

**MASTER SERVICES AGREEMENT**

**REGARDING**

**DIVISION OF FAMILY RESOURCES MODERNIZATION PROJECT**

**By and Between**

**THE STATE OF INDIANA,**

**ACTING ON BEHALF OF**

**THE FAMILY AND SOCIAL SERVICES ADMINISTRATION,**

**And**

**INTERNATIONAL BUSINESS MACHINES CORPORATION**

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## **MASTER SERVICES AGREEMENT**

This MASTER SERVICES AGREEMENT ("**Agreement**") is made effective this \_\_\_\_\_, 2006 ("**Effective Date**"), by and between the State of Indiana ("**State**"), acting on behalf of the Family and Social Services Administration ("**FSSA**"), and International Business Machines Corporation ("**Vendor**"), a New York corporation.

WHEREAS, the State has a responsibility to its citizens to provide Medicaid, Food Stamps, TANF and CCDF assistance to eligible persons, which assistance is currently subject to regulatory supervision by the State through its FSSA Division of Family Resources ("**DFR**"); and

WHEREAS, the State has determined that it is in the best interests of the State and its citizens to transform and modernize the process by which information needed or related to making eligibility determinations is collected, organized, and managed (such process being the "**DFR Eligibility Intake and Determination Preparation**"), in order to improve access to, and responsiveness of, that system and process, and to assure the integrity, reliability and efficiency of the public assistance contemplated by such programs (such transformation and modernization being the "**Modernization Project**"); and

WHEREAS, in order to undertake the Modernization Project, the State has determined that it is in its best interest to enter into a public-private agreement with a service provider to support DFR administratively by developing and providing technology and systems for receiving and processing applications for public assistance, gathering and verifying appropriate data, and managing through document imaging the documentation required for DFR to perform eligibility determinations; and

WHEREAS, in accordance with RFP 6-58, the State and Vendor have negotiated a best and final offer that the State has determined to be the most advantageous to the State for Vendor to provide the Services to the State to accomplish the Modernization Project, other than certain State Retained Activities that remain the responsibility of the State; and

WHEREAS, the State and Vendor desire to enter into this Agreement to evidence their respective agreements and undertakings with respect to the Modernization Project;

NOW, THEREFORE, in consideration of the premises, the mutual terms and conditions set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the State and Vendor agree as follows:

\* \* \* \* \*

[Remainder of this page intentionally left blank]

**ARTICLE 1**  
**POLICY OBJECTIVES AND CONSTRUCTION**

**1.1 Policy Objectives and Intent of Parties**

- (1) The overarching policy objectives of the Modernization Project and this Agreement are (i) to provide efficient, accurate and timely eligibility determinations for individuals and families who qualify for public assistance, (ii) to improve the availability, quality and reliability of the services being provided to Clients by expanding access to such services, decreasing inconvenience and improving response times, among other improvements, (iii) to assist and support Clients through programs that foster personal responsibility, independence and social and economic self-sufficiency, (iv) to assure compliance with all relevant Laws, (v) to assure the protection and integrity of Personal Information gathered in connection with eligibility determination, and (vi) to foster the development of policies and procedures that underscore the importance of accuracy in eligibility determinations, caseload integrity across all areas of public assistance and work and work-related experience for Clients in the Programs.
- (2) The State has determined that DFR can best effect its Modernization Project by engaging Vendor to support DFR administratively by developing and providing technology and systems for receiving and processing applications for public assistance, gathering and verifying appropriate data, and managing, through document imaging, the documentation required for DFR to perform eligibility determination and, in certain counties, operating, maintaining, repairing and managing the Vendor Service Locations, as necessary or reasonably appropriate in connection with the Services. Vendor will provide these Services, in part, through employees who transfer from DFR to the Employer.
- (3) The State believes that a successful and orderly implementation of the Modernization Project requires the fair and equitable treatment of its employees who transfer to the Employer and that such fair and equitable treatment includes (for at least the Protected Employment Period) compensation levels not less than currently provided to such employees on an hourly basis, and employee benefits that are generally comparable, on an overall basis, to the benefits package that the State is providing to the Affected Employees. The State also recognizes that the Transferred Employees will experience changes in their working environment and desires to ensure that reasonable steps are taken to prepare and train the Transferred Employees for such transition. Vendor recognizes that providing Services on a continuous basis without interruption will require an experienced and knowledgeable workforce, and Vendor desires to provide opportunities

to the Transferred Employees for employment at compensation and benefit levels contemplated by this Agreement and to provide training and other work-related advancement opportunities to the Transferred Employees as described in this Agreement.

