THSA must comply with applicable Laws respecting procurement of services in connection with any engagement of an audit firm or other consultant for conducting the audits contemplated in this **Section 9.1**. To the extent permissible under such Laws and the reasonable practice of THSA, THSA shall consult with Contractor respecting the audit firm or other consultant and appropriate criteria related thereto (including general terms of engagement) in making its selection; provided, however, that THSA reserves the right to determine, in its sole discretion, the appropriate audit firm or consultant to be engaged and the arrangement for such engagement. Any THSA Auditor engaged by THSA

to conduct an audit pursuant to **Section 9.1(c)** or **Section 9.1(e)** shall (A) be independent, (B) have in THSA's reasonable judgment, verifiable, demonstrated experience in conducting such audits, and (C) execute a non-disclosure agreement.

- (vi) THSA shall provide Contractor with notice at least five (5) Business Days prior to any operational or financial audit by an THSA Auditor; provided that no such notice shall be required with respect to audits conducted pursuant to **Section 9.1(f)** or to the extent limited due to extenuating circumstances. Notwithstanding the foregoing, to the extent THSA has advance notice of an audit to be conducted pursuant to **Section 9.1(f)**, THSA shall provide reasonable notice of such audit to Contractor.
- (g) **Contractor Response.** In the event THSA would like to discuss the results of any audit conducted pursuant to this **Section 9.1**, Contractor will meet with THSA within ten (10) days of THSA's written request.
- (h) **Contractor Response to External Audits.** If an audit by a governmental body, standards organization or regulatory authority having jurisdiction over THSA or Contractor results in a finding that Contractor is not in compliance with any applicable Law or standard, including any generally accepted accounting principle or other audit requirement relating to the performance of its obligations under this Agreement, Contractor shall, if and to the extent such audit deficiency or finding of non-compliance results from Contractor's failure to comply with its obligations under this Agreement, at its own expense and within the time period specified by such auditor, address and resolve the deficiency(ies) identified by such governmental body, standards organization or regulatory authority, in the manner approved by THSA, to the extent necessary to comply with Contractor's obligations under this Agreement.

10. FEES

10.1 General.

- (a) **Payment of Charges.** In consideration of Contractor's performance of the Services THSA shall pay the Charges to Contractor.
- (b) **No Additional Charges.** Unless expressly set forth in this Agreement or in **Exhibit 4** as a responsibility of THSA, there shall be no charges, fees, expenses or other amounts payable to Contractor for the provision of Services. Any costs incurred by Contractor prior to the Effective Date are included in the Charges and are not to be separately paid or reimbursed by THSA.
- (c) **Incidental Expenses.** Contractor acknowledges that, except as expressly provided otherwise in this Agreement, expenses that Contractor incurs in performing the Services (including management, travel and lodging, document reproduction and shipping, equipment and software required by Contractor Personnel, and long-distance telephone) are included in the Charges as set forth

in **Exhibit 4**. Accordingly, such Contractor expenses shall not be separately paid or reimbursed by THSA.

- (d) **Charges for Contract Changes.** Unless otherwise agreed, changes in the Services shall result in changes in the applicable Charges only if and to the extent (i) this Agreement expressly provides for a change in the Charges in such circumstances; (ii) the agreed upon Charges or pricing methodology expressly provides for a price change in such circumstances; or (iii) such change meets the definition of New Services and additional Charges are applicable in accordance therewith.

10.2 Taxes.

Pursuant to Sections 151.309 and 151.310, Texas Tax Code, THSA is exempt from the assessment of State taxes and, pursuant to Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter O, § 3.322(c)(4), is not required to present an exemption certificate with respect to State sales tax. In addition, THSA is exempt from federal taxes pursuant to 26 U.S.C. §§ 4253(i) and (j).

- (a) **Contractor's Tax Responsibility.** Contractor shall be solely responsible for all sales, service, value-added, use, excise, consumption, and any other taxes, duties, and charges of any kind imposed by any federal, state, or local governmental entity on any amounts payable by THSA under this Agreement. Contractor shall not include any taxes in the Charges.
- (b) **Tax Filings.** Contractor represents, warrants and covenants that it shall file appropriate tax returns, and pay applicable taxes owed arising from or related to the provision of the Services.

11. INVOICING AND PAYMENT

11.1 Invoicing.

- (a) **Invoice for Implementation Services.** Contractor shall invoice THSA for Accepted Deliverables. The invoice shall include (i) THSA's purchase order number, (ii) the vendor identification number, (iii) the name of the Deliverable and each outcome of the Deliverable for which payment is requested, (iv) the pricing set forth in **Exhibit 4**, and (v) supporting information as identified in the Statement of Work, or other support as THSA may require. No payment shall be made without the submission of detailed, correct invoices. Contractor shall submit an invoice after Acceptance of the Deliverable by THSA. Invoices for Implementation Services provided by Subcontractors shall be paid by the Contractor, then invoiced to THSA.
- (b) **Invoice for Production Services.** Following the Commencement Date, Contractor shall invoice THSA for Production Services no sooner than 30 days following the completion of each THSA Fiscal Quarter. Thereafter, Contractor shall present THSA with the quarterly invoice for the preceding THSA Fiscal

Quarter (the “**Quarterly Invoice**”). Contractor shall not invoice THSA for taxes or any backdated Charges that Contractor failed to invoice to THSA within four (4) invoice cycles following the month in which the Charges were incurred. To the extent that any Charges included in the Quarterly Invoice are disputed by THSA, such dispute shall be resolved in accordance with **Section 11.3**.

- (c) **Form and Data.** Each invoice provided by Contractor to THSA under this Agreement shall be submitted electronically to Phil Beckett phil.beckett@thsa.org , or by hard copy to Phil Beckett, PhD, CEO, 901 S. Mopac Expressway | Building 1 | Suite 300, Austin, Texas 78746, and shall (i) comply with all applicable legal, regulatory and accounting requirements, (ii) allow THSA to validate the Charges, and (iii) comply with THSA’s accounting and billing requirements, including providing sufficient detail for THSA to allocate costs to all federal and State programs in accordance with the relative benefits received and to make federal claims according to the federal cost plan of THSA (if any).
- (d) **Reimbursements.** To the extent a Service Level Reimbursement, Deliverable Fee or other reimbursements or fees may be due to THSA pursuant to this Agreement, THSA shall invoice Contractor with the appropriate amounts then due and owing.
- (e) **Time Limitation.** Unless otherwise requested by Contractor in advance and agreed by THSA in its sole discretion, if Contractor fails to provide an invoice to THSA for any amount within four (4) invoice cycles of the month in which the Services in question are rendered or the expense incurred, Contractor shall waive any right it may otherwise have to invoice for and collect such amount.

11.2 Set Off.

THSA may set off against amounts to be paid or reimbursed by THSA any amount that Contractor is obligated to pay THSA hereunder, provided that THSA notifies Contractor in writing of the amounts of, and the basis for, such set off.

11.3 Disputed Charges.

- (a) **Disputed Amounts.** THSA may withhold any amount of any invoice in dispute.
- (b) **No Waiver.** Neither the failure to dispute any Charges or amounts prior to payment nor the failure to withhold any amount shall constitute, operate or be construed as a waiver of any right THSA may otherwise have to dispute any Charge or amount or recover any amount previously paid.
- (c) **Prompt Resolution.** In the event THSA initiates a dispute related to an invoice, Contractor shall promptly (but not more than two (2) Business Days from the time THSA initiated such dispute) respond to the issue raised in such dispute,

which response shall include a written explanation of the charges that are the subject of such dispute, as well as any supporting documentation necessary to support Contractor's position. If, within ten (10) days of the date on which THSA notifies Contractor of the dispute, Contractor has either (i) failed to respond to THSA with sufficient details or (ii) failed to provide documentation or other evidence as to the validity of the charges, then such dispute will be deemed resolved in favor of THSA, the appropriate credits against the unpaid invoice will be withheld and the matter closed.

12. DATA AND OTHER CONFIDENTIAL INFORMATION

12.1 Confidentiality.

- (a) **Confidential Information.** Contractor and THSA each acknowledge that the other possesses and shall continue to possess information that has been developed or received by it, has commercial, proprietary, or other value in its or its constituents' or customers' activities or operations and is not generally available to the public.
- (b) **Disclosure of Confidential Information.**
 - (i) During the Term and at all times thereafter as specified in **Section 12.4**, each Receiving Party (A) shall hold Confidential Information received from a Disclosing Party in confidence and shall use such Confidential Information only for the purposes of fulfilling its obligations or exercising its rights under this Agreement and for no other purposes, (B) shall follow all applicable security requirements, protocols, and procedures for accessing and handling such Confidential Information, and (C) shall not disclose, provide, disseminate or otherwise make available any Confidential Information of the Disclosing Party to any Third Party without the express written permission of the Disclosing Party, unless expressly permitted by **Sections 12.1(b)(ii)** and **12.1(b)(iii)** below or elsewhere in this Agreement. Subject to the requirements of **Section 12.2(b)**, as applicable, each Receiving Party shall use at least the same degree of care to prevent disclosure, dissemination, and misuse of the Disclosing Party's Confidential Information to third parties as the Receiving Party employs to avoid unauthorized disclosure, publication, dissemination, destruction, loss or alteration of its own information (or information of its customers) of a similar nature, but not less than reasonable care.
 - (ii) The Receiving Party may disclose Confidential Information of the Disclosing Party to its employees, directors, attorneys, financial advisors, contractors and agents (including THSA Auditors in the case of THSA) provided that (A) such person or Entity has a need to know the Confidential Information for purposes of performing his or her obligations under or with respect to this Agreement or as otherwise naturally occurs in such person's scope of responsibility, (B) such disclosure is made pursuant to an

obligation of confidentiality upon such person or Entity that is no less stringent than that set forth in this **Section 12.1**, and (C) such disclosure is not in violation of Law or applicable THSA Standards. The Receiving Party assumes full responsibility for the acts or omissions of any person or Entity to whom it discloses Confidential Information of the Disclosing Party regarding their use of such Confidential Information and must take commercially reasonable measures to protect the Confidential Information from disclosure or use in contravention of this Agreement.

- (iii) The Receiving Party may disclose Confidential Information of the Disclosing Party as required to satisfy any legal requirement of a competent government body, provided that, promptly upon receiving any such request (but not more than two (2) days from receipt of such request), the Receiving Party, to the extent it may legally do so, gives notice to the Disclosing Party of the Confidential Information to be disclosed and the identity of the Third Party requiring such disclosure prior to making such disclosure in order that the Disclosing Party may interpose an objection to such disclosure, take action to assure confidential handling of the Confidential Information, or take such other action as it deems appropriate to protect the Confidential Information. The Receiving Party shall use reasonable efforts to cooperate with the Disclosing Party in its efforts to seek a protective order or other appropriate remedy or, in the event such protective order or other remedy is not obtained, to obtain assurance that confidential treatment shall be accorded such Confidential Information.
- (iv) Unless expressly permitted by this Agreement, neither Party shall (A) make or use any copies of the Confidential Information of the other Party except as expressly contemplated by this Agreement, (B) possess or acquire any right in or assert any lien against the Confidential Information of the other Party, (C) sell, assign, transfer, lease, encumber or otherwise dispose of or disclose the Confidential Information of the other Party to third parties, or (D) commercially exploit, or permit a Third Party to commercially exploit, such information, or refuse for any reason (including a default or material breach of this Agreement by the other Party) to promptly provide the other Party's Confidential Information (including any copies thereof) to the other Party if requested to do so.
- (v) Contractor may not use any Confidential Information for purposes other than for the fulfillment of the Services for the benefit of THSA. This includes, but is not limited to, ensuring that staff, resources, and Confidential Information related to this Agreement are not shared or accessible to individuals or teams working on other projects or services. For avoidance of doubt, Contractor has no right or license to use THSA's Confidential Information or Data, whether or not such THSA Confidential Information or Data is anonymized or aggregated. If Contractor provides services that are similar or identical to the Services under this Agreement to itself or to third parties, the Contractor is required to take all reasonable and

necessary steps to ensure that the personnel and operations involved in fulfilling this Agreement are strictly separated (or 'firewalled') from any other operations.

- (vi) Notwithstanding the provisions of this **Section 12.1(b)**, THSA may disclose Confidential Information relating to the financial or operational terms of this Agreement and/or Contractor's performance hereunder (e.g., applicable Service Levels and measurements of Contractor's performance with respect to such Service Levels) in connection with the solicitation of proposals for or the procurement of the same. To the extent allowed by applicable Law, THSA shall promptly provide Contractor written notice of any such disclosure.
- (vii) Each Party shall take all necessary steps to cause its employees, contractors and subcontractors to comply with the provisions of **Article 12**.
- (c) **Exclusions.** Notwithstanding the above, **Section 12.1(b)** shall not apply to any particular information which the Receiving Party can demonstrate (i) is, at the time of disclosure to it, generally available to the public other than through a breach of the Receiving Party's or a Third Party's confidentiality obligations; (ii) after disclosure to it, is published by the Disclosing Party or otherwise becomes generally available to the public other than through a breach of the Receiving Party's or a Third Party's confidentiality obligations or through a Third Party or a party affiliated with the Receiving Party who obtained the information from the Receiving Party; (iii) was lawfully in the possession of the Receiving Party immediately prior to the time of disclosure to it by the Disclosing Party; (iv) is received from a Third Party that is not restricted from disclosing such information by law, contract, fiduciary duty, or otherwise; or (v) is independently developed by the Receiving Party without reference to or use of the Disclosing Party's Confidential Information.
- (d) **Loss of Confidential Information.** Each Party shall (i) immediately notify the other Party of any possession, use, knowledge, disclosure, or loss of such other Party's Confidential Information in contravention of this Agreement, (ii) promptly furnish to the other Party all known details and assist such other Party in investigating and/or preventing the reoccurrence of such possession, use, knowledge, disclosure, or loss, (iii) cooperate with the other Party in any investigation or litigation deemed necessary by such other Party to protect its rights, and (iv) promptly use appropriate efforts to prevent further possession, use, knowledge, disclosure, or loss of Confidential Information in contravention of this Agreement. Each Party shall bear any costs it incurs in complying with this **Section 12.1(d)**.
- (e) **No Implied Rights.** Nothing contained in this **Section 12.1** shall be construed as obligating a Party to disclose its Confidential Information to the other Party, or as granting to or conferring on a Party, expressly or impliedly, any rights or license to any Confidential Information of the other Party.

- (f) **Return or Destruction of Confidential Information.** Each Party shall securely store the other Party's Confidential Information until such Confidential Information is securely returned or permanently destroyed as described in this **Section 12.1(f)**. Except as limited by applicable Laws or this **Section 12.1(f)**, each Party shall destroy all other documentation in any medium that contains, refers to or relates to the other Party's Confidential Information and any copies thereof in such Party's control or possession (or the portion of such Confidential Information specified by the other Party) within fifteen (15) Business Days of the expiration or termination of this Agreement and completion of each Party's obligations hereunder. Upon written request, the Party returning or destroying the other Party's Confidential Information shall deliver to the other Party written certification of its compliance with this paragraph signed by an authorized representative of such Party. Notwithstanding the foregoing, either Party may retain one copy of the other Party's Confidential Information in its legal department as and to the extent required to comply with applicable Laws or enforce its rights under this Agreement; provided that such Confidential Information shall be returned or destroyed in accordance with this provision upon the expiration of the period specified in the applicable Law, the expiration of the applicable statute of limitations or the final resolution of any pending dispute, as applicable. Contract Records shall be retained by Contractor for the duration of the Audit Period unless and to the extent Contractor is directed by THSA to deliver such Contract Records to THSA prior to the expiration of the Audit Period. In no event shall a Party withhold any Confidential Information of the other Party as a means of resolving any dispute.
- (g) **Transfer of THSA Confidential Information.** Contractor shall not transfer THSA Confidential Information to any other locations, nor change the locations for storage and processing of such THSA Confidential Information, except with the express written consent of THSA, which THSA may withhold in its sole discretion.
- (h) **Texas Public Information Act.** THSA is subject to the Texas Public Information Act (the Act), located in Chapter 552 of the Texas Government Code, and information maintained by THSA, including this Agreement and other confidential information obtained by THSA, may be disclosed to the public upon request. Notwithstanding the foregoing, Contractor may attempt to protect what it considers to be trade secret and confidential information from public disclosure. Contractor should review carefully Chapter 552, Texas Government Code, and in particular Section C, Information Excepted From Required Disclosure, for more information on exceptions to the requirement for public disclosure of information pursuant to a Texas Public Information Act request. Contractor understands that the ultimate decision as to whether materials qualify for an exception under Chapter 552 rests with the Texas Office of the Attorney General. THSA agrees to notify Contractor upon receipt of a request under the Act relating to this Agreement or any work thereunder.

12.2 Data.

Nothing in this **Section 12.2** is intended to limit the obligations of Contractor under **Section 12.1** of this Agreement with respect to the Confidential Information addressed in such Section.

- (a) **Data.** Except solely for the purpose of performing its obligations under this Agreement, Contractor shall not use, sell, license, assign, lease, transfer, distribute, or encumber Data. Contractor shall not disclose to, or allow access by, third parties to Data, unless expressly provided for in this Agreement or upon prior written consent of THSA. Contractor shall not directly or indirectly commercially exploit, or permit a Third Party to commercially exploit, Data on behalf of Contractor or any other person or Entity. Upon THSA's request, and in the form and format as reasonably requested by THSA, Contractor shall make Data available to THSA. Contractor agrees that Contractor shall not, and shall cause Contractor Personnel to not, use any Data for any purpose other than the fulfillment of the terms and conditions of this Agreement.

- (b) **Safeguarding of Data.**

Contractor shall implement and maintain throughout the Term a written, comprehensive data security program, which shall (A) include reasonable and appropriate technical, organizational and security measures and safeguards to protect Data from unauthorized access, acquisition, disclosure, destruction, alteration, accidental loss, misuse, or damage, (B) be no less rigorous than those maintained (or required to be maintained) by THSA, (C) be no less rigorous than those maintained by Contractor for its own information of a similar nature, (D) be no less rigorous than best security standards in the industry (e.g., Texas Administrative Code, Title 1, Part 10, Chapter 202), but without limiting Contractor's obligations respecting technology evolution, and (E) comply (without limiting the Parties' obligations under **Section 14.9**) with all applicable THSA Standards, including the requirements of THSA's then-current privacy, security and records retention policies, including the Health Information Trust Alliance (HITRUST), Common Security Framework (CSF), viewed at least annually. Contractor and its systems and services shall be FedRamp and TexRamp certified. Contractor shall permit THSA or its designee(s) and THSA Auditors to review such documentation and/or to inspect Contractor's compliance with these provisions in accordance with **Section 9.1**. All Data shall reside only on systems within the United States of America.

- (i) Contractor certifies that it will comply with the security controls required under this Agreement and will maintain records and make them available to THSA as evidence of its compliance.
- (ii) Contractor shall not make any changes that materially weaken any technical, organizational, or security measures in place to safeguard Data or result in Contractor's failure to meet any of the minimum standards set forth

above without THSA's prior approval. Under no circumstances shall Contractor or Contractor Personnel use, access, attempt to use or access, or permit use of or access to, Data except as may be required for the performance of Contractor's obligations or otherwise permitted under this Agreement.

- (iii) To the extent Contractor removes Data from any media that is taken out of service that is under Contractor's control, Contractor shall destroy or securely erase such media. Under no circumstances shall Contractor use or re-use media on which Data has been stored to store data of any other customer of Contractor or to deliver data to a Third Party, including another Contractor customer.
- (c) **Destruction of Data.** Contractor shall securely store Data until such Data is returned or destroyed. Except as limited by applicable Laws, Contractor shall return then permanently delete or destroy all Data and all other documentation in any medium as requested by THSA that contains, refers to or relates to the Data and any copies thereof in Contractor's control or possession within fifteen (15) Business Days of the expiration or termination of this Agreement and completion of each Party's obligations hereunder, including all periods of Termination Assistance Services requested by THSA. Contractor shall deliver to THSA written certification of its compliance with this paragraph signed by an authorized representative.
- (d) **Contractor Personnel.** Contractor shall take appropriate action to cause any Contractor Personnel who have access to Data pursuant to this Agreement to be (i) advised of, and comply with, the terms and conditions of this **Section 12.2**; and (ii) trained regarding their handling of such Data. Contractor shall be responsible for any failure of Contractor Personnel to comply with the terms and conditions regarding Data. Contractor agrees to maintain a disciplinary process to address any unauthorized access, use or disclosure of Data by any Contractor Personnel.