- (4) In order to achieve the Policy Objectives, the modernization efforts contemplated by the Modernization Project, as reflected in this Agreement, will employ output-based measures reflecting success in employment and training activities, including full engagement of Clients in work-readiness programs (including referrals to counseling and treatment programs for which work credits under applicable federal Law are provided) which foster self-sufficiency and promote personal responsibility.
- (5) Vendor recognizes that (i) the Services to be performed under this Agreement are vital to the State and its citizens who currently are and in the future will be legally eligible for and reliant upon the assistance available under the Programs and must be continued without interruption and (ii) upon Termination, a Successor must be able to continue to provide the Services in as seamless a transition from Vendor as possible.

## 1.2 Definitions

Capitalized terms used herein and in the Attachments shall have the respective meanings ascribed to such terms in the Glossary attached hereto as Appendix I [Glossary of Terms].

## 1.3 Exhibits, Schedules and Appendices

The following exhibits, schedules and appendices (collectively, “Attachments”) are attached to this Agreement:

### **Exhibits:**

|                  |   |
|------------------|---|
| <u>Exhibit A</u> | Form of Invoice   |
| <u>Exhibit B</u> | Form of Vendor Certificate for Annual Confirmation of Representations |
| <u>Exhibit C</u> | Form of Subcontractor Certificate                                     |
| <u>Exhibit D</u> | Form of Confidentiality Undertaking for Subcontractors                |
| <u>Exhibit E</u> | Form of Attornment Certificate  |
| <u>Exhibit F</u> | Form of Business Associate Agreement                                  |
| <u>Exhibit G</u> | Form of Conditional Assignment of Subcontracts                        |
| <u>Exhibit H</u> | Form of Signatory Attestation   |
| <u>Exhibit I</u> | Form of Employer’s Undertaking Regarding Employment Matters           |
| <u>Exhibit J</u> | Form of Employer Parent Guaranty                                      |

**Schedules:**

|                    |   |
|--------------------|---|
| <u>Schedule 1</u>  | Statement of Work   |
| <u>Schedule 2</u>  | Contemplated Policy Changes   |
| <u>Schedule 3</u>  | Vendor Service Environment  |
| <u>Schedule 4</u>  | Service Locations   |
| <u>Schedule 5</u>  | State Leases and Service Centers  |
| <u>Schedule 6</u>  | SCD Plan Review Timeframes  |
| <u>Schedule 7</u>  | Required Reports  |
| <u>Schedule 8</u>  | Fees <ul style="list-style-type: none"><li>- A – Variable Fees</li><li>- B – Fixed Fees</li></ul> |
| <u>Schedule 9</u>  | Electronic Funds Transfer Instructions  |
| <u>Schedule 10</u> | Performance Standards   |
| <u>Schedule 11</u> | Material Assumptions  |
| <u>Schedule 12</u> | Employee Benefit Plans for Transferred Employees  |
| <u>Schedule 13</u> | Key Vendor Positions and Key Personnel  |
| <u>Schedule 14</u> | Subcontractors  |
| <u>Schedule 15</u> | Mandatory Subcontract Provisions  |
| <u>Schedule 16</u> | Changes to the Systems of Record  |
| <u>Schedule 17</u> | Material Agreements   |
| <u>Schedule 18</u> | Managed Contracts   |
| <u>Schedule 19</u> | Identification of State Counties and Vendor Counties  |
| <u>Schedule 20</u> | Entities with Restricted Access to Vendor Information   |
| <u>Schedule 21</u> | Vendor Third Party Software   |
| <u>Schedule 22</u> | Insurance Coverages Matrix  |
| <u>Schedule 23</u> | Continuity Plan Requirements  |
| <u>Schedule 24</u> | Deferred Fees   |
| <u>Schedule 25</u> | Initial Transition Timeline   |

**Appendices:**

|                      |  |
|----------------------|--|
| <u>Appendix I</u>    | Glossary of Terms  |
| <u>Appendix II</u>   | Transition Plan  |
| <u>Appendix III</u>  | Communication Plan                                       |
| <u>Appendix IV</u>   | Technology and Security Plan                             |
| <u>Appendix V</u>    | Governance Plan  |
| <u>Appendix VI-A</u> | As-Is Procedures Manual – Draft Table of Contents        |
| <u>Appendix VI-B</u> | Steady State Procedures Manual - Draft Table of Contents |
| <u>Appendix VII</u>  | Quality Management Plan                                  |
| <u>Appendix VIII</u> | MBE/WBE Participation Plan                               |
| <u>Appendix IX</u>   | Continuity Plan  |
| <u>Appendix X</u>    | Document Management Plan                                 |

The Parties acknowledge that (i) one or more of the Attachments may be amended, modified or supplemented from time to time during the Term, (ii) any such changes must be done pursuant to the requirements of this Agreement, (iii) to the extent that any consent, approval or execution of any document with respect to any such change is required of either Party, such change will not be effective until executed by the applicable respective Authorized Representative(s) of each Party and will be effective on the date set forth in the change signed by such Authorized Representative(s) or, if there is no effective date set forth, then on the date of the last signature of each Authorized Representative, and (iv) any reference to an Attachment shall refer to the version thereof then in effect. Notwithstanding the fact that Exhibits are incorporated into this Agreement by reference, Vendor shall not have independent or additional liability to the State arising from the breach of any Exhibit which becomes an enforceable agreement but which is not signed by Vendor; provided that (x) the foregoing shall not affect or limit Vendor's obligations under this Agreement, excluding any such enforceable Exhibits to which Vendor is not a signatory, and (y) Vendor shall be and remain responsible for all provisions of this Agreement to which it is bound regardless of any reference to such provisions which is in the form of an Exhibit but to which Vendor is not a signatory.

#### **1.4 Construction and Interpretation**

- (1) All references to sections or Attachments are to sections or Attachments in or to this Agreement unless otherwise specified.
- (2) All uses herein or in any Attachment of the word "including" shall mean "including, without limitation" and words of similar effect, unless the context shall indicate otherwise.
- (3) Unless otherwise specified, the words "hereof," "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement.
- (4) Unless otherwise specified, all meanings attributed to defined terms herein or in any Attachment shall be equally applicable to both the singular and plural forms of the terms so defined. All pronouns and any variation thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or entity, or the context, may require.
- (5) In the event of any uncertainties regarding the interpretation of any particular provision or term used in this Agreement, or in the event of any ambiguity, vagueness or inconsistency therein or thereof, such provisions and terms shall be read in a manner consistent with the Policy Objectives. In all events, the provisions and terms of this Agreement shall be interpreted with a view toward achieving those objectives. Notwithstanding the foregoing, in no event shall the Policy

Objectives change or expand Vendor's obligations hereunder unless expressly agreed to by the Parties pursuant to a Change.

- (6) Any headings preceding the texts of the several articles and sections of this Agreement, including the Attachments, and any table of contents or marginal notes appending to copies hereof, shall be solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.
- (7) Any reference to "days" in this Agreement shall mean calendar days unless specifically required to be Business Days.
- (8) In the computation of periods of time from a specified date to a later specified date, unless otherwise expressly stated, the word "from" means "from and including" and the words "to" and "until" each means "to but excluding." If the last day of any such period is not a Business Day, such period shall end on the next Business Day.
- (9) Accounting terms shall have the meanings contemplated under GAAP for such terms.
- (10) Words or abbreviations that have well known or trade meanings are used herein in accordance with their recognized meanings.
- (11) If there is a specific citation to a Law herein or in any Attachment and such Law is recodified to give it a different citation, the citation herein shall apply to the Law as recodified, provided that any provision(s) thereof that are materially modified will apply to the Services only pursuant to a Legal Change.
- (12) Any reference to a Law herein or in any Attachment shall refer to such Law as in effect from time to time, subject to the Change Order Process.