12.3 Security Incident.

- (a) **Procedures.** In the event Contractor discovers or is notified of, or should have known of, a Security Incident or potential Security Incident, Contractor shall immediately notify THSA of such Security Incident or potential Security Incident. Following such notice, Contractor shall fully cooperate in THSA's handling of such Security Incident or potential Security Incident and, at Contractor's own cost and expense, shall (i) investigate such Security Incident or potential Security Incident, facilitating interviews with Contractor Personnel and others involved in the matter, and making available all relevant records, logs, files, data reporting, and other materials required to comply with applicable Laws, regulations, industry standards or as otherwise reasonably required by THSA, (ii) perform a risk assessment, Root Cause Analysis and Corrective Action Plan thereon in accordance with **Section 5.3(b)**, (iii) provide

a detailed written report to THSA of such risk assessment, Root Cause Analysis and Corrective Action Plan, (iv) upon THSA's approval, remediate the effects of such Security Incident or potential Security Incident as soon as practicable or assist in the coordination of such remediation if Contractor does not have responsibility for the matters which are the source of the breach or potential breach, (v) provide THSA with reasonable assurances that such Security Incident or potential Security Incident shall not recur, (vi) cooperate with THSA in providing any notices regarding impermissible disclosures caused by such Security Incident which THSA deems appropriate, and (vii) cooperate in any litigation, investigation, or other action deemed necessary by THSA to protect its rights relating to the use, disclosure, protection and maintenance of Data. Following any Security Incident, Contractor shall continuously use its best efforts to prevent a recurrence of any such Security Incident.

- (b) **Security Incident Involving Personal Data.** To the extent a Security Incident involves Personal Data and is attributable to a breach by Contractor or Contractor Personnel of Contractor's obligations under this Agreement, Contractor shall bear the costs incurred by Contractor in complying with its legal obligations relating to such Security Incident and, in addition to any other damages for which Contractor may be liable under this Agreement, Contractor shall reimburse THSA for all actual costs incurred in providing (i) notice to affected individuals, (ii) such affected individuals with credit monitoring services for thirty-six (36) months (where such Security Incident results in the potential for exposure of Highly-Sensitive Personal Information), (iii) such affected individuals with \$50,000 of identity theft insurance, (iv) call center support for such affected individuals for thirty (30) days, (v) any related governmental fees or fines assessed against THSA, (vi) any Losses for which Contractor would be liable under **Section 16.1**, and (vii) any other services that THSA deems necessary to protect such affected individuals in light of the risks posed by such Security Incident.
- (c) **Third Party Notices.** Contractor agrees that it shall not inform any Third Party of any Security Incident without first obtaining THSA's prior written consent, other than to inform a complainant that the matter has been forwarded to THSA's legal counsel. Further, Contractor agrees that THSA shall have the right to determine (i) whether notice of the Security Incident is to be provided to any individuals, regulators, law enforcement agencies, consumer reporting agencies, or others as required by Law or regulation, or otherwise in THSA's discretion; and (ii) the contents of such notice, whether any type of remediation may be offered to affected persons, and the nature and extent of any such remediation.
- (d) **Ongoing Obligations.** Contractor agrees to maintain and preserve all documents, records and other data related to any Security Incident.

12.4 Protected Health Information and Data Use.

Contractor acknowledges that, pursuant to its obligations under this Agreement, it will receive health information that is protected under applicable state and/or federal law, including without limitation, Protected Health Information and Electronic Protected Health Information. Contractor shall execute a Business Associate Agreement to reflect its confidentiality obligations, in substantially the form shown in **Exhibit 5 – Business Associate Agreement**. To the extent that confidential information is received from, or transmitted to, the Texas Health and Human Services Enterprise, Contractor shall execute a Data Use Agreement, in substantially the form shown in **Exhibit 6 – Data Use Agreement**.

12.5 Survival.

Notwithstanding the expiration or any termination of this Agreement, (i) the limitations on use and disclosure by Contractor under this Article with respect to Data shall survive the expiration or any termination of this Agreement and shall be perpetual and (ii) other than the foregoing with respect to the survival of Data, each Party's confidentiality obligations under this Agreement shall continue for any period required by applicable Law or, in the absence of a required period, perpetually until such time as the Confidential Information is publicly known and made generally available through no action or inaction of the Receiving Party or any agent, employee or Affiliate thereof.

13. LICENSE GRANT AND MATERIALS

13.1 Contractor Owned and Licensed Materials.

- (a) **Ownership of Contractor Owned Materials.** As between the Parties, Contractor shall be the sole and exclusive owner of the (i) Materials and other intellectual property lawfully owned by it or its Affiliates prior to the Effective Date, (ii) Materials and other intellectual property acquired by Contractor or its Affiliates on or after the Effective Date, and (iii) Materials and other intellectual property that are developed by or on behalf of Contractor pursuant to this Agreement or otherwise paid for by THSA under this Agreement (collectively, "**Contractor Owned Materials**"), including all Intellectual Property Rights in the Contractor Owned Materials.
- (b) **License to Contractor Owned Materials.** As of the Effective Date, Contractor hereby grants to THSA during the Term, at no additional charge, a world-wide, non-exclusive, irrevocable (provided that Contractor Owned Materials are used in accordance with the terms hereof), royalty-free right and license to use, with the right to allow an unlimited number of Authorized Users to use, the Services and the Contractor Owned Materials (including all modifications, replacements, upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto), including to (i) receive the full benefit of the Services, (ii) perform or have performed services of the nature of the Services, including in-scope processes and services, (iii) monitor, access,

interface with or use the Materials then being used in the performance of the Services, and (iv) perform or have performed ancillary services and functions, including related information technology services and functions. Contractor Owned Materials shall remain the property of Contractor. THSA shall not (A) reverse engineer, decompile, or disassemble the source code of all or any portion of the Contractor Owned Materials or (B) except as referenced in this Agreement, use the Contractor Owned Materials for the benefit of any Third Party.

- (c) **License to Contractor Third Party Materials.** As of the Effective Date, and subject to Contractor having obtained any Required Consents, Contractor hereby grants to THSA during the Term, at no additional charge, a world-wide, non-exclusive, irrevocable (provided that the Third Party Materials are used in accordance with the terms hereof), royalty-free right and license to use, with the right to grant sublicenses to third parties to use for the benefit of THSA and its Authorized Users, the Third Party Materials for which Contractor holds the license or for which Contractor is financially responsible under this Agreement (including all modifications, replacements, upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto) for the benefit of THSA, including to (i) receive the full benefit of the Services, (ii) perform or have performed services of the nature of the Services, including in-scope processes and Services, (iii) monitor, access, interface with or use the Materials then being used in the performance of the Services, and (iv) perform or have performed ancillary services and functions, including related information technology services and functions. To the extent any provision of this Agreement creates an ambiguity or a conflict with any terms or conditions of any agreement covering Third Party Materials of or provided by Contractor relating to the Services, the provisions of this Agreement shall control.
- (d) **Embedded and Dependent Materials.** Contractor hereby grants to THSA a world-wide, non-exclusive, perpetual, irrevocable, royalty-free right and license to use by THSA or any Authorized Users any embedded Contractor Owned Materials or Third Party Materials (including all modifications, replacements, upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto). Following the expiration or any termination of this Agreement and the termination of the Service(s) for which such Contractor Owned Materials were used, Contractor shall, at THSA's request, provide upgrades, maintenance, support and other services for such Contractor Owned Materials or Third Party Materials.
- (e) **Source Code Escrow for Contractor Owned Materials.** Contractor shall maintain a source code escrow agreement with a third party under which Contractor shall deposit source code for the Software, including timely supplemental deposits for each major release of the Software. THSA may, at any time during the Term and upon payment and completion of the beneficiary form, be added as a beneficiary to the source code escrow agreement. THSA

will be responsible for maintaining its ongoing status as a beneficiary, including payment of the then-current annual beneficiary fees. Release of source code for the Software is strictly governed by the terms of the escrow agreement.

14. REPRESENTATIONS, WARRANTIES AND COVENANTS

14.1 Work Standards.

Contractor represents, warrants and covenants that (i) the Services shall be rendered with promptness, due care, skill and diligence; (ii) the Services shall be executed in a professional and workmanlike manner, in accordance with the Service Levels and accepted industry standards of first tier providers of services that are the same as or similar to the Services; (iii) Contractor shall use adequate numbers of qualified individuals with suitable training, education, experience, know-how, competence and skill to perform the Services; (iv) Contractor shall provide such individuals with training as to new products and services prior to the implementation of such products and services in THSA's environment; and (v) Contractor shall have the resources, capacity, expertise and ability in terms of Equipment, Materials, know-how and personnel to provide the Services.

14.2 Software Currency.

Contractor represents, warrants and covenants that, unless otherwise agreed and to the extent it has operational responsibility under this Agreement, it shall maintain the Software so that it operates in accordance with the Service Levels and their Specifications, and perform Software maintenance in accordance with the applicable Software supplier's documentation, recommendations and requirements.

14.3 Efficiency and Cost Effectiveness.

Contractor represents, warrants and covenants that it shall use commercially reasonable efforts to provide the Services in a cost-effective and efficient manner consistent with the required level of quality and performance set forth in the Service Level Agreement.

14.4 Intellectual Property.

- (a) **Ownership and Use.** Contractor represents, warrants and covenants that it is either the owner of or is authorized to use, and possesses sufficient rights to grant the rights and licenses contained in this Agreement to, Materials, Equipment, Systems and other resources or items provided by Contractor. As to any such Materials, Equipment, Systems, resources or items that Contractor does not own, Contractor shall advise THSA as to the ownership and extent of Contractor's rights in such Materials, Equipment, Systems, resources or items to the extent any limitation in such rights would materially impair Contractor's performance of its obligations under this Agreement or the right and licenses granted by Contractor under this Agreement.
- (b) **Performance.** Contractor represents, warrants and covenants that any Contractor Owned Materials consisting of Software and any Equipment

provided by Contractor shall comply in all material respects with their applicable documentation and Specifications and shall provide the functions and features and operate in the manner described therein during the Warranty Period.

14.5 Non-Infringement.

Except as otherwise provided in this Agreement, Contractor represents, warrants and covenants that it shall perform its obligations and responsibilities under this Agreement in a manner that does not infringe or misappropriate, or constitute an infringement or misappropriation of, any Intellectual Property Rights or rights of any Third Party, and that the Services and Contractor Owned Materials provided by Contractor under this Agreement will not infringe, misappropriate, or otherwise violate any Intellectual Property Rights or rights of any Third Party. There is no settled, pending, or to Contractor's knowledge, threatened litigation, claim or proceeding: (i) alleging that performance, access to, or use of the Services does or would infringe, misappropriate, or otherwise violate any Intellectual Property Right of any Third Party, (ii) challenging Contractor's ownership of, or right to use or license, any Materials used or required to be used in connection with the performance, access or use of the Services, or (iii) that, if decided unfavorably to Contractor, would reasonably be expected to have an actual or potential adverse effect on Contractor's ability to perform the Services or its other obligations under this Agreement, and Contractor has no knowledge of any factual, legal, or other reasonable basis for any such litigation, claim, or proceeding.

14.6 General.

- (a) **Contractor.** Contractor represents, warrants and covenants to THSA that:
 - (i) Contractor is a business Entity duly formed, validly existing and in good standing under the Laws of its state of formation;
 - (ii) Contractor has the requisite corporate power and authority to execute, deliver and perform its obligations under this Agreement;
 - (iii) Contractor has obtained all licenses, authorizations, approvals, consents or permits required to perform its obligations under this Agreement under all applicable federal, state, or local Laws and under all applicable rules and regulations of all authorities having jurisdiction over the Services, including under all applicable Laws of the State;
 - (iv) The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated by this Agreement have been duly authorized by the requisite corporate action on the part of Contractor;
 - (v) The individual executing this Agreement and the documents made part of this Agreement is authorized to sign such documents on behalf of the

Contractor and to bind the Contractor to any contract that may result from this Agreement;

- (vi) When executed and delivered by both Parties, this Agreement will constitute the legal, valid and binding obligation of Contractor enforceable in accordance with its terms;
 - (vii) The execution, delivery and performance of this Agreement shall not constitute a violation of any judgment, order or decree; a material default under any material contract by which Contractor or any of its material assets are bound; or an event that would, with notice or lapse of time, or both, constitute such a default; and
 - (viii) As of the Effective Date there is no pending claim, suit or proceeding or, to the best of Contractor's knowledge, any threatened claim, suit or proceeding, against or affecting Contractor or any of its Affiliates or Subcontractors that could reasonably be expected to adversely affect Contractor's ability to perform and fulfill its obligations under this Agreement including actions pertaining to the proprietary rights described in **Sections 14.4** and **14.5**. Contractor shall notify THSA within ten (10) Business Days of Contractor's knowledge of any such claim, suit or proceeding. Without limiting the terms of **Section 12.1(b)(iii)**, Contractor shall notify THSA, within two (2) days, if process is served on Contractor in connection with this Agreement where such matter may reasonably affect the Services or a Party's rights, including any subpoena for Contractor's records, and shall send a written notice of the service together with a copy of the same to THSA within five (5) Business Days of such service.
- (b) **THSA.** THSA represents, warrants and covenants to Contractor that:
- (i) THSA has statutory authority to enter into this Agreement and to perform its obligations hereunder;
 - (ii) The execution, delivery and performance of this Agreement shall not constitute a violation of any judgment, order or decree; a material default under any material contract by which it or any of its material assets are bound; or an event that would, with notice or lapse of time, or both, constitute such a default; and
 - (iii) When executed and delivered by both Parties, this Agreement will constitute the legal, valid and binding obligation of THSA enforceable in accordance with its terms.

14.7 Certifications.

Contractor, for itself and on behalf of its Subcontractors, certifies that:

- (a) It has not given, offered to give, and does not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this Agreement;
- (b) It is not ineligible to receive the payments under this Agreement and acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate;
- (c) Neither it, nor anyone acting for it, has violated the antitrust Laws of the United States nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage;
- (d) Neither it, nor anyone acting for it, has (1) violated any provision of the Texas Free Enterprise and Antitrust Act of 1983, Chapter 15 of the Texas Business and Commerce Code, or the federal antitrust laws, or (2) communicated directly or indirectly the contents of this Agreement to any competitor or any other person engaged in the same line of business as the Contractor;
- (e) It has not received payment from THSA or any of THSA's employees for participating in the preparation of this Agreement;
- (f) There are no suits or proceedings pending or, to the best of its knowledge, threatened against or affecting it, which if determined adversely to it will have a material adverse effect on the ability to fulfill its obligations under this Agreement;
- (g) It is not, and its principals are not, suspended or debarred from doing business with the State or the federal government as listed in the State of Texas Debarred Vendor List maintained by the Texas Comptroller of Public Accounts and the System for Award Management (SAM) maintained by the General Services Administration;
- (h) As of the Effective Date, it is not listed in the prohibited vendors list authorized by Executive Order #13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*," published by the United States Department of the Treasury, Office of Foreign Assets Control;
- (i) It agrees that any payments due under this Agreement shall be applied towards any debt or delinquency that is owed to the State of Texas;
- (j) It is not (1) the executive head of THSA, (2) a person who at any time during the four years before the date of this Agreement was the executive head of THSA, or (3) a person who employs a current or former executive head of THSA;

- (k) It does not have any knowledge that any Contractor Personnel or any employee of a Subcontractor performing Services under this Agreement is, or is a relative of, any current or former State employee, within three (3) degrees of consanguinity, and if these facts change during the Term, any failure by Contractor to disclose to THSA the existence of any such employee relationship known to Contractor shall give rise to a right by THSA to terminate this Agreement, in whole or in part, immediately for cause or exercise any other remedy under applicable Law;
- (l) The provision of Deliverables or Services or other performance under this Agreement shall not constitute an actual or potential conflict of interest and certifies that it shall not create the appearance of impropriety, and, if these facts change during the course of this Agreement, Contractor certifies it shall disclose for itself and on behalf of Subcontractors, the actual or potential conflict of interest and any circumstances which create the appearance of impropriety;
- (m) It is not engaged in business with Iran, Sudan, or a foreign terrorist organization;
- (n) It is compliant with the requirements of the Americans with Disabilities Act (ADA) and its implementing regulations, as each may be amended;
- (o) It does not require its customers to provide any documentation certifying the customer's COVID-19 vaccination or post-transmission recovery on the entry to, to gain access to, or to receive service from the Contractor's business. Contractor acknowledges that such a vaccine or recovery requirement would make Contractor ineligible for a state-funded contract;
- (p) It does not boycott energy companies and will not boycott energy companies during the Term;
- (q) It (1) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association and (2) will not discriminate during the Term against a firearm entity or firearm trade association;
- (r) Contractor and its principals are not suspended or disbarred from doing business with the State or federal government as listed on the State of Texas Disbarred Vendor List maintained by the Texas Comptroller of Public Accounts and the System for Awarded Management (SAM) maintained by the General Services Administration; and
- (s) Contractor has not been the subject of allegations of deceptive trade practices violations under Chapter 17 of the Texas Business and Commerce Code, or allegations of any unfair business practice in any administrative hearing or court suit and Contractor has not been found to be liable for such practices in such proceedings. Contractor further certifies that it has no officers who have served as officers of other entities that have been the subject of allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an

administrative hearing or court suit, and that such officers have not been found to be liable for such practices in such proceedings.

During the Term, Contractor shall, for itself and on behalf of its Subcontractors, promptly disclose to THSA all changes that occur to the foregoing certifications, representations and warranties. Contractor covenants to cooperate with THSA in the development and execution of resulting documentation necessary to maintain an accurate record of the certifications, representations and warranties.

14.8 Inducements; Ethics.

In addition to these provisions applying to Contractor, Contractor shall impose the provisions of this **Section 14.8** in each of its subcontracts and each such representation, warranty and covenant shall be fully applicable with respect to Contractor and each Subcontractor:

- (a) **Reliance.** In executing this Agreement, THSA relies on Contractor's representations, warranties and covenants regarding the following: (i) Contractor regularly provides the types of Services described in the RFP to other public or private entities; (ii) Contractor has the skills, qualifications, expertise, financial resources and experience necessary to perform the Services described in this Agreement in an efficient, cost-effective manner, with a high degree of quality and responsiveness, and has performed similar Services for other public or private entities; (iii) Contractor has thoroughly reviewed, analyzed, and understood the RFO, has timely raised all questions or objections to the RFO, and has had the opportunity to review and fully understand the current program, operating environment for the Services, this Agreement and the needs and requirements of THSA and the State during the Term; (iv) Contractor has had the opportunity to review and understand the State's stated objectives in entering into this Agreement and, based on such review and understanding, Contractor has the ability and capacity to perform the Services for the Term in accordance with the terms and conditions of this Agreement; (v) Contractor also has reviewed and accepts the risks associated with the Services as described in this Agreement, including the risk of non-appropriation of funds; (vi) Contractor shall at all times be capable of, and legally authorized to, provide the Services; and (vii) the Charges assessed to THSA shall be true and correct.
- (b) **Inducements.** Contractor represents, warrants and covenants that neither Contractor nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee has given or will give commissions, payments, kickbacks, lavish or extensive entertainment or other inducements of more than minimal value to any employee or agent of THSA in connection with this Agreement. Contractor also acknowledges that the giving of any such payment, gift, entertainment, or other thing of value is strictly in violation of THSA policy on conflicts of interest and may result in the

cancellation of this Agreement and other existing and future contracts between the Parties.