## **1.5 Incorporation by Reference**

The Attachments are incorporated herein by reference. In the event of any conflict, between this Agreement and any Attachment with respect to the scope of the Services, the conflict shall be resolved pursuant to the internal mediation process in Section 19.1.2; provided that if such conflict is not resolved pursuant thereto, the terms of this Agreement (without the Attachments) shall govern. In the event of any other conflict, the terms of this Agreement without the Attachments shall govern.

\* \* \* \* \*

[Remainder of this page intentionally left blank]



## ARTICLE 2 CLOSING AND TERM

### 2.1 Closing

The closing for this Agreement (“**Closing**”) has occurred concurrently with the execution and delivery of this Agreement by the parties hereto on the Effective Date. The Closing occurred at [the offices of Krieg DeVault LLP, One Indiana Square, Suite 2800, Indianapolis, Indiana 46204] [other location as the Parties agree] commencing at approximately 10:00 A.M. local time. The date of Closing shall also be known as the “**Closing Date**.”

### 2.2 Term

The term of this Agreement commences on the Effective Date and extends through midnight of the day preceding the tenth (10th) anniversary of the Effective Date, namely [\_\_\_\_\_], 2016 (the “**Term**”).

\* \* \* \* \*

[Remainder of this page intentionally left blank]

**ARTICLE 3**  
**STATE'S MODERNIZATION PROJECT AND**  
**APPOINTMENT OF VENDOR TO ASSIST THE STATE**

**3.1** Allocation of Activities and Appointment of Vendor

**3.1.1** *State Responsibilities*

- (1) The State shall have and shall retain final responsibility for eligibility determinations under each of the Programs, which determinations will be made in part in reliance upon the performance by Vendor of the Services, including the Delegated Activities, pursuant to the terms of this Agreement.
- (2) With respect to the State Service Locations identified on Schedule 4 [Service Locations], the State will perform those tasks and activities identified as State Retained Activities for State Service Locations in Schedule 1 [Statement of Work] in a reasonably competent and timely manner consistent with its standard practice as in effect from time to time. The State will be responsible for the operation, maintenance, repair and management of State Service Locations.
- (3) With respect to the Vendor Service Locations identified on Schedule 4 [Service Locations], the State will perform those tasks and activities identified as State Retained Activities for Vendor Service Locations in Schedule 1 [Statement of Work] in a reasonably competent and timely manner consistent with its standard practice as in effect from time to time.
- (4) During the Term, to the extent required by Law, the State will maintain at least one County Office in each County and shall staff each such office with at least one (1) State employee for the performance of the applicable State Retained Activities.
- (5) The State shall maintain the Systems of Record and shall take reasonable steps to assure that the Systems of Record perform at a functionality level at least equal to their respective functionality levels on the Effective Date. The State shall also implement the modifications, enhancements and improvements to the Systems of Record described in Schedule 16 [Changes to the Systems of Record] and other modifications, enhancements and improvements to the Systems of Record to which the State and Vendor agree from time to time pursuant to actions taken by the Change Control Board. The State shall provide Vendor and appropriate Subcontractors with such access to the Systems of Record as is needed to perform the Services, which access shall be subject to, and further described in, the Technology and Security Plan.

- (6) The State shall make, and shall retain final authority with respect to, any policy changes with respect to the Services as may be necessary to comply with applicable Law or which the State, in its discretion, determines to be appropriate and in the best interests of the State and its citizens. Except for those policy changes contemplated as of the Closing Date, which are those described in Schedule 2 [Contemplated Policy Changes], and the responsibility to obtain and electronically maintain proof of citizenship, as required by the federal law, such policy changes by the State shall be a Change.
- (7) The State shall provide at each State Service Location such space and use rights as Vendor reasonably requires for it or a Subcontractor to perform applicable Services for the County in which the State Service Location is located.

### **3.1.2** *Appointment and Designation of Vendor*

On a limited authority basis as set forth in this Agreement, and solely for the Term and any Disengagement Period, the State hereby appoints and designates Vendor as its contractor (and limited agent, to the extent an agency is expressly provided herein), to perform the Services in, and only in, the State of Indiana (other than on a temporary basis pursuant to Section 8.3 or as may be approved by the State in writing in its discretion), including the operation, maintenance, repair and management of the Vendor Service Locations, as necessary or reasonably appropriate in connection with the Services, for and on behalf of the State, and Vendor accepts such appointment and agrees to provide the Services to the State, subject to the terms and conditions hereof.