- (c) **No Interest.** Contractor represents, warrants and covenants that neither Contractor nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee has acquired or will acquire any contractual, financial, business or other interest or advantage, direct or indirect, that would conflict in any manner or degree with Contractor's performance of its duties and responsibilities to THSA under this Agreement or otherwise create an appearance of impropriety with respect to this Agreement; and Contractor shall promptly (but not more than two (2) days from the time in which Contractor first becomes aware of any such interest) inform THSA of any such interest that may be incompatible with the interests of THSA.
- (d) **No Abuse of Authority for Financial Gain.** Contractor represents, warrants, and covenants that neither Contractor nor any of its Affiliates, nor any employee of either, has used or shall use the authority provided or to be provided under this Agreement to improperly obtain financial gain, advantage, or benefit for Contractor, any of its Affiliates, any of their employees or any member of the immediate family of any such employee.
- (e) **No Use of Information for Financial Gain.** Contractor represents, warrants, and covenants that neither Contractor nor any of its Affiliates, nor any employee of either, has used or shall use any THSA Confidential Information to obtain financial gain, advantage, or benefit for Contractor, any of its Affiliates, any of their employees, nor any member of the immediate family of any such employee.
- (f) **Independent Judgment.** Contractor represents, warrants, and covenants that neither Contractor nor any of its Affiliates, nor any employee of either, has accepted or shall accept another THSA contract that would impair the independent judgment of Contractor in the performance of this Agreement.
- (g) **No Influence.** Contractor represents, warrants and covenants that neither Contractor nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee, has accepted or shall accept anything of value, or an inducement that would provide a financial gain, advantage or benefit, based on an understanding that the actions of Contractor, any such Affiliates or any such employees on behalf of THSA would be influenced thereby; and neither Contractor nor any of its Affiliates shall attempt to influence any THSA employee by the direct or indirect offer of anything of value.
- (h) **No Payment Tied to Award.** Contractor represents, warrants and covenants that neither Contractor nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee, has paid or agreed to pay any person or Entity, other than bona fide employees working solely for

Contractor or such Affiliates or any Subcontractors, any fee, commission, percentage, brokerage fee, gift or any other consideration that is contingent upon or resulting from the award or execution of this Agreement.

- (i) **No Collusion.** Contractor represents, warrants and covenants that the prices presented in the Response were arrived at independently, without consultation, communication or agreement with any other proposer for the purpose of restricting competition, the prices quoted were not knowingly disclosed by Contractor to any other proposer, and no attempt was made by Contractor to induce any other person or Entity to submit or not to submit a proposal for the purpose of restricting competition.

14.9 Malicious Code.

- (a) **Malicious Code.** Contractor represents, warrants, and covenants that the Contractor Systems and the Services are and will remain free of Malicious Code and that Contractor shall not insert and shall take all commercially reasonable actions and precautions to prevent the introduction and proliferation of, any Malicious Code into THSA's environment or any System used to provide the Services.
- (b) **Recovery Services.** At all times during the Term, Contractor shall maintain written plans and procedures designed to prevent the introduction of Malicious Code into THSA's environment or any System used to provide the Services, which such measures shall include plans to notify and update THSA of such introduction and to mitigate the effects thereof. Contractor shall notify THSA expeditiously of any Malicious Code in any such environment or System of which it becomes aware and mitigate the effects in accordance with such written plans and procedures. Without limiting Contractor's other obligations under this Agreement, in the event Malicious Code is found in Equipment, Software or Systems managed or supported by Contractor or used by Contractor to provide the Services, Contractor shall, except as expressly set forth below, at no additional Charge to THSA, eliminate or permanently quarantine such Malicious Code and reduce the effects of such Malicious Code and, if the Malicious Code causes a loss of operational efficiency or loss of data, mitigate such losses and restore such data with generally accepted data restoration techniques ("**Malicious Code Recovery Services**"). Contractor shall provide all Malicious Code Recovery Services at no additional Charge. The Parties anticipate that Malicious Code Recovery Services requested by THSA shall be provided by Contractor without adversely affecting Contractor's ability to meet its performance obligations.

14.10 Compliance with Laws.

- (a) **Compliance by Contractor.** Contractor represents, warrants, and covenants that, with respect to the provision of the Services and the performance of any of Contractor's other legal and contractual obligations hereunder, Contractor

and the Services are and shall comply in all material respects with all applicable Laws and shall remain in compliance with such applicable Laws during the Term, including any Privacy Laws. If Contractor becomes aware that it is out of compliance with such applicable Laws, Contractor shall, at its sole cost, promptly (but not more than thirty (30) days from the time in which Contractor first becomes aware of such non-compliance) comply with such applicable Laws.

- (b) **Compliance Data and Reports.** At no additional Charge, Contractor shall provide THSA with data reasonably necessary for THSA to comply with all Laws applicable to the use of the Services.
- (c) **Materials, Equipment and Systems Compliance.** Contractor represents, warrants, and covenants that the Materials and Systems used in connection with providing the Services are in compliance with all applicable Laws and shall remain in compliance with such Laws during the Term.
- (d) **Data.** Contractor represents, warrants, and covenants that any collection, receipt, access, use, storage, disposal, and disclosure of any Data by Contractor shall comply with all applicable Laws, including federal and state Privacy Laws, as well as all other applicable regulations and directives.
- (e) **Notice of Laws.** Contractor shall notify THSA of any Laws and changes in Laws applicable to the Services that would reasonably be expected to affect Contractor's obligations under this Agreement or THSA's use of the Services.
- (f) **Implementation of Changes in Laws.** Upon a change in applicable Laws affecting use of the Services, THSA reserves the right, in its sole discretion, to unilaterally amend this Agreement to incorporate any modifications necessary for THSA's compliance. Without modifying the Parties' respective financial obligations under **Exhibit 4**, Contractor shall bear the costs associated with compliance with changes in Laws unless the change(s) required for compliance meets the definition of New Services, in which case it shall be treated as such and subject to payment of fees for such New Services.
- (g) **Responsibility.** Contractor shall be responsible for any Losses imposed on Contractor or THSA resulting from any failure of Contractor or any Third Party engaged by Contractor to comply with applicable Laws or respond in a timely manner to changes in such Laws.

14.11 Equal Opportunity Compliance.

Contractor represents, warrants, and covenants that it shall abide by all applicable Laws pertaining to equal employment opportunity, including state and federal Laws.

14.12 Information Furnished to THSA.

Contractor represents that all written information made a part of this Agreement is current, complete, true, and accurate. This Agreement contains no untrue statement of a material fact or omits any material fact necessary to make such information not misleading. Contractor hereby agrees to provide THSA with notice within two (2) days in the event it discovers that any information that has been provided to THSA is or becomes untrue or incorrect. Such notice shall identify the information incorrectly provided and shall set forth the true and correct information.

14.13 Previous Contracts.

Other than as specifically disclosed by Contractor in writing, Contractor represents that neither it, nor any of its Affiliates or Subcontractors, is in default or breach of any other contract or agreement related to information systems facilities, equipment, or services that it or they may have with THSA, the State or any other State related Entity. Contractor further represents that neither it, nor any of its Affiliates or Subcontractors, has been a party to any contract for information system facilities, equipment or services with THSA, the State or any other State related Entity that was finally terminated within the previous five (5) years because Contractor or such Affiliate or Subcontractor failed to perform or otherwise breached an obligation of such contract. Contractor hereby certifies that it has provided disclosure of all pending, resolved, or completed litigation, mediation, arbitration, or other alternate dispute resolution procedure involving Contractor, its Affiliates or its Subcontractors that could reasonably be expected to materially adversely affect Contractor's ability to perform and fulfill its obligations under this Agreement.

14.14 Completeness of Due Diligence Activities.

Contractor acknowledges that it has been provided with sufficient access to THSA information and personnel and has had sufficient time in which to conduct and perform a thorough due diligence of THSA's operations and business requirements and assets currently used by THSA in providing the Services. Accordingly, Contractor shall not seek any adjustment in the Charges based on any incorrect assumptions made by Contractor in arriving at the Charges.

14.15 Interoperability.

Contractor represents, warrants, and covenants that the Software, Equipment and Systems that are owned, developed, implemented or used by Contractor in connection with providing the Services shall be interoperable with the Software, Equipment and Systems used by THSA to the extent necessary for THSA to receive the full benefit of the Services.

14.16 Prohibition on Contracts with Companies Boycotting Israel.

By executing this Agreement, Contractor represents and warrants that it does not, and will not during the Term, boycott Israel. Contractor further represents and warrants that no Subcontractor of the Contractor boycotts Israel or will boycott Israel during the Term.

Contractor agrees to take all necessary steps to ensure this representation and warranty remains true during the Term.

14.17 Financial Condition.

During the Term, Contractor shall promptly provide, but no later than one hundred twenty (120) days after the end of the Contractor's fiscal year, its year-end financial statements as of the end of such fiscal year, all in reasonable detail, and an audit reported by a nationally recognized independent certified public accountant (without a "going concern" or like qualification or exception as to the scope of such audit) to the effect that the financial statements present fairly the financial condition and results of operation of the Contractor.

15. INSURANCE AND RISK OF LOSS

Contractor shall at all times during the Term of this Agreement carry and maintain at its sole cost and expense the following insurance coverage in each case issued by an insurer having an A. M. Best Company financial strength rating of A or greater and a financial size category ranking of class VII or higher, licensed in the state of Texas, and authorized to provide the corresponding coverage: (a) Standard Workers Compensation Insurance covering all personnel who will provide Services under this Agreement and endorsed with a waiver of subrogation against the State, THSA, counties, and courts, and their respective officers and employees, for bodily injury (including death), property damage or any other loss; (b) Commercial General Liability Insurance in an amount not less than \$1,000,000 minimum per each occurrence and \$2,000,000 in the aggregate; (c) Professional Liability (Errors and Omissions Liability) with limits of at least \$2,000,000 each occurrence; (d) Cybersecurity Insurance in an amount not less than \$3,000,000 minimum per each occurrence and \$5,000,000 in the aggregate, protecting against the loss arising out of a Security Incident, including (i) network security and privacy liability, (ii) notification and other breach response costs, (iii) fines and penalties, and (iv) cyber extortion; and (e) Umbrella Insurance in an amount of no less than \$10,000,000. Contractor shall provide at least thirty (30) days written notice prior to any cancellation of policies listed under this section. Contractor shall maintain the above insurance coverage during the Term of this Agreement, and shall include THSA and its directors, officers, and employees as additional insureds, include a waiver of subrogation in favor of THSA and its directors, officers, and employees, and be primary and non-contributory with respect to any insurance or self-insurance that is maintained by THSA and shall provide THSA with an executed copy of the policies immediately upon request. Contractor shall furnish proof to THSA of the above coverage in the form of a certificate of insurance from Contractor's insurance carrier indicating the required coverage. Such certificate shall be addressed to THSA as the certificate holder.

16. INDEMNITIES

16.1 General Indemnity by Contractor.

CONTRACTOR AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE STATE OF TEXAS, THSA AND/OR THEIR OFFICERS, AGENTS,

EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES (COLLECTIVELY, "THSA INDEMNITEES") FROM AND AGAINST ANY AND ALL LIABILITY, ACTION, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES ARISING OUT OF OR RESULTING FROM ANY ACTS OR OMISSIONS OF CONTRACTOR OR ITS AGENTS, EMPLOYEES, SUBCONTRACTORS, ORDER FULFILLERS, OR SUPPLIERS OF SUBCONTRACTORS IN THE EXECUTION OR PERFORMANCE OF THIS AGREEMENT AND ANY STATEMENT OF WORK OR PURCHASE ORDERS ISSUED UNDER THIS AGREEMENT. CONTRACTOR AND THSA AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. CONTRACTOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE, INCLUDING ATTORNEYS' FEES. IN ADDITION, CONTRACTOR WILL REIMBURSE THSA AND THE STATE OF TEXAS FOR ANY CLAIMS, DAMAGES, COSTS, EXPENSES OR OTHER AMOUNTS, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES AND COURT COSTS, ARISING FROM ANY SUCH CLAIM. IF THSA DETERMINES THAT A CONFLICT EXISTS BETWEEN ITS INTERESTS AND THOSE OF CONTRACTOR OR IF THSA IS REQUIRED BY LAW TO SELECT SEPARATE COUNSEL, THSA WILL BE PERMITTED TO SELECT SEPARATE COUNSEL AND CONTRACTOR WILL PAY ALL REASONABLE COSTS OF THSA'S COUNSEL.

16.2 Intellectual Property Indemnity.

CONTRACTOR SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS THSA AND THE STATE OF TEXAS FROM AND AGAINST ANY AND ALL CLAIMS, VIOLATIONS, MISAPPROPRIATIONS OR INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHTS AND/OR OTHER INTANGIBLE PROPERTY, PUBLICITY OR PRIVACY RIGHTS, AND/OR IN CONNECTION WITH OR ARISING FROM: (1) THE PERFORMANCE OR ACTIONS OF CONTRACTOR PURSUANT TO THIS AGREEMENT; (2) ANY DELIVERABLE WORK PRODUCT, CONFIGURED SERVICE OR OTHER SERVICE PROVIDED HEREUNDER; AND/OR (3) THSA'S AND/OR CONTRACTOR'S USE OF OR ACQUISITION OF ANY REQUESTED SERVICES OR OTHER ITEMS PROVIDED TO THSA BY CONTRACTOR OR OTHERWISE TO WHICH THSA HAS ACCESS AS A RESULT OF CONTRACTOR'S PERFORMANCE UNDER THIS AGREEMENT. CONTRACTOR AND THSA AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. CONTRACTOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE, INCLUDING ATTORNEYS' FEES. IN ADDITION, CONTRACTOR WILL REIMBURSE THSA AND THE STATE OF TEXAS FOR ANY CLAIMS, DAMAGES, COSTS, EXPENSES OR OTHER AMOUNTS, INCLUDING, BUT NOT LIMITED TO ATTORNEYS' FEES AND COURT COSTS, ARISING FROM ANY SUCH CLAIM. IF THSA DETERMINES THAT A CONFLICT EXISTS BETWEEN ITS INTERESTS AND THOSE OF CONTRACTOR OR IF THSA IS REQUIRED BY LAW TO SELECT SEPARATE COUNSEL, THSA WILL BE

PERMITTED TO SELECT SEPARATE COUNSEL AND CONTRACTOR WILL PAY ALL REASONABLE COSTS OF THSA'S COUNSEL.

16.3 Comparative Fault.

THE PARTIES AGREE THAT THE INDEMNITIES ABOVE SHALL CONTINUE IN EFFECT EVEN IN THE CASE WHERE A PORTION OF THE DAMAGE IS CAUSED BY THE ACTS OR OMISSIONS (INCLUDING NEGLIGENCE) OF THSA. HOWEVER, THE PARTIES FURTHER AGREE THAT CONTRACTOR IN NO WAY WAIVES ANY DEFENSE OTHERWISE AVAILABLE TO IT IN ANY SUCH EVENT, INCLUDING THE RIGHT TO ASSERT COMPARATIVE FAULT OF THSA.

16.4 Infringement and Mitigation.

In the event that (i) Contractor receives or otherwise learns of any threat, warning, or notice alleging that all, or any component or feature, of the Services violates an Intellectual Property Right, or (ii) THSA's continued use of Deliverables, Work Product, Developed Materials, Contractor Owned Material, or Services is enjoined; then, in each case, Contractor shall, in addition to defending, indemnifying and holding harmless THSA as provided in **Section 16.1** and to the other rights THSA may have under this Agreement, promptly and at its own option, cost and expense and in such a manner as to minimize the disturbance to THSA's operations and activities, do one of the following:

- (a) **Obtain Rights.** Obtain for THSA the right to continue using and receiving the benefits of such Deliverables, Work Product, Developed Materials, Contractor Owned Material, or Services.
- (b) **Modification.** Modify the item(s) in question so that it is no longer infringing or enjoined (provided that such modification does not degrade the performance or quality of the Services or adversely affect THSA's intended use as contemplated by this Agreement).
- (c) **Replacement.** Replace such item(s) with a non-infringing or non-enjoined, as applicable, functional and qualitative equivalent acceptable to THSA.
- (d) **Discontinued Use.** If, despite Contractor's commercially reasonable efforts to effect the alternatives set forth in **Sections 16.4(a), (b), and (c)** above, the Parties determine that none of such alternatives are feasible, Contractor may discontinue its use of such infringing, potentially infringing or enjoined Deliverables, Work Product, Developed Materials, Contractor Owned Material, or Services; provided, however, that neither such right nor such discontinuation shall limit or expand THSA's rights or Contractor's obligations under this Agreement; nor shall such right or such discontinuation excuse any breach by Contractor of its obligation to provide the Services in a non-infringing and non-enjoined manner.

16.5 Indemnification Procedures.

With respect to claims which are subject to indemnification under this Agreement, the following procedures shall apply:

- (a) **Notice.** Promptly after receipt by any person or Entity entitled to indemnification under this Agreement of notice of the commencement or threatened commencement of any civil, criminal, administrative or investigative action or proceeding involving a claim in respect of which the THSA Indemnatee may seek indemnification hereunder, the THSA Indemnatee shall notify Contractor of such claim. No delay or failure to so notify Contractor shall relieve Contractor of its obligations under this Agreement except to the extent that Contractor has suffered actual prejudice by such delay or failure. Within fifteen (15) Business Days following receipt of notice from the indemnatee relating to any claim, but no later than five (5) Business Days before the date on which any response to a complaint or summons is due, Contractor may notify the indemnatee that Contractor elects to assume control of the defense and investigation of that claim (a “**Notice of Election**”).
- (b) **Procedure Following Notice of Election.** If Contractor delivers a Notice of Election within the required notice period, Contractor shall immediately take control of the defense and investigation of such claim and shall employ counsel reasonably acceptable to THSA to handle and defend the same, at Contractor’s sole cost and expense. CONTRACTOR AND THSA AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.
- (c) **Procedure Where No Notice of Election Is Delivered.** If Contractor does not deliver a Notice of Election relating to any claim within the required notice period, the THSA Indemnatee shall have the right to defend the claim in such manner as it may deem appropriate. Contractor shall promptly reimburse the THSA Indemnatee for all such reasonable costs and expenses incurred by the THSA Indemnatee, including reasonable attorneys’ fees.

16.6 Subrogation.

If Contractor shall be obligated to indemnify an indemnatee pursuant to any provision of this Agreement, Contractor shall, upon payment of such indemnity in full, be subrogated to all rights of the indemnatee with respect to the claims to which such indemnification relates.

17. LIABILITY

17.1 General Intent.

Subject to the specific provisions and limitations of this **Article 17**, and to the extent allowed by applicable Laws, it is the intent of the Parties that each Party shall be liable to the other Party for any actual damages incurred as a result of the breaching Party’s failure to perform its obligations in the manner required by this Agreement.

17.2 Force Majeure.

- (a) **General.** Subject to Section 17.2(c), no Party shall be liable for any default or delay in the performance of its obligations under this Agreement if and to the extent such default or delay is caused, directly or indirectly, by fire, flood, earthquake, elements of nature or acts of God, wars, riots, civil disorders, rebellions or revolutions, acts of terrorism, epidemics or pandemics, and provided that such default or delay cannot reasonably be circumvented by the non-performing Party through the use of prudent planning, alternate sources, incident response plans, workaround plans or other means (“**Force Majeure Event**”). A strike, lockout or labor dispute involving Contractor Personnel shall not excuse Contractor from its obligations hereunder. Notwithstanding anything to the contrary in this Section 17.2, Contractor shall remain obligated to perform its obligations contained in Section 7.2(a).
- (b) **Termination.** If any Force Majeure Event substantially prevents, hinders or delays the performance by Contractor of Services necessary for the performance of critical THSA functions for more than five (5) Business Days, then THSA may, upon notice to Contractor, terminate this Agreement in its entirety or any portion of the Services so affected (including portions that are no longer required if the impacted portion is terminated) as of the termination date specified in the notice without any obligations or liabilities.
- (c) **Disaster Recovery.** Upon the occurrence of a Force Majeure Event that prohibits the ability of THSA to provide critical business functions for some predetermined period, or any other event that is designated as a “Disaster” under the applicable Disaster Recovery Plan, Contractor shall promptly implement, as appropriate, the applicable business continuity and Disaster Recovery Plan and provide business continuity and disaster recovery services, as described in the Disaster Recovery Plan.
- (d) **Payment Obligation.** If Contractor fails to provide Services in accordance with this Agreement due to the occurrence of a Force Majeure Event, all amounts payable to Contractor hereunder shall be equitably adjusted downward so that THSA is not required to pay any amounts for Services that THSA is not receiving, whether from Contractor or from an alternate source at Contractor’s expense pursuant to Section 17.2(b). Contractor shall not have the right to additional payments or increased usage Charges as a result of any force majeure occurrence affecting Contractor’s ability to perform.