### **3.1.3** *Vendor Responsibilities*

Commencing on the Service Commencement Date and in accordance with the Performance Standards, Vendor (i) will operate, maintain, repair and manage the Vendor Service Locations, as necessary or reasonably appropriate in connection with the Services, (ii) will deliver the Services in an effective, competent and timely manner, consistent with sound commercial practices, including performance of the Delegated Activities identified as Vendor responsibilities in the Statement of Work attached hereto as Schedule 1 [Statement of Work], and (iii) will meet all criteria and perform all other tasks and activities required or appropriate for the delivery of the Services, whether or not described in Schedule 1. The Services may include additional activities as are from time to time agreed between the Parties. Vendor shall provide at each Vendor Service Location such space and use rights (as described in Schedule 4 [Service Locations]) as the State reasonably requires for the State to perform the State Retained Activities.

## 3.2 Transition

### 3.2.1 *Transition Plans*

- (1) The State has communicated its requirements to Vendor with respect to the delivery of the Services and, in response, Vendor has proposed a solution to meet the State's requirements for the Modernization Project. As part of this Agreement, Vendor and the State have negotiated an agreed Vendor solution to be implemented by Vendor so that at the end of the Transition, the Services will be performed in accordance with the Vendor Service Environment as described in Schedule 3 [Vendor Service Environment].
- (2) The Initial Transition Timeline attached hereto as Schedule 25 [Initial Transition Timeline] sets forth a preliminary timeline for the transition of the DFR Eligibility Intake and Determination Preparation from the State's as-is operating environment to the Vendor Service Environment (including the transition of the Transferred Employees to employment with the Employer) ("**Transition**").
- (3) At the Closing as a deliverable, Vendor will deliver to the State a proposed transition plan for the Phase I Transition and the Phase II Transformation as described in the Initial Transition Timeline (the "**Initial Transition Plan**"), describing (i) in detail the Phase I Transition activities, (ii) summary level activities for the Phase II Transformation, (iii) the timelines for implementation consistent with those in the Initial Transition Timeline, and (iv) the progress reports to be delivered to FSSA in connection therewith. The State acknowledges that the Initial Transition Plan is acceptable in principal to the State in both form and substance, but the Parties acknowledge that the Initial Transition Plan has not yet been approved by the State. The Parties shall work in good faith to finalize the Initial Transition Plan for the State's approval within ten (10) Business Days of the Effective Date.
- (4) As set forth in Schedule 6 [SCD Plan Review Timeframes], Vendor shall propose a final transition plan containing a more detailed description of the transition activities for Phase I Transition and Phase II Transformation. Upon approval of such proposed final transition plan pursuant to the schedule set forth in Schedule 6, such plan shall be deemed to be the "**Transition Plan**", shall be deemed attached to this Agreement as Appendix II [Transition Plan] and shall supersede the Initial Transition Plan. Any material changes between the Initial Transition Plan and the Transition Plan shall be implemented as a Change, subject to Section 3.2.1(9).

- (5) On the Effective Date, Vendor shall commence implementation of the Initial Transition Plan. Thereafter, upon approval of the Transition Plan by the State, Vendor shall implement the Transition Plan. Vendor will implement the Transition in accordance with the time schedule and milestones contained in the Initial Transition Plan and the Transition Plan, as applicable. During the Transition, as contemplated by the Governance Plan, the Transition Plan shall be reviewed and evaluated on a continual basis, and updated as appropriate, by Vendor and the State for corrections and improvements that may be warranted or desirable. Any changes to the Transition Plan shall be mutually agreed upon by the Parties. The status of Vendor's progress in achieving the steps in the Initial Transition Plan and the Transition Plan will be reported during the monthly DFR financial review contemplated by the Governance Plan.
- (6) On the Service Commencement Date, as a part of the Transition and until such time as the Transition is complete, Vendor will assume responsibility for performing the Delegated Activities. Vendor and the State shall initially utilize FSSA's "as-is" operating environment to provide the Services at the Service Locations.
- (7) Vendor may from time to time implement revisions to the procedures utilized in FSSA's "as-is" operating environment at any time during the Transition Phase subject to (i) giving notice to the State of the proposed revisions, the outcomes to be achieved by such revisions, and the impact on procedures, charges and other related matters resulting from such proposed revisions, (ii) discussing with the State any questions, comments, or suggestions that the State may have with respect to such proposed revisions, and (iii) receiving the approval of the State (given or withheld in its discretion) of such revisions.
- (8) At the end of the Transition Phase, Vendor shall have completed the Transition and the DFR Eligibility Intake and Determination Preparation shall have been fully transitioned to the Vendor Service Environment. Thereafter, Vendor shall deliver the Services in accordance with this Agreement.
- (9) Other than pursuant to a Change by the State to the Services or to the Initial Transition Plan that occurs during the Transition Phase and results in a mutually agreed increase in the Fees, Vendor will not seek an increase in the Fees as a result of any changes to the Transition Plan.

### **3.2.2**     *Conduct of the Transition*

Except as otherwise expressly provided in the Initial Transition Plan or the Transition Plan, Vendor's responsibilities during the Transition will include:

- (1) performing and managing the Transition, as approved by the State;
- (2) establishing, setting up, configuring, and testing, prior to their use, any communications lines, network connections, Equipment, Software, tapes, records and supplies which are necessary or appropriate for the Transition and (with the State's cooperation) the interface with the Systems of Record;
- (3) performing the Services (including the DFR Eligibility Intake and Determination Preparation) without material interruption and without materially adversely disrupting the State Retained Activities;
- (4) achieving each Transition Milestone and the exit criteria applicable thereto;
- (5) coordinating and cooperating with any of the State's Contract Administrators; and
- (6) completing the Transition.

### **3.2.3** *State's Cooperation and Support*

The State will cooperate with Vendor as reasonably required to implement the Transition as described in the Initial Transition Plan and the Transition Plan, subject to Vendor's compliance with its obligations under this Agreement.

### **3.2.4** *Completion of Transition*

- (1) Vendor will complete the Transition by the Transition Completion Date.
- (2) The State reserves the right to monitor, test, observe, and participate in the Transition and to take such other actions in connection therewith, including appointment of a Contract Administrator pursuant to Section 9.7, as the State determines appropriate and necessary to assure Vendor's compliance with the Initial Transition Plan and the Transition Plan.

### **3.2.5** *Suspension of Transition*

The State may elect to suspend the Transition at any time, including in the event the Transition is not proceeding substantially in accordance with the requirements of the Initial Transition Plan or the Transition Plan, is causing unplanned disruptions or other Material Adverse Effects to DFR's operations or is proceeding in a manner or with consequences which jeopardize the best interests of the State and its citizens, including the Clients. During any suspension of Transition activities, Vendor will continue to perform the Services as required under this Agreement at least at the level such Services

were performed by DFR prior to the commencement of the Transition, as such Services may be modified by the elements of the Transition that were in place at the time of the suspension. The State may initiate a suspension under this Section 3.2.5 by delivering notice of the suspension to the Vendor Senior Program Executive, which notice shall set forth in reasonable detail the State's basis for such suspension and the Transition activities to be suspended. During any suspension pursuant to this Section 3.2.5, the State shall continue to pay Vendor all Fees (adjusted in an equitable manner to reflect any avoided costs of Vendor in connection therewith or as the Parties may otherwise agree). In the event the State suspends the Transition for any reason other than Vendor's failure to perform its material obligations with respect to the Transition, the State shall be liable for any additional reasonable charges by Vendor resulting from the suspension and restarting (if applicable) of the Transition; and the Parties shall equitably adjust the dates for achieving the Transition Milestones and the Steady State Date. Notwithstanding the reason for any suspension of the Transition, in the event a suspension continues for more than thirty (30) consecutive days or more than forty-five (45) days in any period of sixty (60) consecutive days, but in no event for longer than sixty (60) days in the aggregate for any series of suspensions (or, in each case, such longer periods as the Parties may mutually agree) (the "**Maximum Suspension Period**"), then not later than the fifth (5th) day after the expiration of the Maximum Suspension Period, the State shall make a determination, and so notify Vendor, to restart the Transition or terminate the Agreement pursuant to Article 16, or take such other actions as the Parties may mutually agree.