17.3 Limitation of Liability.

- (a) **Exclusions from Limitations.** EXCEPT AS PROVIDED IN THIS SECTION 17.3 AND IN ARTICLE 16, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, COLLATERAL, EXEMPLARY OR PUNITIVE DAMAGES, INCLUDING LOST PROFITS, REGARDLESS OF THE FORM

OF THE ACTION OR THE THEORY OF RECOVERY, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

- (b) **Liability Cap.** Except for those obligations found in **Article 16**, and as limited by applicable Laws (including those provisions applying to governmental agencies under the constitution of the State), the total aggregate liability of either Party, for all claims asserted by the other Party under or in connection with this Agreement, regardless of the form of the action or the theory of recovery, shall not exceed the greater of (i) Charges paid and payable by THSA to Contractor during the twenty-four (24) months preceding the date upon which the cause of action accrues hereunder or (ii) \$10,000,000. In addition to those exceptions set forth above, the liability cap shall neither apply to claims made to the applicable insurance policies set forth herein nor any liabilities, claims, judgments or damages arising out of or related to a cybersecurity incident, including, but not limited to, any act that jeopardizes or seeks to jeopardize the Services, systems, or data.
- (c) **Items Not Considered Damages.** The following shall not be considered damages subject to, and shall not be counted toward the liability exclusion or cap specified in, **Sections 17.3(a)** or **17.3(b)**:
 - (i) Service Level Reimbursements or Deliverable Fees assessed against Contractor.
 - (ii) Amounts withheld by THSA in accordance with this Agreement due to incorrect Charges or Services not provided.
 - (iii) Amounts paid by THSA but subsequently recovered from Contractor due to incorrect Charges or Services not provided.
 - (iv) Invoiced Charges and other amounts that are due and owing to Contractor for Services under this Agreement.
- (d) **Acknowledged Direct Damages.** For the avoidance of doubt, the following shall be considered direct damages and neither Party shall assert that the following are indirect, incidental, collateral, consequential or special damages or lost profits to the extent they result directly from the breaching Party's failure to perform in accordance with this Agreement:
 - (i) Costs and expenses of restoring, reloading, or notifying of any lost, stolen or damaged Data.
 - (ii) Costs and expenses of implementing a work around in respect of a failure to provide the Services or any part thereof.

- (iii) Cover damages, including the costs and expenses incurred to procure the Services or corrected Services from an alternate source in excess of the Charges that would have been paid Contractor for such Services.
- (iv) Fines, penalties, sanctions, interest or other monetary remedies incurred as a result of a failure to comply with applicable Laws.
- (v) Service Level Reimbursements or Deliverable Fees assessed against Contractor.
- (vi) Lost discounts, late fees and/or interest Charges incurred by THSA resulting from Contractor's breach of its obligations.

The absence of direct damages listed in this **Section 17.3(d)** shall not be construed or interpreted as an agreement to exclude it as a direct damage under this Agreement.

- (e) **Waiver of Liability Cap.** If, at any time, the total aggregate liability of Contractor for claims asserted by THSA under or in connection with this Agreement exceeds sixty percent (60%) of the applicable liability cap specified in **Section 17.3(b)** and, upon receipt of the request of THSA, Contractor refuses to waive such cap and/or increase the available cap to an amount at least equal to the original liability cap, then THSA may, upon notice, terminate this Agreement in its entirety as of the termination date specified in the notice.

18. DISPUTE RESOLUTION

18.1 Informal Dispute Resolution.

Prior to the initiation of formal dispute resolution procedures with respect to any dispute, other than as provided in **Section 18.1(b)**, the Parties shall first attempt to resolve such dispute informally and in accordance with the Statement of Work.

- (a) **Prerequisite to Formal Proceedings.** If a Party determines that amicable resolution through continued negotiations of a dispute does not appear likely, such Party shall be entitled to discontinue negotiations and resolve the dispute through a dispute resolution process.
- (b) **Equitable Remedies.** Notwithstanding the provisions and escalation time periods specified in this Agreement (including the Statement of Work), either Party may at any time discontinue negotiations and resolve the dispute through a dispute resolution process in order to (i) avoid the expiration of any applicable limitations period, (ii) preserve a superior position with respect to other creditors, (iii) address a claim arising out of the breach of a Party's obligations under **Article 12**, or (iv) pursue claims for injunctive relief with respect to a Party's obligations to the extent resulting in irreparable injury.

18.2 Jurisdiction.

Except as otherwise expressly provided in this **Article 18** or unless the specific venue is otherwise identified in a statute which directly names or otherwise identifies its applicability to THSA, each Party irrevocably agrees that any legal action, suit or proceeding brought by such Party in any way arising out of this Agreement must be brought solely and exclusively in the United States District Court for the Western District of Texas, Austin Division, or in the state courts of the State of Texas located in Travis County, Texas, and irrevocably accepts and submits to the sole and exclusive jurisdiction of each of the aforesaid courts *in personam*, generally and unconditionally with respect to any action, suit or proceeding brought by it or against it by the other Party; provided, however, that this Section shall not prevent a Party against whom any legal action, suit or proceeding is brought by the other Party in the state courts of the State of Texas from seeking to remove such legal action, suit or proceeding, pursuant to applicable federal Law, to the United States District Court for the Western District of Texas, Austin Division, and in the event an action is so removed each Party irrevocably accepts and submits to the jurisdiction of the aforesaid district court.

18.3 Continued Performance.

- (a) **General.** Each Party agrees that it shall, unless otherwise directed by the other Party, continue performing its obligations under this Agreement while any dispute is being resolved; provided that this provision shall not operate or be construed as extending the Term of this Agreement or prohibiting or delaying a Party's exercise of any right it may have to terminate this Agreement as expressly provided herein. For purposes of clarification, Data may not be withheld by Contractor pending the resolution of any dispute.
- (b) **Non-Interruption of Services.** Contractor acknowledges and agrees that any interruption to the Services may cause irreparable harm to THSA and may adversely impact the ability of the State to carry out vital public safety and other governmental functions (including homeland security matters), in which case an adequate remedy at Law would not be available. Contractor expressly acknowledges and agrees that at all times, including pending resolution of any dispute or controversy, it shall continue to perform under this Agreement and not directly or indirectly engage in any act or omission that may have a detrimental effect on provision of the Services to THSA under this Agreement.

18.4 Governing Law.

This Agreement shall be governed by and construed in accordance with the Laws of the State of Texas, without regard to the conflicts of law provisions. Nothing in this Agreement shall be construed to waive the State's sovereign immunity.

19. TERMINATION

19.1 Termination for Cause.

THSA may, upon written notice to Contractor, terminate this Agreement or the Statement of Work, in whole or in part, at any time, effective upon the termination date set forth in such termination notice, if Contractor:

- (i) commits a material breach of its obligations with respect to Deliverables or Services, including those that may be covered under the Statement of Work(s), and such breach is not cured, or is not reasonably capable of being cured, within the earlier of seven (7) Business Days from knowledge or notice of the breach;
- (ii) signs this Agreement with a false statement or commits a material breach of any provision of this Agreement, including the violation of any of the representations, warranties, guarantees, certifications, affirmations, or covenants contained herein;
- (iii) commits numerous breaches of its duties or obligations which collectively constitute a material breach of this Agreement and Contractor fails to do both of the following: (A) cure each such breach within seven (7) Business Days from knowledge or notice of the breach; and (B) develop within five (5) Business Days following initial written notice or knowledge of the breach from THSA a complete plan reasonably acceptable to THSA for curing the breach and correcting the deficiencies causing such breach on a permanent basis; provided, however, that this **Section 19.1(iii)** shall in no manner limit (A) THSA's right of termination pursuant to any other provision of **Section 19.1**, or (B) Contractor's obligation to cure individual nonmaterial breaches of this Agreement;
- (iv) commits a material breach of **Section 14.7** of this Agreement;
- (v) (1) files for bankruptcy, (2) becomes or is declared insolvent, or is the subject of any bona fide proceedings related to its liquidation, administration, provisional liquidation, or insolvency, (3) passes a resolution for its voluntary liquidation, (4) has a receiver or manager appointed over all or substantially all of its assets, (5) makes an assignment for the benefit of its creditors, or (6) enters into an agreement or arrangement for the composition, extension, or readjustment of substantially all of its obligations or any class of such obligations;
- (vi) fails to communicate with THSA as required by this Agreement; or
- (vii) breaches its obligations under this Agreement with respect to THSA Confidential Information.

19.2 Termination for Convenience.

THSA may (without incurring any liabilities) terminate this Agreement or the Statement of Work, for any reason or no reason, in whole or in part, (a) if it is in the best interest of THSA to do so, or (b) upon at least ninety (90) days' prior notice to Contractor, effective as of the termination date specified in such notice.

19.3 Termination Upon Contractor Change of Control.

In the event there is a change in control of Contractor (or that portion of Contractor providing all or any portion of the Services under this Agreement), or Contractor (or that portion of Contractor providing all or any portion of the Services under this Agreement) is merged with or into another Entity, then Contractor shall immediately provide THSA with written notice of such change in control. At any time within twelve (12) months following receipt of such written notice, THSA may terminate this Agreement, in whole or in part, upon at least ten (10) Business Days' prior notice to Contractor, effective as of the termination date specified in such notice. As used in this Agreement, "change in control" means (a) a sale of substantially all the assets of Contractor, (b) a change in a majority of the management team, such as the board of directors, or (c) a direct or indirect change in beneficial ownership of 25% or more of the equity interest in Contractor.

19.4 THSA Rights Upon Contractor's Bankruptcy.

- (a) **General Rights.** In the event of Contractor's bankruptcy or of the filing of any petition under bankruptcy Laws affecting the rights of Contractor which is not stayed or dismissed within thirty (30) days of filing, in addition to the other rights and remedies set forth herein, to the maximum extent permitted by Law, THSA shall have the immediate right to retain and take possession for safekeeping all Data, THSA Confidential Information, THSA licensed Third Party Materials, THSA owned Materials, THSA owned Developed Materials and all other Materials, Equipment or Systems to which THSA is or would be entitled during the Term or upon the expiration or any termination of this Agreement. Contractor shall cooperate fully with THSA and assist THSA in identifying and taking possession of the items listed in the preceding sentence. THSA shall have the right to hold such Data, Confidential Information, Materials, Equipment and Systems until such time as the trustee or receiver in bankruptcy or other appropriate insolvency office holder can provide adequate assurances and evidence to THSA that they shall be protected from sale, release, inspection, publication, or inclusion in any publicly accessible record, document, material or filing. Contractor and THSA agree that without this material provision, THSA would not have entered into this Agreement or provided any right to the possession or use of Data, THSA Confidential Information or THSA Materials, Equipment and Systems covered by this Agreement.
- (b) **THSA Rights in Event of Bankruptcy Rejection.** Notwithstanding any other provision of this Agreement to the contrary and to the maximum extent

permitted by applicable Laws, if Contractor becomes a debtor under the United States Bankruptcy Code (11 U.S.C. §101 et. seq. or any similar Law in any other country (the “**Bankruptcy Code**”)) and rejects this Agreement pursuant to Section 365 of the Bankruptcy Code (a “**Bankruptcy Rejection**”), then (i) any and all of the licensee and sublicensee rights of THSA arising under or otherwise set forth in this Agreement, including the rights of THSA referred to in **Section 13.1**, shall be deemed fully retained by and vested in THSA as protected Intellectual Property Rights under Section 365(n)(1)(B) of the Bankruptcy Code and further shall be deemed to exist immediately before the commencement of the bankruptcy case in which Contractor is the debtor; (ii) THSA shall have all of the rights afforded to non-debtor licensees and sublicensees under Section 365(n) of the Bankruptcy Code; and (iii) to the extent any rights of THSA which arise after the expiration or any termination of this Agreement are determined by a bankruptcy court not to be “intellectual property rights” for purposes of Section 365(n) of the Bankruptcy Code, all of such rights shall remain vested in and fully retained by THSA after any Bankruptcy Rejection as though this Agreement were terminated or expired. THSA shall under no circumstances be required to terminate this Agreement, in whole or in part, after a Bankruptcy Rejection in order to enjoy or acquire any of its rights under this Agreement, including any of the rights of THSA set forth in **Section 13.1**, unless and to the extent required by applicable Laws.

19.5 Termination for Adverse Change in Contractor’s Financial Condition.

If (i) Contractor receives a “going concern” explanation or qualification from its external auditor, (ii) Moody’s Investors Service lowers Contractor’s long term credit rating to Ba2 or lower, or (iii) Standard & Poor’s lowers Contractor’s long term credit rating to BB or lower and, in each case, in the reasonable opinion of THSA such change in the financial condition of Contractor may impair or otherwise compromise the ability of Contractor to perform its obligations under this Agreement, then THSA may, in its sole discretion, terminate this Agreement by giving Contractor at least thirty (30) days’ prior notice. With respect to the events described in (ii) or (iii) above, prior to exercising its right to terminate, THSA shall meet with Contractor within ten (10) Business Days following notification (or awareness) of such event and permit Contractor to submit to THSA a plan that comprehensively addresses THSA’s concerns related to Contractor’s ability to perform its obligations under this Agreement. If THSA, in its sole discretion, determines that the plan does not adequately address its concerns, THSA shall have the right to terminate this Agreement as described above.

19.6 Step-In Rights.

Without limiting THSA’s rights under **Section 19.1**, if Contractor commits a material breach that has a significant impact on the ability of THSA to conduct a critical aspect of its operations, and Contractor is unable to cure such breach within five (5) Business Days, THSA may, in addition to its other remedies at Law and in equity, obtain from a Third Party or provide for itself comparable services that shall allow THSA to conduct its operations until Contractor has cured the breach or this Agreement is terminated.

Contractor shall reimburse THSA for all reasonable costs and expenses of obtaining or providing such services during such period of non-performance. The express inclusion of this remedy in this **Section 19.6** does not limit THSA's right to use a similar remedy for other breaches by Contractor of this Agreement or limit THSA from any other remedy afforded to it under this Agreement.

19.7 Absolute Right.

If Contractor becomes (i) listed on the prohibited vendors list authorized by Executive Order Number 13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*", published by the United States Department of the Treasury, Office of Foreign Assets Control, or (ii) suspended or debarred from doing business with the State or federal government as listed in the State of Texas Debarred Vendor List or the Excluded Parties List System maintained by the General Services Administration, then THSA may, upon notice to Contractor, terminate this Agreement, in whole or, to the extent possible under applicable Law, in part, as of the termination date specified in the notice.

19.8 Lack of Sufficient Funds or Statutory Authority.

If funding for THSA's obligations under this Agreement is reduced by Law or funds sufficient to pay Contractor for the Services provided hereunder are not appropriated by applicable governing bodies or otherwise made available by Law, then THSA may, upon at least thirty (30) days' prior notice to Contractor, decrease the amount and types of the Services in such manner and for such periods of time as THSA may elect. In such event, (i) the Charges shall be adjusted downward in proportion to the portion of the Services that Contractor shall not be providing, and (ii) the Parties shall negotiate equitable adjustments to the Service Levels if and to the extent that any resulting reductions in scope or volume of Services directly affects Contractor's ability to meet the Service Levels, provided that Contractor notifies THSA the extent to which it shall not be able to meet such Service Levels and uses commercially reasonable efforts to meet the Service Levels notwithstanding such reductions. THSA shall promptly notify Contractor if THSA believes that the necessary funding or authorizations shall not be obtained. If partial funding sufficient only for a portion of the Services shall be made available, the Parties may agree to perform their respective obligations relative to such Services, and this Agreement shall be amended accordingly. THSA is a State agency whose authority is subject to the actions of the State legislature. If funds sufficient to pay THSA's obligations under this Agreement are not appropriated by applicable governmental authorities or if THSA's statutory authority to enter into this Agreement is repealed by the State legislature or ruled unconstitutional by a court of competent jurisdiction, then THSA may, upon notice to Contractor, terminate this Agreement, in whole or in part, as of the termination date specified in the notice without penalty or Charges to THSA. If THSA and/or the subject matter of this Agreement become subject to a legislative or regulatory change or the revocation of statutory or regulatory authority that would (a) render the continued provision of the Services impossible or unnecessary, (b) render this Agreement invalid, illegal or otherwise unenforceable, (c) substantially decrease the amount and types of the Services or (d) terminate the appropriations for this Agreement, then THSA may, upon notice to

Contractor, terminate this Agreement, in whole or in part, as of the termination date specified in the notice, without penalty to THSA.

19.9 General Termination Rights.

- (a) **Partial Terminations.** If THSA chooses to terminate only a portion of this Agreement, the Charges shall be equitably adjusted downward in proportion to the portion of the Services that Contractor shall not be providing.
- (b) **Other Terminations.** In addition to the provisions of this Article, THSA may terminate this Agreement as expressly provided in this Agreement or under Law.

19.10 Effect of Termination.

Following termination of this Agreement, in whole or in part, upon THSA's request, Contractor shall provide Termination Assistance Services directly to THSA, its successors or assigns and any of their designee(s) in accordance with **Section 4.2**. Except as specified in **Section 19.2**, termination of this Agreement shall not result in the payment of a Termination Charge or any other penalties, fees or charges, nor shall THSA incur any liabilities in connection with termination of the Agreement.

20. GENERAL

20.1 No Waiver of Sovereign Immunity.

The Parties expressly agree that no provision of this Agreement shall be construed as or constitute a waiver by THSA or the State of any immunities from suit or from liability that THSA or the State have by operation of law (whether constitutional or statutory, whether State or federal).

20.2 RFP Errors and/or Omissions.

Neither Party shall take advantage of or exploit any errors and/or omissions in the RFP or the resulting Agreement. Each Party must promptly (but not more than two (2) days from the time in which said Party first becomes aware of any such situation) notify the other Party of any such errors and/or omissions that are discovered and reasonably agree to modifications consistent with the intent of the Parties as of the Effective Date of this Agreement.

20.3 Abandonment or Default.

If Contractor abandons the Agreement, THSA reserves the right to immediately terminate the Agreement without notice and either re-solicit and re-award the Agreement or take such further action or no action in the best interest of the State, and Contractor shall not be considered in the re-solicitation and may not be considered in future solicitations for the same type of Services, unless the Specifications or scope of work significantly change.

20.4 Place of Performance.

Unless otherwise agreed to in writing, all Services performed by Contractor, its Subcontractors and agents must be performed in the United States and any Data shall reside exclusively within the territorial boundaries of the United States. For avoidance of doubt, no Data shall be stored in any data center or any other facility outside the territorial boundaries of the United States.

20.5 Binding Nature and Assignment.

- (a) **Binding Nature.** This Agreement shall be binding on the Parties and their respective successors, permitted assigns, transferees, and delegates. Except in the instance of an assignment or transfer by THSA of all or any portion of this Agreement pursuant to **Section 20.5(b)**, the assigning Party shall remain liable for the performance of any assigned or transferred obligations hereunder.
- (b) **Assignment.** Contractor may not assign all or any portion of its rights under or interests in this Agreement (including by operation of law) or delegate, in whole or in part, any of its duties without the prior written consent of THSA, which consent will not be unreasonably conditioned, withheld or delayed; provided, however, in the event of a merger, acquisition, or purchase of substantially all of Contractor's assets, Contractor may assign this Agreement to (i) an Affiliate, or (ii) a business entity that is capable of complying with and performing all obligations under this Agreement (including, if applicable, the parent company of such business entity); provided that notice to THSA of such assignment shall occur within two (2) Business Days of such assignment. THSA may, without the approval of Contractor, assign or transfer its rights or obligations under this Agreement, in whole or in part, to any other State agency as directed by the State legislature or as otherwise required under Law. The consent of a Party to any assignment of this Agreement shall not constitute such Party's consent to further assignment. Each party to whom an assignment or transfer is made must assume all or any part of Contractor's or THSA's interests in this Agreement, the Services, and any documents executed with respect to this Agreement, including its obligation for all or any portion of the payments due hereunder.
- (c) **Impermissible Assignment.** Any attempted assignment that does not comply with the terms of this Section shall be null and void *ab initio*; provided, however, that if Contractor assigns this Agreement in contravention of this Section by operation of Law, such assignment shall be voidable at the option of THSA.

20.6 Entire Agreement; Amendment.

This Agreement, including any Exhibits and Attachments referred to herein or attached hereto, each of which is incorporated herein for all purposes, constitutes the entire agreement between the Parties with respect to the subject matter hereof. There are no agreements, representations, warranties, promises, covenants, commitments, or

undertakings other than those expressly set forth herein. This Agreement supersedes the RFP and all prior agreements, representations, warranties, promises, covenants, commitments, or undertakings, whether written or oral, with respect to the subject matter contained in this Agreement. No amendment, modification, change, waiver, or discharge hereof shall be valid unless in writing and signed by an authorized representative of the Party against which such amendment, modification, change, waiver, or discharge is sought to be enforced.

20.7 Notices.

- (a) **Primary Notices.** Any notice, notification, request, demand, or determination provided by a Party under this Agreement shall be in writing and shall be delivered in hard copy using one of the following methods and shall be deemed delivered upon receipt: (i) by hand, (ii) by an express courier with a reliable system for tracking delivery, or (iii) by registered or certified mail, return receipt requested, postage prepaid. Unless otherwise notified, the foregoing notices shall be delivered as follows:

In the case of THSA:

Texas Health Services Authority
901 South Mopac Expressway,
Building 1, Suite 300
Austin, TX 78746
Attn: Phil Beckett, PhD

In the case of Contractor:

With a copy to:

Jackson Walker, LLP
100 Congress Avenue, Suite 1100
Austin, TX 78701
Attn: Jonathan Lass

- (b) **Notice of Change.** A Party may from time to time change its address or designee for notification purposes by giving the other Party prior notice of the new address or designee and the date upon which it shall become effective.

20.8 Counterparts.

This Agreement may be executed in several counterparts, all of which taken together shall constitute one single agreement between the Parties hereto.

20.9 Headings.

The Article and Section headings and the table of contents used herein are for reference and convenience only and shall not be considered in the interpretation of this Agreement.

20.10 Relationship of Parties.

Contractor, in furnishing Services hereunder, is acting as an independent contractor, and Contractor has the sole obligation to supervise, manage, contract, direct, procure, perform or cause to be performed, all work to be performed by Contractor under this Agreement. The relationship of the Parties under this Agreement shall not constitute a partnership or joint venture for any purpose. Contractor is not an agent of THSA and has no right, power, or authority, expressly or impliedly, to represent or bind THSA as to any matters.

20.11 Severability.

If any provision of this Agreement (or any portion thereof) or the application of any such provision (or portion thereof) to any person, Entity or circumstance is held to be invalid, illegal, or otherwise unenforceable in any respect by a final judgment, order of the State Office of Administrative Hearings or a court of competent jurisdiction, such provision shall be deemed to be void and unenforceable. Notwithstanding the preceding sentence, the remaining provisions of this Agreement, if capable of substantial performance, shall remain in full force and effect. By entering into this Agreement, THSA makes no representations or warranties regarding the enforceability of the terms of this Agreement and THSA does not waive any applicable Law that conflicts with the terms of this Agreement.

20.12 Consents and Approval.

Except where expressly provided as being in the sole discretion of a Party, where any agreement, approval, acceptance, consent, confirmation, determination, notice or similar action by either Party is required under this Agreement, such action shall not be unreasonably delayed or withheld. An approval or consent given by a Party under this Agreement shall not relieve the other Party from responsibility for complying with the requirements of this Agreement, nor shall it be construed as a waiver of any rights under this Agreement, except as and to the extent otherwise expressly provided in such approval or consent.

20.13 Waiver of Default; Cumulative Remedies.

- (a) **Waiver of Default.** A delay or omission by either Party hereto to exercise any right or power under this Agreement shall not be construed to be a waiver thereof. A waiver by either of the Parties hereto of any of the covenants to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant herein contained. All waivers must be in writing and signed by the Party waiving its rights.

- (b) **Cumulative Remedies.** Except as expressly set forth herein, all remedies provided for in this Agreement shall be cumulative and in addition to and not in lieu of any other remedies available to either Party at Law, in equity or otherwise. The election by a Party of any remedy provided for in this Agreement or otherwise available to such Party shall not preclude such Party from pursuing any other remedies available to such Party at Law, in equity, by contract or otherwise.

20.14 Survival.

Any provision of this Agreement which contemplates performance or observance after any termination or expiration of this Agreement shall survive any termination or expiration of this Agreement and continue in full force and effect. Additionally, all provisions of this Agreement shall survive the expiration or termination of this Agreement to the fullest extent necessary to give the Parties the full benefit of the bargain expressed herein.

20.15 Publicity.

Contractor shall not issue or release any announcement, statement, press release, or other publicity or marketing material relating to this Agreement, or without THSA's prior written consent, use any of the names, logos, domain names, service marks, trademarks, or other likeness of THSA. Contractor shall provide THSA with a copy of any such pre-approved media release not less than five (5) Business Days prior to its intended public release. Notwithstanding the foregoing, Contractor may use THSA's name in any client lists.

20.16 Export.

The Parties acknowledge that certain Materials and technical data to be provided hereunder and certain transactions hereunder may be subject to export controls under the Laws of the United States, the European Union, the United Nations, and other jurisdictions. Without limiting the Parties' obligations under Section 10, no Party shall export or re-export any such items or any direct product thereof or undertake any transaction or service in violation of any such Laws.

20.17 No Third Party Beneficiaries.

This Agreement is entered into solely between, and may be enforced only by, THSA and Contractor and shall not be deemed to create any rights or causes of action in or on behalf of any third parties, including employees, suppliers and customers of a Party, or to create any obligations of a Party to any such third parties.

20.18 Covenant Against Pledging.

Contractor agrees that, without the prior written consent of THSA, it shall not assign, transfer, pledge, hypothecate or otherwise encumber its rights to receive payments from THSA under this Agreement for any reason whatsoever. To the extent THSA permits Contractor to assign, transfer, pledge, hypothecate or otherwise encumber its rights to receive payments from THSA under this Agreement, (i) Contractor shall continue to be

THSA's sole point of contact with respect to this Agreement, including with respect to payment, and (ii) the person or Entity to which such rights are assigned, transferred, pledged, hypothecated or otherwise encumbered shall not be considered a Third Party beneficiary under this Agreement and shall not have any rights or causes of action against THSA.

20.19 Solicitation and Hiring of Employees.

Subject to applicable Laws, and except as expressly set forth herein, during the Term and for a period of twelve (12) months thereafter, Contractor shall not directly or indirectly recruit for employment in a position involved in the performance of Contractor's obligations under this Agreement, any employees of THSA without the prior approval of THSA. This provision shall not operate or be construed to prevent or limit any employee's right to practice his or her profession or to utilize his or her skills for another employer or to restrict any employee's freedom of movement or association.

20.20 Further Assurances.

Each Party covenants and agrees that, subsequent to the execution and delivery of this Agreement and without any additional consideration, each Party shall execute and deliver any further legal instruments and perform any acts that are or may become necessary to effectuate the purposes of this Agreement.

20.21 Liens.

Contractor shall not file, or by its action or inaction permit one of the Contractor Personnel to file, any liens on or against property or realty of THSA. If any such liens arise as a result of Contractor's action or inaction, Contractor shall obtain a bond to fully satisfy such liens or otherwise remove such liens at its sole cost and expense within ten (10) Business Days. If Contractor fails to do so, THSA may, in its sole discretion, pay the amount of such lien, and/or deduct such amounts from payments due to Contractor.

20.22 Covenant of Good Faith, Commercially Reasonable Efforts.

Each Party agrees that, in its performance of, and in its respective dealings with the other Party under or in connection with this Agreement, it shall at all times (i) act in good faith, and (ii) use commercially reasonable efforts (except where a higher standard is set forth in this Agreement).

20.23 Best Price Guarantee.

Contractor agrees to provide THSA with pricing, terms, and conditions that are at least as favorable as those offered to any other customer for similar goods and services during the term of this Agreement. If Contractor offers better prices, terms, or conditions to another customer, Contractor will promptly extend the same benefits to THSA. Contractor shall provide written notice to THSA of any such new pricing terms within thirty (30) days of offering such terms to another customer. Upon receipt of such notice, THSA may elect to

amend the pricing provisions of this Agreement to reflect the more favorable terms. Upon request, Contractor will certify compliance with this clause.

20.24 Acknowledgment.

The Parties each acknowledge that the terms and conditions of this Agreement have been the subject of active and complete negotiations, with the assistance of legal counsel for each Party, and that such terms and conditions should not be construed in favor of or against any Party by reason of the extent to which any Party or its professional advisors participated in the preparation of this Agreement.

20.25 References.

Notwithstanding **Section 12.1**, but subject to appropriate confidentiality arrangements and applicable Law, Contractor acknowledges and agrees that THSA may freely discuss all aspects of Contractor's performance and THSA's satisfaction with such performance with prospective Contractor customers. Contractor shall provide such prospective Contractor customers with appropriate THSA contact information.

20.26 Guaranty.

If Contractor is wholly owned by one or more business entities, as a material condition to the effectiveness of this Agreement, upon request by THSA, Contractor shall, within ten (10) Business Days after the execution of this Agreement, either execute or cause to be executed and delivered to THSA a guaranty or a parent guaranty.

[Signature Page to Follow]

Authority to Execute.

IN WITNESS WHEREOF, the Parties have executed this Master Services Agreement in their capacities as stated below with authority to bind their organizations on the dates set forth by their signatures.

Texas Health Services Authority

Phil Beckett, PhD, CEO

Date

Date

Exhibit 1 – Definitions

Master Services Agreement

THSA Contract No. 0000001

Between

Texas Health Services Authority (THSA)

and

Contractor

Term	Definition
Accept, Acceptance, <i>or</i> Accepted	Means THSA's written acceptance of any Deliverable, which may be given or withheld in accordance with the Agreement.
Affiliate	Means with respect to an Entity, any other Entity that directly or indirectly controls, is controlled by, or is under common control with that Entity at the time in question.
Agreement	Means the final version of the Master Services Agreement between THSA and Contractor relating to the subject matter of the RFO, to which this <u>Exhibit 1</u> is attached.
Assistance Event	Means (i) any termination (in whole or in part) under, or the expiration of, the Agreement, or (ii) the discontinuance of the provision of the Services (in whole or in part) in respect of THSA.
Audit Period	Has the meaning given in <u>Section 9.1(a)</u> of the Agreement.
Authorized User(s)	Means any individual, system or Entity authorized to access, use or file documents and use the Services provided by Contractor under the Agreement.
Available	Means the Services are available and operable for access and use by its Authorized Users over the Internet in full conformity with the Specifications.
Bankruptcy Code	Has the meaning given in <u>Section 19.4(b)</u> of the Agreement.
Bankruptcy Rejection	Has the meaning given in <u>Section 19.4(b)</u> of the Agreement.
Business Day	Means each day from Monday through Friday 7:00 a.m. through 6:00 p.m. (Central Time), excluding national holidays as defined by Tex. Gov't Code § 662.003(a).
CAP Notice	Has the meaning set forth in <u>Section 5.3(b)</u> of the Agreement.
Change Request	Means a written instrument in a form approved by THSA that states a change in or an addition to any of Contractor's obligations under the Agreement.

Term	Definition
Charges	Means the fixed charges and fees for Contractor's provision of the Services in accordance with the Agreement and contained in the Pricing and Financial Provisions attached as <u>Exhibit 4</u> .
Commencement Date	Means 12:01 a.m., Central Time, on the date Services commence.
Confidential Information	Means (i) all information marked confidential, restricted, or proprietary by either Party, (ii) any certain non-public, sealed or redacted Data, (iii) any Highly-Sensitive Personal Information, and (iv) any other information that is treated as confidential by the Disclosing Party and would reasonably be understood to be confidential, whether or not so marked. Contractor's Confidential Information shall not include Confidential Information of THSA; provided, however, that characterization of information as Confidential Information of Contractor shall not limit or restrict the rights of THSA to exercise its rights (including rights related to auditing) provided for under the Agreement.
Contract Records	Has the meaning given in <u>Section 9.1(a)</u> of the Agreement.
Contract Year	Means each THSA Fiscal Year comprising a twelve (12) month period commencing on the Commencement Date and each twelve (12) month period thereafter during the Term. If any Contract Year is less than twelve (12) months, the rights and obligations under the Agreement that are calculated on a Contract Year basis will be proportionately adjusted for such shorter period.
Contractor	Has the meaning set forth in the preamble to the Agreement.
Contractor Owned Materials	Has the meaning given in <u>Section 13.1(a)</u> of the Agreement.
Contractor Personnel	Means those employees, representatives, contractors, Subcontractors, and agents of Contractor assigned to provide Services under the Agreement.
Contractor Program Manager	Means the Contractor representative, designated by Contractor in accordance with <u>Section 6.2</u> , responsible for both the day-to-day relationship with THSA as well as the delivery of all Services to THSA.
Contractor Project Manager	Means the Contractor representative, designated by Contractor in accordance with <u>Section 6.1</u> of the Agreement to manage the Implementation Services.

Term	Definition
Contractor Sites	Means, individually and collectively, the facilities owned or leased by Contractor (or its Affiliates or Subcontractors) from which Contractor (or its Affiliates or Subcontractors) provides any Services.
Corrective Action Plan	Means a written action plan prepared by Contractor that (i) clearly identifies the applicable problem or failure, (ii) describes the desired situation going forward, and (iii) sets forth the specific steps that shall be taken to solve the identified problem or correct the identified failure.
Data	Means any data, metadata or information of or regarding either THSA or any Authorized User that is provided to or obtained by Contractor in connection with the performance of Contractor's obligations under the Agreement. Data includes any data or metadata that: (i) resides in or is accessed through or submitted to the Systems, or (ii) is provided, operated, supported, or used by Contractor in connection with the Services. Notwithstanding the foregoing, Data shall not include any of Contractor's Confidential Information.
Deliverable	Means any Material, Software, or System that constitutes a pay point and is developed for, on behalf of, or provided to THSA in the course of Contractor's performance of the Statement of Work or a Change Request.
Deliverable Expectation Document	Means the Deliverable Expectation Document provided by Contractor to THSA that defines the approach and criteria for satisfactory completion and approval of all Deliverables.
Deliverable Fee(s)	Means the amounts specified in <u>Exhibit 2</u> , to be paid or credited to THSA by Contractor in recognition of the diminished value of the Services resulting from Contractor's failure to meet the agreed upon obligations, and not as a penalty.
Developed Materials	Means any Materials or any modifications, enhancements, improvements, upgrades or derivative works of Materials that are developed pursuant to the Agreement or otherwise paid for by THSA under the Agreement, excluding Contractor Owned Materials or any modifications, enhancements, improvements, upgrades or derivative works of Contractor Owned Materials regardless of whether they were developed under the Agreement or otherwise paid for by THSA.

Term	Definition
Disaster Recovery Plan	Means the Disaster Recovery & Business Continuity Plan, as attached to the Statement of Work in <u>Exhibit 2</u> to the Agreement.
Disclosing Party	Means a Party disclosing Confidential Information to the Receiving Party as permitted under the Agreement.
Effective Date	Has the meaning given in the preamble of the Agreement.
Entity or Entities	Means a governmental body, agency, unit or division, corporation, partnership, joint venture, trust, limited liability company, limited liability partnership, association, court or clerk of a court, or other organization or entity.
Equipment	Means the computer, telecommunications, and facility-related hardware, equipment, and peripherals (and all modifications, replacements, upgrades, enhancements, documentation, materials, and media related thereto) that are used in connection with the Services by Contractor.
Fiscal Quarter	THSA Fiscal Quarters end on November 30, February 28 or 29, May 31 and August 31.
Fiscal Year	THSA Fiscal Year commences on September 1 and ends on August 31.
Force Majeure Event	Has the meaning given in <u>Section 17.2(a)</u> of the Agreement.
Highly-Sensitive Personal Information	Means an individual's (i) government-issued identification number (including Social Security number, driver's license number, or state- issued identification number); or (ii) financial account number, credit card number, debit card number, or credit report information, with or without any required security code, access code, personal identification number, or password that would permit access to an individual's financial account.
Implementation Services	Means those activities, functions and Deliverables described in the Statement of Work, and such other tasks as are necessary to enable Contractor to provide the Services.
Income Tax	Means any tax on or measured by the net income of a Party (including taxes on capital, net worth or revenue that are imposed as an alternative to a tax based on net or gross income), or taxes which are of the nature of excess

Term	Definition
	profits tax, minimum tax on tax preferences, alternative minimum tax, accumulated earnings tax, personal holding company tax, capital gains tax, or franchise tax for the privilege of doing business.
Infrastructure Services Plan	Means the plan set forth in the Statement of Work (<u>Exhibit 2</u>).
Initial Term	Has the meaning given in <u>Section 3.1(a)</u> of the Agreement.
Intellectual Property Right	Means any and all registered and unregistered rights granted, applied for, or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, privacy, proprietary, database protection, or other intellectual property rights laws, and all similar or equivalent rights or forms of protection, in any part of the world.
IRS	Means the Internal Revenue Service, a division of the U.S. Treasury Department responsible for collecting taxes.
Laws	Means all federal, state and local laws, statutes, ordinances, regulations, rules, or court orders. References in the Agreement to any Law shall be to such Law in changed or amended form or to a newly adopted Law replacing a prior Law.
Losses	Means all costs, losses, liabilities, damages (including punitive and exemplary damages), fees (including attorneys' fees), fines, penalties, settlements, judgments, interest and claims (including taxes), in each case that a court may award to a Party or Third Party or which are otherwise included in the amount payable to a Party or Third Party and all related costs and expenses (including reasonable legal fees and disbursements and costs of investigation, litigation, experts, settlement, judgment, interest and penalties), as incurred.
Malicious Code	Means (i) any code, program, or sub-program whose knowing or intended purpose or effect is to damage or interfere with the operation of the computer system containing the code, program or sub-program, or to halt, disable or interfere with the operation of the Software, code, program, or sub-program, itself, or to corrupt, delete, or render inaccessible Data or (ii) any device, method, or token that permits any person to circumvent the normal security of the Software or the system containing the code.

Term	Definition
Malicious Code Recovery Services	Has the meaning given in <u>Section 14.9(b)</u> of the Agreement.
Materials	Means all reports, management plan, issue management plan, project deployment plan, project schedule, configuration plan, stakeholder outreach, communication plan, any other plans, artifacts, formulae, algorithms, processes, process improvements, procedures, designs, concepts, methodologies, trade secrets, technology, Software (in both object and source code form), databases, Specifications and all records thereof, including documentation, design documents and analyses, interface documentation, studies, tools, plans, models, flow charts, reports and drawings.
New Services	Means services requested by THSA or required by applicable Laws (without limiting the obligation of the Parties under <u>Section 4.3</u> of the Agreement) that are within the scope of the RFP and (i) that are different from the Services, (ii) that require materially different levels of effort or resources from Contractor to provide the Services, and (iii) which are not required for Contractor to meet the Service Levels. For the avoidance of doubt, New Services shall not include (1) increases in the volume of Services, (2) the disaggregation of an existing service from the Statement of Work, or (3) any release of Software.
Noncompliance	Means each instance that a Deliverable fails to meet its Acceptance criteria or fails to fulfill the requirements of the Specifications or the Agreement.
Notice of Election	Has the meaning given in <u>Section 16.5(a)</u> of the Agreement.
Party and Parties	Has the meaning given in the recitals to the Agreement.
Personal Data	Means that portion of Data (including such data that pertains to Authorized Users) that (i) is subject to any Privacy Laws (including, but not limited to, information which THSA discloses that consists of personal Confidential Information); (ii) identifies or can be used to identify an individual (including, without limitation, names, signatures, addresses, telephone numbers, email addresses, and other unique identifiers); or (iii) can be used to authenticate an individual (including, without limitation, employee identification numbers, government-issued identification numbers, passwords or PINs, user identification and account access credentials or passwords, financial account numbers, credit report information, student information, answers to security questions, or other personal identifiers).

Term	Definition
Privacy Laws	Means Laws relating to data privacy or data protection.
Problem	Means any (i) Security Incident, (ii) failure to deliver any Services, (iii) failure to deliver any Service Levels, (iv) situation that has negatively impacted or reasonably could negatively impact the maintenance of THSA's internal controls or compliance with THSA's physical or information security, operations, and any policies, procedures, or services described in this Agreement, the Statement of Work or work authorization, or applicable Laws; (v) situation that has had or reasonably could have any adverse impact on the Services (including but not limited to any failure by Contractor to comply with its obligations under this Agreement, any delay in delivery or performance, change in control or change in legal form of the Contractor, or infringement of Third Party rights or any claim made by a Third Party in respect of such rights); or (vi) other act, omission or development which would be important for THSA to be aware of in order to take precautions to prevent an adverse effect to its businesses or reputation.
Production Services	Means all Services in connection with hosting, operating, administering, supporting, maintaining and providing THSA and Authorized Users with access to the Data System and other services as may be specified in the Statement of Work or by THSA through any Accepted Change Requests.
Quality Assurance	Means the actions, planned and performed, so that all processes, Systems, Equipment, Software, and components that influence the quality of the Services are working as set forth in the Agreement.
Quarterly Invoice	Has the meaning given in <u>Section 11.1(b)</u> of the Agreement.
Receiving Party	Means a Party receiving Confidential Information of the other Party.
Renewal Term	Has the meaning given in <u>Section 3.1(b)</u> of the Agreement.
Reports	Has the meaning given in <u>Section 7.1(a)</u> of the Agreement.
Required Consents	Means the consents required to be obtained (i) to assign or transfer to Contractor THSA licensed Third Party Materials, Third Party contracts, Equipment leases or acquired assets (including related warranties); (ii) to grant Contractor the right to use and/or access the THSA licensed Third Party Materials or Third Party contracts; (iii) to grant THSA and/or its designee(s) the right to use and/or access the Contractor Owned Materials, Third Party Materials and Equipment acquired, operated, supported, used, or required to

Term	Definition
	be used by Contractor in connection with providing the Services; (iv) to assign or transfer to THSA and/or its designee(s) any Developed Materials to the extent provided in the Agreement; (v) to assign or transfer to THSA and/or its designee(s) Contractor Owned Materials, Third Party Materials, Third Party contracts, Equipment leases or other rights following the Term to the extent provided in the Agreement; and (vi) all other consents required from third parties in connection with Contractor's provision of, and THSA's receipt and use of, the Services and Contractor's performance of its obligations under the Agreement.
Response	Has the meaning given in the recitals of the Agreement.
Root Cause Analysis	Means the formal process to be used by Contractor to diagnose the underlying cause of problems at the lowest reasonable level so that effective corrective action can be taken.
Scheduled Downtime	Has the meaning given in <u>Section 7.3(c)</u> of the Agreement.
Secondary Backup Facility	Has the meaning given in <u>Section 7.2(a)(viii)</u> of the Agreement.
Security Incident	Means an occurrence that actually or potentially jeopardizes the confidentiality, integrity, or availability of an information system or the information the system processes, stores, or transmits or that constitutes a violation or imminent threat of violation of security policies, security procedures, or acceptable use policies.
Service Level Agreement	Means the Service Level Agreement set forth in <u>Exhibit 3</u> to the Agreement, and its related attachments, including the Service Level Requirements.
Service Level Reimbursements	Means the monetary amounts that the Contractor shall be obligated to pay to THSA, as more detailed in the Service Level Agreement set forth in <u>Exhibit 3</u> .
Service Level Requirements	Means the Service Level Requirements set forth in the Service Level Requirements spreadsheet that is attached to the Service Level Agreement set forth in <u>Exhibit 3</u> .
Service Levels	Means, individually and collectively, any of the following: the quantitative and qualitative performance standards for the Services, the error severity

Term	Definition
	levels and corresponding required service level responses, response times, resolution, and resolution times as set forth in the Service Level Agreement and the Service Level Requirements set forth therein.
Services	Means all services, functions and responsibilities to be performed by Contractor under the Agreement and the Statement(s) of Work, including, but not limited to, all services in connection with configuring, operating, and maintaining a Data System.
Software	Means all Materials consisting of Software programs and programming (and all modifications, replacements, upgrades, releases, enhancements, documentation, materials and media related thereto), including antivirus software, application software, development tools and system software.
Specifications	Means the technical, design and/or functional specifications in THSA's description of any Services, or otherwise agreed upon in writing by the Parties.
State	Means the State of Texas, unless expressly stated otherwise.
Statement of Work	Means the statement of work in <u>Exhibit 2</u> to this Agreement and its related attachments, each as amended, modified, or supplemented from time to time.
Subcontractors	Means subcontractors (of any tier) of Contractor, including Affiliates of Contractor, performing Services under the Agreement pursuant to <u>Section 7.4</u> of the Agreement.
System	Means an interconnected grouping of manual or electronic processes, including Software and associated attachments, features, accessories, peripherals and cabling, and all additions, modifications, substitutions, upgrades or enhancements to such System and all Systems installed for THSA during the Term.
Term	Has the meaning set forth in <u>Section 3.1(b)</u> of the Agreement.
Termination Assistance Plan	Has the meaning set forth in <u>Section 4.2(c)</u> of the Agreement.

Term	Definition
Termination Assistance Services	Means (i) the Services (including the terminated, in-sourced, resourced or expired Services, the Services described in <u>Section 4.2</u> of the Agreement, and any replacements thereof or supplements thereto), to the extent THSA requests such Services during a Termination Assistance Services period; (ii) Contractor's cooperation with THSA and its designee(s) in the orderly transfer of the Services (or replacement or supplemental services) to THSA and its designee(s); (iii) Contractor's cooperation with THSA and its designee(s) in providing data as requested to define requirements for a new procurement; (iv) knowledge transfer requested by THSA for replacement services; and (v) any New Services requested by THSA in order to facilitate the transfer of the Services (or replacement or supplemental services) to THSA and its designee(s).
Termination Charge	Means the sum of (i) amounts due and owing for completed Deliverables in <u>Exhibit 4</u> plus (ii) for each incomplete Deliverable listed in <u>Exhibit 4</u> , the product of the percentage completed of such incomplete Deliverable multiplied by the amount set forth in <u>Exhibit 4</u> for such completed Deliverable.
Third Party	Means, whether or not capitalized, a legal Entity, company, or person(s) that is not a Party to the Agreement and is not an Affiliate of a Party.
Third Party Materials	Means Materials that are owned by Third Parties, including any Subcontractors that are Third Parties, and provided under license or lease to Contractor or THSA and that (i) have been or will be used to provide or receive the Services, (ii) are in use or required to be used as of the Commencement Date, or (iii) constitute programs or programming licensed and/or leased to THSA or Contractor during the Term.
THSA Auditors	Has the meaning given in <u>Section 9.1(b)</u> of the Agreement.
THSA Confidential Information	Means Confidential Information of THSA, and includes Data, attorney-client privileged materials, attorney work product, research information, information that contains trade secrets, human resources and personnel information, or other information or data obtained, observed, received, transmitted, processed, stored, archived or maintained by Contractor under the Agreement.
THSA Indemnitees	Has the meaning given in <u>Section 16.1</u> of the Agreement.

Term	Definition
THSA Site(s)	Means the facilities that are provided by THSA for use by Contractor to the extent necessary to provide the Services as well as those THSA and Contractor locations at or to which Contractor is to provide the Services.
THSA Standard(s)	Means (i) the standards, policies, practices, processes, procedures, and controls to be adhered to and enforced by Contractor in the performance of the Services, including those identified in the Agreement, and (ii) the associated IT technologies architectures, standards, products and systems to be provided, operated, managed, supported and/or used by Contractor in connection therewith.
Warranty Period	Means the Term of the Agreement.
Work Product	Means (i) data models, including all data schematic and infrastructure maps, (ii) all reports and plans, including business requirements documents, design documents, manuals, training and knowledge transfer materials and documentation, and (iii) any other works of authorship created under the Agreement that express, embody or execute or perform a function, method or process, all of which shall be owned in its entirety by Contractor. Work Product includes customized reports, manuals, and forms, but not the original unmodified versions used by Contractor as a starting point for creating the customized version.

Exhibit 2 – Statement of Work

Master Services Agreement

THSA Contract No. 0000001

Between

Texas Health Services Authority (THSA)

and

Contractor

Exhibit 3 – Service Level Agreement

Master Services Agreement

THSA Contract No. 0000001

Between

Texas Health Services Authority (THSA)

and

Contractor

Exhibit 4 – Pricing and Financial Provisions

Master Services Agreement

THSA Contract No. 0000001

Between

Texas Health Services Authority (THSA)

and

Contractor

Exhibit 5 – Business Associate Agreement Master Services Agreement

THSA Contract No. 0000001

Between

Texas Health Services Authority (THSA)

and

Contractor



BUSINESS ASSOCIATE AGREEMENT

THIS BUSINESS ASSOCIATE AGREEMENT ("BAA") dated _____ (the "Effective Date"), is entered into by and between the Texas Health Services Authority ("THSA" or "Covered Entity") and _____ ("Business Associate"), each a "Party" and collectively, the "Parties." Business Associate and Covered Entity have entered into, are entering into, or may subsequently enter into, agreements or other documented arrangements pursuant to which Business Associate may provide products and/or services for Covered Entity, or Covered Entity's customers, that require Business Associate to access, use and/or disclose health information that is protected by state and/or federal law.

1. **Business Associate Obligations.** Business Associate may receive from Covered Entity, or create or receive on behalf of Covered Entity, health information that is protected under applicable state and/or federal law, including without limitation, PHI and EPHI. All references to PHI herein shall be construed to include EPHI. Business Associate agrees not to use or disclose (or permit the use or disclosure of) PHI in a manner that would violate the Privacy Standards, Security Standards, the HITECH Act, or Texas law, including without limitation the provisions of Texas Health and Safety Code Chapters 181 and 182, in each case including any implementing regulations as applicable (collectively referred to hereinafter as the "Confidentiality Requirements").

2. **Use of PHI.** Except as otherwise required by law, Business Associate shall use PHI in compliance with 45 C.F.R. § 164.504(e). Furthermore, Business Associate shall use PHI (i) solely for the benefit of Covered Entity and only for the purpose of performing services for Covered Entity as such services are defined in the Master Services Agreement dated _____, by and between THSA and Business Associate ("Agreement"), (ii) for Data Aggregation Services (as hereinafter defined), and (iii) as necessary for the proper management and administration of the Business Associate or to carry out its legal responsibilities, provided that such uses are permitted under federal and state law. For avoidance of doubt, under no circumstances may Business Associate sell PHI in such a way as to violate Texas Health and Safety Code Section 181.153, nor shall Business Associate use PHI for marketing purposes in such a manner as to violate Texas Health and Safety Code Section 181.152, or attempt to re-identify any information in violation of Texas Health and Safety Code Section 181.151, regardless of whether such action is on behalf of or permitted by the Covered Entity. To the extent not otherwise prohibited in the Agreement or by applicable law, use, creation and disclosure of de-identified health information, as that term is defined in 45 C.F.R. § 164.514, by Business Associate is permitted.

3. **Disclosure of PHI.** Subject to any limitations in this BAA, Business Associate may disclose PHI to any third-party persons or entities as necessary to perform its obligations under the Agreement and as permitted or required by applicable federal or state law.

3.1 Business Associate shall not, and shall provide that its directors, officers, employees, subcontractors, and agents do not, disclose PHI to any other person (other than members of their respective workforce as specified in subsection 3.1(ii) below), unless disclosure is required by law or authorized by the person whose PHI is to be disclosed. Any such disclosure other than as specifically permitted in the immediately preceding sentence shall be made only if such disclosee has previously signed a written agreement that:

(i) Binds the disclosee to the provisions of this BAA pertaining to PHI, for the express benefit of Covered Entity, Business Associate and, if disclosee is other than Business Associate, the disclosee;

(ii) Contains reasonable assurances from disclosee that the PHI will be held confidential as provided in this BAA, and only disclosed as required by law for the purposes for which it was disclosed to disclosee; and

(iii) Obligates disclosee to immediately notify Business Associate of any breaches of the confidentiality of the PHI, to the extent disclosee has obtained knowledge of such breach.

3.2 Business Associate shall not disclose PHI to any member of its workforce and shall provide that its subcontractors and agents do not disclose PHI to any member of their respective workforces, unless Business Associate or such subcontractor or agent has advised such person of Business Associate's obligations under this BAA, and of the consequences for such person and for Business Associate or such subcontractor or agent of violating them. Business Associate shall take, and shall provide that each of its subcontractors and agents take, appropriate disciplinary action against any member of its respective workforce who uses or discloses PHI in contravention of this BAA.

3.3 In addition to Business Associate's obligations under Section 8, Business Associate agrees to mitigate, to the extent commercially practical, harmful effects that are known to Business Associate and are the result of a use or disclosure of PHI by Business Associate in violation of this BAA.

4. Access to and Amendment of Protected Health Information. Business Associate shall:

(i) provide access to, and permit inspection and copying of, PHI by Covered Entity, as relevant; and

(ii) amend PHI maintained by Business Associate as requested by Covered Entity. Any such amendments shall be made in such a way as to record the time and date of the change, if feasible, and in accordance with any subsequent requirements promulgated by the Texas Medical Board. Business Associate shall respond to any request from Covered Entity for access by an individual within seven (7) calendar days of such request and shall make any amendment requested by Covered Entity within twenty (20) calendar days of the later of (a) such request by Covered Entity or (b) the date as of which Covered Entity has provided Business Associate with all information

necessary to make such amendment. Business Associate may charge a reasonable fee based upon the Business Associate's labor costs in responding to a request for electronic information (or the fee approved by the Texas Medical Board for the production of non-electronic media copies). Business Associate shall notify Covered Entity within five (5) business days of receipt of any request for access or amendment by an individual. Covered Entity shall determine whether to grant or deny any access or amendment requested by the individual. Business Associate shall have a process in place for requests for amendments and for appending such requests and statements in response to denials of such requests to the designated record set, as requested by Covered Entity.

5. Accounting of Disclosures. Business Associate shall make available to Covered Entity in response to a request from an individual, information required for an accounting of disclosures of PHI with respect to the individual in accordance with 45 C.F.R. § 164.528, as amended by Section 13405(c) of the HITECH Act and any related regulations or guidance issued by HHS in accordance with such provision.

6. Records and Audit. Business Associate shall make available to the United States Department of Health and Human Services or its agents, its internal practices, books, and records relating to the use and disclosure of PHI received from, created, or received by Business Associate on behalf of Covered Entity for the purpose of determining Covered Entity's compliance with the Confidentiality Requirements or the requirements of any other health oversight agency, in a time and manner designated by the Secretary.

7. Implementation of Security Standards; Notice of Security Incidents. Business Associate will use appropriate safeguards to prevent the use or disclosure of PHI other than as expressly permitted under this BAA. Business Associate will implement administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the PHI that it creates, receives, maintains or transmits on behalf of Covered Entity. Business Associate acknowledges that the HITECH Act requires Business Associate to comply with 45 C.F.R. §§ 164.308, 164.310, 164.312 and 164.316 as if Business Associate were a Covered Entity, and Business Associate agrees to comply with these provisions of the Security Standards and all additional security provisions of the HITECH Act. Furthermore, to the extent feasible, Business Associate will use commercially reasonable efforts to secure PHI through technology safeguards that render such PHI unusable, unreadable and indecipherable to individuals unauthorized to acquire or otherwise have access to such PHI in accordance with HHS Guidance published at 74 Federal Register 19006 (April 17, 2009), or such later regulations or guidance promulgated by HHS or issued by the National Institute for Standards and Technology ("NIST") concerning the protection of identifiable data such as PHI. Lastly, Business Associate will promptly report to Covered Entity any successful Security Incident of which it becomes aware. At the request of Covered Entity, Business Associate shall identify the date of the Security Incident, the scope of the Security Incident, Business Associate's response to the Security Incident and the identification of the party responsible for causing the Security Incident, if known.

8. Data Breach Notification and Mitigation.

8.1 HIPAA Data Breach Notification and Mitigation. Business Associate agrees to implement reasonable systems for the discovery and prompt reporting to Covered Entity of any "breach" of "unsecured PHI" as those terms are defined by 45 C.F.R. § 164.402. Specifically, a

breach is an unauthorized acquisition, access, use or disclosure of unsecured PHI, including EPHI, which compromises the security or privacy of the PHI/EPHI. A breach compromises the security or privacy of PHI/EPHI if it poses a significant risk of financial, reputational, or other harm to the individual whose PHI/EPHI was compromised (hereinafter a “HIPAA Breach”). The parties acknowledge and agree that 45 C.F.R. § 164.404, as described below in this Section 8.1, governs the determination of the date of discovery of a HIPAA Breach. In addition to the foregoing and notwithstanding anything to the contrary herein, Business Associate will also comply with applicable state law, including without limitation, Chapter 521 Texas Business and Commerce Code, or such other laws or regulations as may later be amended or adopted. In the event of any conflict between this Section 8.1, the Confidentiality Requirements, Chapter 521 of the Texas Business and Commerce Code, and any other later amended or adopted laws or regulations, the most stringent requirements shall govern.

8.2 Discovery of Breach. Business Associate will, following the discovery of a HIPAA Breach, notify Covered Entity without unreasonable delay and in no event later than the earlier of the maximum of time allowable under applicable law or three (3) business days after Business Associate discovers such HIPAA Breach, unless Business Associate is prevented from doing so by 45 C.F.R. § 164.412 concerning law enforcement investigations. For purposes of reporting a HIPAA Breach to Covered Entity, the discovery of a HIPAA Breach shall occur as of the first day on which such HIPAA Breach is known to Business Associate or, by exercising reasonable diligence, would have been known to Business Associate. Business Associate will be considered to have had knowledge of a HIPAA Breach if the HIPAA Breach is known, or by exercising reasonable diligence would have been known, to any person (other than the person committing the HIPAA Breach) who is an employee, officer or other agent of Business Associate.

8.3 Reporting a Breach. Without unreasonable delay and no later than the earlier of the maximum of time allowable under applicable law or five (5) business days following a HIPAA Breach, Business Associate shall provide Covered Entity with sufficient information to permit Covered Entity to comply with the HIPAA Breach notification requirements set forth at 45 C.F.R. § 164.400 et seq. Specifically, if the following information is known to (or can be reasonably obtained by) Business Associate, Business Associate will provide Covered Entity with:

- (i) contact information for individuals who were or who may have been impacted by the HIPAA Breach (e.g., first and last name, mailing address, street address, phone number, email address);
- (ii) a brief description of the circumstances of the HIPAA Breach, including the date of the HIPAA Breach and date of discovery;
- (iii) a description of the types of unsecured PHI involved in the HIPAA Breach (e.g., names, social security numbers, dates of birth, addressees, account numbers of any type, disability codes, diagnostic and/or billing codes and similar information);
- (iv) a brief description of what Business Associate has done or is doing to investigate the HIPAA Breach, mitigate harm to the individual impacted by the HIPAA Breach, and protect against future HIPAA Breaches; and

(v) appoint a liaison and provide contact information for same so that Covered Entity may ask questions or learn additional information concerning the HIPAA Breach.

Following a HIPAA Breach, Business Associate will have a continuing duty to inform Covered Entity of new information learned by Business Associate regarding the HIPAA Breach, including but not limited to the information described in items (i) through (v), above.

9. Termination.

9.1 This BAA shall commence on the Effective Date.

9.2 Upon the termination of the applicable Agreement, either Party may terminate this BAA by providing written notice to the other Party.

9.3 Upon termination of this BAA for any reason, Business Associate agrees:

(i) to return to Covered Entity or to destroy all PHI received from Covered Entity or otherwise through the performance of services for Covered Entity, that is in the possession or control of Business Associate or its agents. Business Associate agrees that all paper, film, or other hard copy media shall be shredded or destroyed such that it may not be reconstructed, and EPHI shall be purged or destroyed concurrent with NIST Guidelines for media sanitization at <http://www.csrc.nist.gov/>; or

(ii) in the case of PHI which is not feasible to “return or destroy,” to extend the protections of this BAA to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI. Business Associate further agrees to comply with other applicable state or federal law, which may require a specific period of retention, redaction, or other treatment of such PHI.

10. Miscellaneous.

10.1 Notice. All notices, requests, demands and other communications required or permitted to be given or made under this BAA shall be in writing, shall be effective upon receipt or attempted delivery, and shall be sent by:

- (i) personal delivery;
- (ii) certified or registered United States mail, return receipt requested;
- (iii) overnight delivery service with proof of delivery; or
- (iv) facsimile with return facsimile acknowledging receipt.

Notices shall be sent to the addresses below. Neither Party shall refuse delivery of any notice hereunder. Address information for any and all notices shall be as expressed in the Agreement and/or in relevant Statements of Work.

Texas Health Services Authority

[Business Associate]

Attn: CEO

Attn:

901 S. Mopac Expressway

[Address line 1]

Building 1, Suite 300

[Address line 2]

Austin, Texas 78746

[city, state, zip code]

10.2 Waiver. No provision of this BAA or any breach thereof shall be deemed waived unless such waiver is in writing and signed by the Party claimed to have waived such provision or breach. No waiver of a breach shall constitute a waiver of or excuse any different or subsequent breach.

10.3 Assignment. Neither Party may assign (whether by operation or law or otherwise) any of its rights or delegate or subcontract any of its obligations under this BAA without the prior written consent of the other Party. Notwithstanding the foregoing, Covered Entity shall have the right to assign its rights and obligations hereunder to any entity that is an affiliate or successor of Covered Entity, without the prior approval of Business Associate.

10.4 Severability. Any provision of this BAA that is determined to be invalid or unenforceable will be ineffective to the extent of such determination without invalidating the remaining provisions of this BAA or affecting the validity or enforceability of such remaining provisions.

10.5 Entire BAA. This BAA constitutes the complete agreement between Business Associate and Covered Entity relating to the matters specified in this BAA, and supersedes all prior representations or agreements, whether oral or written, with respect to such matters. In the event of any conflict between the terms of this BAA and the terms of the Agreement or any such later agreement(s), the terms of this BAA shall control unless the terms of such Agreements are more strict with respect to PHI and compliance with the Confidentiality Requirements, or the Parties specifically otherwise agree in writing. No oral modification or waiver of any of the provisions of this BAA shall be binding on either Party; provided, however, that upon the enactment of any law, regulation, court decision or relevant government publication and/or interpretive guidance or policy that the Covered Entity believes in good faith will adversely impact the use or disclosure of PHI under this BAA, Covered Entity may amend the BAA to comply with such law, regulation, court decision or government publication, guidance or policy by delivering a written amendment to Business Associate which shall be effective thirty (30) calendar days after receipt. No obligation on either Party to enter into any transaction is to be implied from the execution or delivery of this BAA. This BAA is for the benefit of, and shall be binding upon the Parties, their affiliates and respective successors and assigns. No third party shall be considered a third-party beneficiary under this BAA, nor shall any third party have any rights as a result of this BAA.

10.6 Governing Law. This BAA shall be governed by and interpreted in accordance with the laws of the state of Texas. Venue for any dispute relating to this BAA shall be in Travis County, Texas.

10.7 Nature of BAA; Independent Contractor. Nothing in this BAA shall be construed to create

- (i) a partnership, joint venture or other joint business relationship between the Parties or any of their affiliates, or
- (ii) a relationship of employer and employee between the Parties. Business Associate is an independent contractor, and not an agent of Covered Entity. This BAA does not express or imply any commitment to purchase or sell goods or services.

10.8 Counterparts. This BAA may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. In making proof of this BAA, it shall not be necessary to produce or account for more than one such counterpart executed by the Party against whom enforcement of this BAA is sought. Signatures to this BAA transmitted by facsimile transmission, by electronic mail in portable document format (".pdf") form, or by any other electronic means intended to preserve the original graphic and pictorial appearance of a document, will have the same force and effect as physical execution and delivery of the paper document bearing the original signature.

10.9 Definitions. For the purposes of this BAA, the following definitions shall apply:

- (i) "Business Associate" shall have the meaning given to such term under the Privacy Standards or Security Standards, including, but not limited to, 45 C.F.R. Section 160.103. Nothing in this Section shall create a Business Associate status where one does not otherwise exist under law.
- (ii) "Covered Entity" shall have the meaning given to such term under the Privacy Standards or Security Standards, including, but not limited to, 45 C.F.R. Section 160.103. Nothing in this Section shall create a Covered Entity status where one does not otherwise exist under law.
- (iii) "Data Aggregation Services" shall mean the combining of PHI or EPHI by Business Associate with the PHI or EPHI received by Business Associate in its capacity as a Business Associate of another Covered Entity, to permit data analyses that relate to the health care operations of, payment to, and treatment of patients by the respective covered entities.
- (iv) "Electronic Protected Health Information" or "EPHI" shall have the meaning given to such term under HIPAA, including but not limited to 45 C.F.R. Parts 160, 162, and 164, and under HITECH.
- (v) "Privacy Standards" shall mean the HIPAA Regulation that is codified at 45 C.F.R. Parts 160, 162 and 164.
- (vi) "Protected Health Information" or "PHI" means any information, whether oral or recorded in any form or medium: (i) that relates to the past, present, or future physical or mental condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (ii) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual, and shall have the meaning given to such term under the Privacy Standards or

Security Standards, including, but not limited to, 45 C.F.R. Section 164.501. 45 C.F.R. §§ 160.103 and 164.501.

(vii) “Security Standards” shall mean the HIPAA regulation that is codified at 45 C.F.R. Part 164.

(viii) The Health Information Technology for Economic and Clinical Health (“HITECH”) Act shall mean Division A, Title XIII of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5). The U.S. Department of Health and Human Services (“HHS”) interim final rule at 74 Fed. Reg. 42,740 implements the security breach notice provisions of HITECH.

(ix) Any other capitalized term not otherwise defined in this Section 10.9 or this BAA shall have the meanings set forth in the Privacy Standards, Security Standards or the HITECH Act, as applicable.

IN WITNESS WHEREOF, the Parties have executed this BAA as of the Effective Date.

THSA:

Business Associate:

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

Exhibit 6 – Data Use Agreement

Master Services Agreement

THSA Contract No. 0000001

Between

Texas Health Services Authority (THSA)

and

Contractor

**DATA USE AGREEMENT
BETWEEN THE
TEXAS HEALTH AND HUMAN SERVICES ENTERPRISE
AND
_____ (“CONTRACTOR”)**

This Data Use Agreement (“DUA”), effective as of the Base Contract (“Effective Date”), is entered into by and between the Texas Health and Human Services Enterprise agency _____ (“HHS”) and _____ (“CONTRACTOR”), and incorporated into the terms of HHS Contract No. _____, in Travis County, Texas (the “Base Contract”).

ARTICLE 1. PURPOSE; APPLICABILITY; ORDER OF PRECEDENCE

The purpose of this DUA is to facilitate creation, receipt, maintenance, use, disclosure or access to Confidential Information with CONTRACTOR, and describe CONTRACTOR’s rights and obligations with respect to the Confidential Information and the limited purposes for which the CONTRACTOR may create, receive, maintain, use, disclose or have access to Confidential Information. **45 CFR 164.504(e)(1)-(3)** This DUA also describes HHS’s remedies in the event of CONTRACTOR’s noncompliance with its obligations under this DUA. This DUA applies to both Business Associates and contractors who are not Business Associates who create, receive, maintain, use, disclose or have access to Confidential Information on behalf of HHS, its programs or clients as described in the Base Contract.

As of the Effective Date of this DUA, if any provision of the Base Contract, including any General Provisions or Uniform Terms and Conditions, conflicts with this DUA, this DUA controls.

ARTICLE 2. DEFINITIONS

For the purposes of this DUA, **capitalized, underlined terms have the meanings set forth in the following:** Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (42 U.S.C. § 1320d, *et seq.*) and regulations thereunder in 45 CFR Parts 160 and 164, including all amendments, regulations and guidance issued thereafter; The Social Security Act, including Section 1137 (42 U.S.C. §§ 1320b-7), Title XVI of the Act; The Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a and regulations and guidance thereunder; Internal Revenue Code, Title 26 of the United States Code and regulations and publications adopted under that code, including IRS Publication 1075; OMB Memorandum 07-18; Texas Business and Commerce Code Ch. 521; Texas Government Code Ch. 552, and Texas Government Code § 2054.1125. In addition, the following terms in this DUA are defined as follows:

“Authorized Purpose” means the specific purpose or purposes described in the Scope of Work of the Base Contract for CONTRACTOR to fulfill its obligations under the Base Contract, or any other purpose expressly authorized by HHS in writing in advance.

“Authorized User” means a Person:

- (1) Who is authorized to create, receive, maintain, have access to, process, view, handle, examine, interpret, or analyze Confidential Information pursuant to this DUA;
- (2) For whom CONTRACTOR warrants and represents has a demonstrable need to create, receive, maintain, use, disclose or have access to the Confidential Information; and

(3) Who has agreed in writing to be bound by the disclosure and use limitations pertaining to the Confidential Information as required by this DUA.

“Confidential Information” means any communication or record (whether oral, written, electronically stored or transmitted, or in any other form) provided to or made available to CONTRACTOR or that CONTRACTOR may create, receive, maintain, use, disclose or have access to on behalf of HHS that consists of or includes any or all of the following:

- (1) Client Information;
- (2) Protected Health Information in any form including without limitation, Electronic Protected Health Information or Unsecured Protected Health Information;
- (3) Sensitive Personal Information defined by Texas Business and Commerce Code Ch. 521;
- (4) Federal Tax Information;
- (5) Personally Identifiable Information;
- (6) Social Security Administration Data, including, without limitation, Medicaid information;
- (7) All privileged work product;
- (8) All information designated as confidential under the constitution and laws of the State of Texas and of the United States, including the Texas Health & Safety Code and the Texas Public Information Act, Texas Government Code, Chapter 552.

“Legally Authorized Representative” of the Individual, as defined by Texas law, including as provided in 45 CFR 435.923 (Medicaid); 45 CFR 164.502(g)(1) (HIPAA); Tex. Occ. Code § 151.002(6); Tex. H. & S. Code §166.164; Estates Code Ch. 752 and Texas Prob. Code § 3.

ARTICLE 3. CONTRACTOR’ S DUTIES REGARDING CONFIDENTIAL INFORMATION

Section 3.01 *Obligations of CONTRACTOR*

CONTRACTOR agrees that:

(A) CONTRACTOR will exercise reasonable care and no less than the same degree of care CONTRACTOR uses to protect its own confidential, proprietary and trade secret information to prevent any portion of the Confidential Information from being used in a manner that is not expressly an Authorized Purpose under this DUA or as Required by Law. **45 CFR 164.502(b)(1); 45 CFR 164.514(d)**

(B) CONTRACTOR will not, without HHS’s prior written consent, disclose or allow access to any portion of the Confidential Information to any Person or other entity, other than Authorized User’s Workforce or Subcontractors of CONTRACTOR who have completed training in confidentiality, privacy, security and the importance of promptly reporting any Event or Breach to CONTRACTOR’s management, to carry out the Authorized Purpose or as Required by Law.

HHS, at its election, may assist CONTRACTOR in training and education on specific or unique HHS processes, systems and/or requirements. CONTRACTOR will produce evidence of completed training to HHS upon request. **45 C.F.R. 164.308(a)(5)(i); Texas Health & Safety Code §181.101**

(C) CONTRACTOR will establish, implement and maintain appropriate sanctions against any member of its Workforce or Subcontractor who fails to comply with this DUA, the Base Contract or applicable law. CONTRACTOR will maintain evidence of sanctions and produce it to HHS upon request. **45 C.F.R. 164.308(a)(1)(ii)(C); 164.530(e); 164.410(b); 164.530(b)(1)**

(D) CONTRACTOR will not, without prior written approval of HHS, disclose or provide access to any Confidential Information on the basis that such act is Required by Law without notifying HHS so that HHS may have the opportunity to object to the disclosure or access and seek appropriate relief. If HHS objects to such disclosure or access, CONTRACTOR will refrain from disclosing or providing access to the Confidential Information until HHS has exhausted all alternatives for relief. **45 CFR 164.504(e)(2)(ii)(A)**

(E) CONTRACTOR will not attempt to re-identify or further identify Confidential Information or De-identified Information, or attempt to contact any Individuals whose records are contained in the Confidential Information, except for an Authorized Purpose, without express written authorization from HHS or as expressly permitted by the Base Contract. **45 CFR 164.502(d)(2)(i) and (ii)**. CONTRACTOR will not engage in prohibited marketing or sale of Confidential Information. **45 CFR 164.501, 164.508(a)(3) and (4); Texas Health & Safety Code Ch. 181.002**

(F) CONTRACTOR will not permit or enter into any agreement with a Subcontractor to create, receive, maintain, use, disclose, have access to or transmit Confidential Information on behalf of CONTRACTOR without requiring that Subcontractor first execute the Form Subcontractor Agreement, Attachment 1, which ensures that the Subcontractor will comply with the identical terms, conditions, safeguards and restrictions as contained in this DUA for PHI and any other relevant Confidential Information and which permits more strict limitations. **45 CFR 164.502(e)(1)(1)(ii); 164.504(e)(1)(i) and (2)**

(G) CONTRACTOR is directly responsible for compliance with, and enforcement of, all conditions for creation, maintenance, use, disclosure, transmission and Destruction of Confidential Information and the acts or omissions of Subcontractors as may be reasonably necessary to prevent unauthorized use. **45 CFR 164.504(e)(5); 42 CFR 431.300, et seq.**

(H) If CONTRACTOR maintains PHI in a Designated Record Set, CONTRACTOR will make PHI available to HHS in a Designated Record Set or, as directed by HHS, provide PHI to the Individual, or Legally Authorized Representative of the Individual who is requesting PHI in compliance with the requirements of the HIPAA Privacy Regulations. CONTRACTOR will make other Confidential Information in CONTRACTOR's possession available pursuant to the requirements of HIPAA or other applicable law upon a determination of a Breach of Unsecured PHI as defined in HIPAA. **45 CFR 164.524 and 164.504(e)(2)(ii)(E)**

(I) CONTRACTOR will make PHI as required by HIPAA available to HHS for amendment and incorporate any amendments to this information that HHS directs or agrees to pursuant to HIPAA. **45 CFR 164.504(e)(2)(ii)(E) and (F)**

(J) CONTRACTOR will document and make available to HHS the PHI required to provide access, an accounting of disclosures or amendments in compliance with the requirements of the HIPAA Privacy Regulations. **45 CFR 164.504(e)(2)(ii)(G) and 164.528**

(K) If CONTRACTOR receives a request for access, amendment or accounting of PHI by any Individual subject to this DUA, it will promptly forward the request to HHS; however, if it would violate HIPAA to forward the request, CONTRACTOR will promptly notify HHS of the request and of CONTRACTOR's response. Unless CONTRACTOR is prohibited by law from forwarding a request, HHS will respond to all such requests, unless HHS has given prior written consent for CONTRACTOR to respond to and account for all such requests. **45 CFR 164.504(e)(2)**

(L) CONTRACTOR will provide, and will cause its Subcontractors and agents to provide, to HHS periodic written certifications of compliance with controls and provisions relating to information privacy, security and breach notification, including without limitation information related to data transfers and the handling and disposal of Confidential Information. **45 CFR 164.308; 164.530(c); 1 TAC 202**

(M) Except as otherwise limited by this DUA, the Base Contract, or law applicable to the Confidential Information, CONTRACTOR may use or disclose PHI for the proper management and administration of CONTRACTOR or to carry out CONTRACTOR's legal responsibilities if: **45 CFR 164.504(e)(ii)(1)(A)**

(1) Disclosure is Required by Law, provided that CONTRACTOR complies with Section 3.01(D);

(2) CONTRACTOR obtains reasonable assurances from the Person to whom the information is disclosed that the Person will:

(a) Maintain the confidentiality of the Confidential Information in accordance with this DUA;

(b) Use or further disclose the information only as Required by Law or for the Authorized Purpose for which it was disclosed to the Person; and

(c) Notify CONTRACTOR in accordance with Section 4.01 of any Event or Breach of Confidential Information of which the Person discovers or should have discovered with the exercise of reasonable diligence. **45 CFR 164.504(e)(4)(ii)(B)**

(N) Except as otherwise limited by this DUA, CONTRACTOR will, if requested by HHS, use PHI to provide data aggregation services to HHS, as that term is defined in HIPAA, 45 C.F.R. § 164.501 and permitted by HIPAA. **45 CFR 164.504(e)(2)(i)(B)**

(O) CONTRACTOR will, on the termination or expiration of this DUA or the Base Contract, at its expense, return to HHS or Destroy, at HHS's election, and to the extent reasonably feasible and permissible by law, all Confidential Information received from HHS or created or maintained by CONTRACTOR or any of CONTRACTOR's agents or Subcontractors on HHS's behalf if that data contains Confidential Information. CONTRACTOR will certify in writing to HHS that all the Confidential Information that has been created, received, maintained, used by or disclosed to CONTRACTOR has been Destroyed or returned to HHS, and that CONTRACTOR and its agents and Subcontractors have retained no copies thereof. Notwithstanding the foregoing, CONTRACTOR acknowledges and agrees that it may not Destroy any Confidential Information if federal or state law or HHS record retention policy or a litigation hold notice prohibits such Destruction. If such return or Destruction is not reasonably feasible, or is impermissible by law, CONTRACTOR will immediately notify HHS of the reasons such return or Destruction is not feasible, and agree to extend indefinitely the protections of this DUA to the Confidential Information and limit its further uses and disclosures to the purposes that make the return of the Confidential Information not feasible for as long as CONTRACTOR maintains such Confidential Information. **45 CFR 164.504(e)(2)(ii)(J)**

(P) CONTRACTOR will create, maintain, use, disclose, transmit or Destroy Confidential Information in a secure fashion that protects against any reasonably anticipated threats or hazards to the security or integrity of such information or unauthorized uses. **45 CFR 164.306; 164.530(c)**

(Q) If CONTRACTOR accesses, transmits, stores, and/or maintains Confidential Information, CONTRACTOR will complete and return to HHS at infosecurity@hhsc.state.tx.us the HHS information security and privacy initial inquiry (SPI) at Attachment 2. The SPI identifies basic privacy and security controls with which CONTRACTOR must comply to protect HHS Confidential Information. CONTRACTOR will comply with periodic security controls compliance assessment and monitoring by HHS as required by state and federal law, based on the type of Confidential Information CONTRACTOR creates, receives, maintains, uses, discloses or has access to and the Authorized Purpose and level of risk. CONTRACTOR's security controls will be based on the National Institute of Standards and Technology (NIST) Special Publication 800-53. CONTRACTOR will update its security controls assessment whenever there are significant changes in security controls for HHS Confidential

Information and will provide the updated document to HHS. HHS also reserves the right to request updates as needed to satisfy state and federal monitoring requirements. **45 CFR 164.306**

(R) CONTRACTOR will establish, implement and maintain any and all appropriate procedural, administrative, physical and technical safeguards to preserve and maintain the confidentiality, integrity, and availability of the Confidential Information, and with respect to PHI, as described in the HIPAA Privacy and Security Regulations, or other applicable laws or regulations relating to Confidential Information, to prevent any unauthorized use or disclosure of Confidential Information as long as CONTRACTOR has such Confidential Information in its actual or constructive possession. **45 CFR 164.308 (administrative safeguards); 164.310 (physical safeguards); 164.312 (technical safeguards); 164.530(c) (privacy safeguards)**

(S) CONTRACTOR will designate and identify, subject to HHS approval, a Person or Persons, as Privacy Official **45 CFR 164.530(a)(1)** and Information Security Official, each of whom is authorized to act on behalf of CONTRACTOR and is responsible for the development and implementation of the privacy and security requirements in this DUA. CONTRACTOR will provide name and current address, phone number and e-mail address for such designated officials to HHS upon execution of this DUA and prior to any change. **45 CFR 164.308(a)(2)**

(T) CONTRACTOR represents and warrants that its Authorized Users each have a demonstrated need to know and have access to Confidential Information solely to the minimum extent necessary to accomplish the Authorized Purpose pursuant to this DUA and the Base Contract, and further, that each has agreed in writing to be bound by the disclosure and use limitations pertaining to the Confidential Information contained in this DUA. **45 CFR 164.502; 164.514(d)**

(U) CONTRACTOR and its Subcontractors will maintain an updated, complete, accurate and numbered list of Authorized Users, their signatures, titles and the date they agreed to be bound by the terms of this DUA, at all times and supply it to HHS, as directed, upon request.

(V) CONTRACTOR will implement, update as necessary, and document reasonable and appropriate policies and procedures for privacy, security and Breach of Confidential Information and an incident response plan for an Event or Breach, to comply with the privacy, security and breach notice requirements of this DUA prior to conducting work under the DUA. **45 CFR 164.308; 164.316; 164.514(d); 164.530(i)(1)**

(W) CONTRACTOR will produce copies of its information security and privacy policies and procedures and records relating to the use or disclosure of Confidential Information received from, created by, or received, used or disclosed by CONTRACTOR on behalf of HHS for HHS's review and approval within 30 days of execution of this DUA and upon request by HHS the following business day or other agreed upon time frame. **45 CFR 164.308; 164.514(d)**

(X) CONTRACTOR will make available to HHS any information HHS requires to fulfill HHS's obligations to provide access to, or copies of, PHI in accordance with HIPAA and other applicable laws and regulations relating to Confidential Information. CONTRACTOR will provide such information in a time and manner reasonably agreed upon or as designated by the Secretary, or other federal or state law. **45 CFR 164.504(e)(2)(i)(I)**

(Y) CONTRACTOR will only conduct secure transmissions of Confidential Information whether in paper, oral or electronic form. A secure transmission of electronic Confidential Information in motion includes Secure File Transfer Protocol (SFTP) or Encryption at an appropriate level or otherwise protected as required by rule, regulation or law. HHS Confidential Information at rest requires Encryption unless there is adequate administrative, technical, and physical security, or as otherwise protected as required by rule, regulation or law. All electronic data transfer and communications of Confidential Information will be through secure systems. Proof of system, media or device security

and/or Encryption must be produced to HHS no later than 48 hours after HHS's written request in response to a compliance investigation, audit or the Discovery of an Event or Breach. Otherwise, requested production of such proof will be made as agreed upon by the parties. De-identification of HHS Confidential Information is a means of security. With respect to de-identification of PHI, "secure" means de-identified according to HIPAA Privacy standards and regulatory guidance. **45 CFR 164.312; 164.530(d)**

(Z) CONTRACTOR will comply with the following laws and standards *if applicable to the type of Confidential Information and Contractor's Authorized Purpose*:

- Title 1, Part 10, Chapter 202, Subchapter B, Texas Administrative Code;
- The Privacy Act of 1974;
- OMB Memorandum 07-16;
- The Federal Information Security Management Act of 2002 (FISMA);
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) as defined in the DUA;
- Internal Revenue Publication 1075 – Tax Information Security Guidelines for Federal, State and Local Agencies;
- National Institute of Standards and Technology (NIST) Special Publication 800-66 Revision 1 – An Introductory Resource Guide for Implementing the Health Insurance Portability and Accountability Act (HIPAA) Security Rule;
- NIST Special Publications 800-53 and 800-53A – Recommended Security Controls for Federal Information Systems and Organizations, as currently revised;
- NIST Special Publication 800-47 – Security Guide for Interconnecting Information Technology Systems;
- NIST Special Publication 800-88, Guidelines for Media Sanitization;
- NIST Special Publication 800-111, Guide to Storage of Encryption Technologies for End User Devices containing PHI; and
- Any other State or Federal law, regulation, or administrative rule relating to the specific HHS program area that CONTRACTOR supports on behalf of HHS.
- TexRamp or FedRamp
- **ARTICLE 4. BREACH NOTICE**

ARTICLE 4. BREACH NOTICE, REPORTING AND CORRECTION REQUIREMENTS

Section 4.01. Breach or Event Notification to HHS. 45 CFR 164.400-414

A. CONTRACTOR will cooperate fully with HHS in investigating, mitigating to the extent practicable and issuing notifications directed by HHS, for any Event or Breach of Confidential Information to the extent and in the manner determined by HHS.

B. CONTRACTOR'S obligation begins at the Discovery of an Event or Breach and continues as long as related activity continues, until all effects of the Event are mitigated to HHS's satisfaction (the "incident response period"). **45 CFR 164.404**

C. Breach Notice:

1. Initial Notice.

a. For federal information, including without limitation, Federal Tax Information, Social Security Administration Data, and Medicaid Client Information, within the first, consecutive clock hour of Discovery, and for all other types of Confidential Information not more than 24 hours after Discovery, *or in a timeframe otherwise approved by HHS in writing*, initially report to HHS's Privacy and Security Officers via email at: privacy@HHSC.state.tx.us and to the HHS division responsible for this DUA; and *IRS Publication 1075; Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a; OMB Memorandum 07-16 as cited in HHSC-CMS Contracts for information exchange.*

b. Report all information reasonably available to CONTRACTOR about the Event or Breach of the privacy or security of Confidential Information. **45 CFR 164.410**

c. Name, and provide contact information to HHS for, CONTRACTOR's single point of contact who will communicate with HHS both on and off business hours during the incident response period.

2. 48-Hour Formal Notice. No later than 48 consecutive clock hours after Discovery, or a time within which Discovery reasonably should have been made by CONTRACTOR of an Event or Breach of Confidential Information, **provide** formal notification to the State, including all reasonably available information about the Event or Breach, and CONTRACTOR's investigation, including without limitation and to the extent available: *For (a) - (m) below: 45 CFR 164.400- 414*

a. The date the Event or Breach occurred;

b. The date of CONTRACTOR's and, if applicable, Subcontractor's Discovery;

c. A brief description of the Event or Breach; including how it occurred and who is responsible (or hypotheses, if not yet determined);

d. A brief description of CONTRACTOR's investigation and the status of the investigation;

e. A description of the types and amount of Confidential Information involved;

f. Identification of and number of all Individuals reasonably believed to be affected, including first and last name of the individual and if applicable the Legally Authorized Representative, last known address, age, telephone number, and email address if it is a preferred contact method, to the extent known or can be reasonably determined by CONTRACTOR at that time;

g. CONTRACTOR's initial risk assessment of the Event or Breach demonstrating whether individual or other notices are required by applicable law or this DUA for HHS approval, including an analysis of whether there is a low probability of compromise of the Confidential Information or whether any legal exceptions to notification apply;

h. CONTRACTOR's recommendation for HHS's approval as to the steps Individuals and/or CONTRACTOR on behalf of Individuals should take to protect the Individuals from potential harm, including without limitation CONTRACTOR's provision of notifications, credit protection, claims monitoring, and any specific protections for a Legally Authorized Representative to take on behalf of an Individual with special capacity or circumstances;

i. The steps CONTRACTOR has taken to mitigate the harm or potential harm caused (including without limitation the provision of sufficient resources to mitigate);

j. The steps CONTRACTOR has taken, or will take, to prevent or reduce the likelihood of recurrence of a similar Event or Breach;

k. Identify, describe or estimate the Persons, Workforce, Subcontractor, or Individuals and any

law enforcement that may be involved in the Event or Breach;

l. A reasonable schedule for CONTRACTOR to provide regular updates to the foregoing in the future for response to the Event or Breach, but no less than every three (3) business days or as otherwise directed by HHS, including information about risk estimations, reporting, notification, if any, mitigation, corrective action, root cause analysis and when such activities are expected to be completed; and

m. Any reasonably available, pertinent information, documents or reports related to an Event or Breach that HHS requests following Discovery.

Section 4.02 Investigation, Response and Mitigation. For A-F below: 45 CFR 164.308, 310 and 312; 164.530

(A) CONTRACTOR will immediately conduct a full and complete investigation, respond to the Event or Breach, commit necessary and appropriate staff and resources to expeditiously respond, and report as required to and by HHS for incident response purposes and for purposes of HHS's compliance with report and notification requirements, to the satisfaction of HHS.

(B) CONTRACTOR will complete or participate in a risk assessment as directed by HHS following an Event or Breach, and provide the final assessment, corrective actions and mitigations to HHS for review and approval.

(C) CONTRACTOR will fully cooperate with HHS to respond to inquiries and/or proceedings by state and federal authorities, Persons and/or Individuals about the Event or Breach.

(D) CONTRACTOR will fully cooperate with HHS's efforts to seek appropriate injunctive relief or otherwise prevent or curtail such Event or Breach, or to recover or protect any Confidential Information, including complying with reasonable corrective action or measures, as specified by HHS in a Corrective Action Plan if directed by HHS under the Base Contract.

Section 4.03 Breach Notification to Individuals and Reporting to Authorities. Tex. Bus. & Comm. Code §521.053; 45 CFR 164.404 (Individuals), 164.406 (Media); 164.408 (Authorities)

(A) HHS may direct CONTRACTOR to provide Breach notification to Individuals, regulators or third-parties, as specified by HHS following a Breach.

(B) CONTRACTOR must obtain HHS's prior written approval of the time, manner and content of any notification to Individuals, regulators or third-parties, or any notice required by other state or federal authorities. Notice letters will be in CONTRACTOR's name and on CONTRACTOR's letterhead, unless otherwise directed by HHS, and will contain contact information, including the name and title of CONTRACTOR's representative, an email address and a toll-free telephone number, for the Individual to obtain additional information.

(C) CONTRACTOR will provide HHS with copies of distributed and approved communications.

(D) CONTRACTOR will have the burden of demonstrating to the satisfaction of HHS that any notification required by HHS was timely made. If there are delays outside of CONTRACTOR's control, CONTRACTOR will provide written documentation of the reasons for the delay.

(E) If HHS delegates notice requirements to CONTRACTOR, HHS shall, in the time and manner reasonably requested by CONTRACTOR, cooperate and assist with CONTRACTOR's information requests in order to make such notifications and reports.

ARTICLE 5. SCOPE OF WORK

Scope of Work means the services and deliverables to be performed or provided by CONTRACTOR, or on behalf of CONTRACTOR by its Subcontractors or agents for HHS that are described in detail in the Base Contract. The Scope of Work, including any future amendments thereto, is incorporated by reference in this DUA as if set out word-for-word herein.

ARTICLE 6. GENERAL PROVISIONS

Section 6.01 Ownership of Confidential Information

CONTRACTOR acknowledges and agrees that the Confidential Information is and will remain the property of HHS. CONTRACTOR agrees it acquires no title or rights to the Confidential Information.

Section 6.02 HHS Commitment and Obligations

HHS will not request CONTRACTOR to create, maintain, transmit, use or disclose PHI in any manner that would not be permissible under applicable law if done by HHS.

Section 6.03 HHS Right to Inspection

At any time upon reasonable notice to CONTRACTOR, or if HHS determines that CONTRACTOR has violated this DUA, HHS, directly or through its agent, will have the right to inspect the facilities, systems, books and records of CONTRACTOR to monitor compliance with this DUA. For purposes of this subsection, HHS's agent(s) include, without limitation, the HHS Office of the Inspector General or the Office of the Attorney General of Texas, outside consultants or legal counsel or other designee.

Section 6.04 Term; Termination of DUA; Survival

This DUA will be effective on the date on which CONTRACTOR executes the DUA, and will terminate upon termination of the Base Contract and as set forth herein. If the Base Contract is extended or amended, this DUA is updated automatically concurrent with such extension or amendment.

(A) HHS may immediately terminate this DUA and Base Contract upon a material violation of this DUA.

(B) Termination or Expiration of this DUA will not relieve CONTRACTOR of its obligation to return or Destroy the Confidential Information as set forth in this DUA and to continue to safeguard the Confidential Information until such time as determined by HHS.

(D) If HHS determines that CONTRACTOR has violated a material term of this DUA; HHS may in its sole discretion:

1. Exercise any of its rights including but not limited to reports, access and inspection under this DUA and/or the Base Contract; or
2. Require CONTRACTOR to submit to a corrective action plan, including a plan for monitoring and plan for reporting, as HHS may determine necessary to maintain compliance with this DUA; or
3. Provide CONTRACTOR with a reasonable period to cure the violation as determined by HHS; or
4. Terminate the DUA and Base Contract immediately, and seek relief in a court of competent jurisdiction in Travis County, Texas.

Before exercising any of these options, HHS will provide written notice to CONTRACTOR describing the violation and the action it intends to take.

(E) If neither termination nor cure is feasible, HHS shall report the violation to the Secretary.

(F) The duties of CONTRACTOR or its Subcontractor under this DUA survive the expiration or termination of this DUA until all the Confidential Information is Destroyed or returned to HHS, as required by this DUA.

Section 6.05 *Governing Law, Venue and Litigation*

(A) The validity, construction and performance of this DUA and the legal relations among the Parties to this DUA will be governed by and construed in accordance with the laws of the State of Texas.

(B) The Parties agree that the courts of Travis County, Texas, will be the exclusive venue for any litigation, special proceeding or other proceeding as between the parties that may be brought, or arise out of, or in connection with, or by reason of this DUA.

Section 6.06 *Injunctive Relief*

(A) CONTRACTOR acknowledges and agrees that HHS may suffer irreparable injury if CONTRACTOR or its Subcontractor fails to comply with any of the terms of this DUA with respect to the Confidential Information or a provision of HIPAA or other laws or regulations applicable to Confidential Information.

(B) CONTRACTOR further agrees that monetary damages may be inadequate to compensate HHS for CONTRACTOR's or its Subcontractor's failure to comply. Accordingly, CONTRACTOR agrees that HHS will, in addition to any other remedies available to it at law or in equity, be entitled to seek injunctive relief without posting a bond and without the necessity of demonstrating actual damages, to enforce the terms of this DUA.

Section 6.07 *Indemnification*

CONTRACTOR will indemnify, defend and hold harmless HHS and its respective Executive Commissioner, employees, Subcontractors, agents (including other state agencies acting on behalf of HHS) or other members of its Workforce (each of the foregoing hereinafter referred to as "Indemnified Party") against all actual and direct losses suffered by the Indemnified Party and all liability to third parties arising from or in connection with any breach of this DUA or from any acts or omissions related to this DUA by CONTRACTOR or its employees, directors, officers, Subcontractors, or agents or other members of its Workforce. The duty to indemnify, defend and hold harmless is independent of the duty to insure and continues to apply even in the event insurance coverage required, if any, in the DUA or Base Contract is denied, or coverage rights are reserved by any insurance carrier. Upon demand, CONTRACTOR will reimburse HHS for any and all losses, liabilities, lost profits, fines, penalties, costs or expenses (including reasonable attorneys' fees) which may for any reason be imposed upon any Indemnified Party by reason of any suit, claim, action, proceeding or demand by any third party to the extent caused by and which results from the CONTRACTOR's failure to meet any of its obligations under this DUA. CONTRACTOR's obligation to defend, indemnify and hold harmless any Indemnified Party will survive the expiration or termination of this DUA.

Section 6.08 *Insurance*

(A) In addition to any insurance required in the Base Contract, at HHS's option, HHS may require CONTRACTOR to maintain, at its expense, the special and/or custom first- and third-party

insurance coverages, including without limitation data breach, cyber liability, crime theft and notification expense coverages, with policy limits sufficient to cover any liability arising under this DUA, naming the State of Texas, acting through HHS, as an additional named insured and loss payee, with primary and non-contributory status, with required insurance coverage, by the Effective Date, or as required by HHS.

(B) CONTRACTOR will provide HHS with written proof that required insurance coverage is in effect, at the request of HHS.

Section 6.09 *Fees and Costs*

Except as otherwise specified in this DUA or the Base Contract, including but not limited to requirements to insure and/or indemnify HHS, if any legal action or other proceeding is brought for the enforcement of this DUA, or because of an alleged dispute, contract violation, Event, Breach, default, misrepresentation, or injunctive action, in connection with any of the provisions of this DUA, each party will bear their own legal expenses and the other costs incurred in that action or proceeding.

Section 6.10 *Entirety of the Contract*

This Data Use Agreement is incorporated by reference into the Base Contract and, together with the Base Contract, constitutes the entire agreement between the parties. No change, waiver, or discharge of obligations arising under those documents will be valid unless in writing and executed by the party against whom such change, waiver, or discharge is sought to be enforced.

Section 6.11 *Automatic Amendment and Interpretation*

Upon the effective date of any amendment or issuance of additional regulations to HIPAA, or any other law applicable to Confidential Information, this DUA will automatically be amended so that the obligations imposed on HHS and/or CONTRACTOR remain in compliance with such requirements. Any ambiguity in this DUA will be resolved in favor of a meaning that permits HHS and CONTRACTOR to comply with HIPAA or any other law applicable to Confidential Information.

ATTACHMENT 1. SUBCONTRACTOR AGREEMENT FORM

HHS CONTRACT NUMBER _____

The DUA between HHS and CONTRACTOR establishes the permitted and required uses and disclosures of Confidential Information by CONTRACTOR.

CONTRACTOR has subcontracted with _____ (SUBCONTRACTOR) for performance of duties on behalf of CONTRACTOR which are subject to the DUA. SUBCONTRACTOR acknowledges, understands and agrees to be bound by the identical terms and conditions applicable to CONTRACTOR under the DUA, incorporated by reference in this Agreement, with respect to HHS Confidential Information. CONTRACTOR and SUBCONTRACTOR agree that HHS is a third-party beneficiary to applicable provisions of the subcontract.

HHS has the right but not the obligation to review or approve the terms and conditions of the subcontract by virtue of this Subcontractor Agreement Form.

CONTRACTOR and SUBCONTRACTOR assure HHS that any Breach or Event as defined by the DUA that SUBCONTRACTOR Discovers will be reported to HHS by CONTRACTOR in the time, manner and content required by the DUA.

If CONTRACTOR knows or should have known in the exercise of reasonable diligence of a pattern of activity or practice by SUBCONTRACTOR that constitutes a material breach or violation of the DUA or the SUBCONTRACTOR's obligations CONTRACTOR will:

1. Take reasonable steps to cure the violation or end the violation, as applicable;
2. If the steps are unsuccessful, terminate the contract or arrangement with SUBCONTRACTOR, if feasible;
3. Notify HHS immediately upon reasonable discovery of the pattern of activity or practice of SUBCONTRACTOR that constitutes a material breach or violation of the DUA and keep HHS reasonably and regularly informed about steps CONTRACTOR is taking to cure or end the violation or terminate SUBCONTRACTOR's contract or arrangement.

This Subcontractor Agreement Form is executed by the parties in their capacities indicated below.

CONTRACTOR

SUBCONTRACTOR

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____

DATE _____

DATE: _____