### **3.2.6**      *Communication Plans*

Attached as Appendix III [Communication Plan] is the plan for the internal and external communications to be generated with respect to the Modernization Project ("**Communication Plan**"). Vendor and the State shall review the Communication Plan periodically during the Term and shall make such amendments and modifications to the Communication Plan as the State may direct or approve in its reasonable discretion. The State retains final authority with respect to any public communications regarding the Modernization Project; provided that such public communications shall not be used to create or change the scope of the Services other than pursuant to the Change Order Process.

## **3.3**      Transition of Employees

### **3.3.1**      *Transferred Employees*

- (1) At the Closing as a deliverable, in order for the Employer to effect a prompt and orderly transition of the Affected Employees to Transferred Employees in accordance with the Initial Transition Plan, the State has delivered to Vendor a datafile containing all relevant

information reasonably required by the Employer as of the Closing regarding the the pool of employees of the State who are assigned to the DFR and who may become Affected Employees. Notwithstanding the foregoing, Vendor acknowledges that (i) the State will not, at the Closing, include in the datafile any SSNs, PHI or other medical information regarding any of the Affected Employees, and (ii) following the Closing, additional information regarding the Affected Employees will be provided to Vendor in accordance with the Initial Transition Plan and at the times contemplated therein.

- (2) On or before the date set forth in the Initial Transition Plan, Vendor shall cause the Employer to offer full-time employment to all of the DFR employees (other than Retained Employees) then performing activities in connection with the Programs (such current employees, exclusive of the Retained Employees, being referred to herein as the “**Affected Employees**”), on the terms more fully described in Article 10. The offers shall be unconditional, other than (i) requiring acceptance within the period set forth in the Initial Transition Plan, (ii) requiring compliance with the Employer’s initial employment policies relating to a drug screening and criminal background check, and (iii) requiring compliance with any applicable ethics requirements imposed by the applicable Laws of the State, and such offers shall be subject to the rights of the State under Section 3.3.2.
- (3) Within ten (10) Business Days of delivery of the list of Retained Employees as set forth in the Initial Transition Plan, Vendor may identify up to twenty-five (25) of the Affected Employees who will be considered Transition Specialists.
- (4) Vendor acknowledges that (i) the State makes no representations that any Affected Employee will accept employment with the Employer, and (ii) Vendor bears complete responsibility for establishing and maintaining staffing levels sufficient to perform the Services in accordance with the requirements hereunder, including the Performance Standards. The State will not prevent the Affected Employees from accepting employment with the Employer, except as set forth in Section 3.3.2 below.
- (5) Any employee accepting the employment offer referenced in Section 3.3.1(1) above shall become the employee of the Employer on, but not before, the Service Commencement Date (or on such earlier date to which the State in its discretion may consent as to the Transition Specialists and one or more identified Transferred Employees).
- (6) Vendor shall cause the Employer to deliver at Closing (i) a duly executed copy of the Employer’s Undertaking Regarding Employment Matters in the form attached hereto as Exhibit I (“**Undertaking**”), and



(ii) a duly executed copy of a performance guaranty from the Employer's ultimate parent company with respect to the Employer's obligations under the Employer's Undertaking Regarding Employment Matters in substantially the form attached as Exhibit J ("**Guaranty**"). The State shall not exercise any of the State's rights under the Undertaking and the Guaranty in a manner that materially impairs Vendor's ability to perform the applicable subcontracted services under this Agreement. Any financial recovery the State may obtain under the Undertaking or the Guaranty, if any, shall offset any Vendor liability to the State under this Agreement arising out of the same set of circumstances.

### **3.3.2** *Retained Employees*

The State will identify prior to the Service Commencement Date those employees of the State whom the State desires to retain as employees of the State on and after the Service Commencement Date ("**Retained Employees**"). The State shall provide Vendor a list of the Retained Employees as set forth in the Initial Transition Plan. The State retains the right to make additions to and deletions from such list in its discretion (other than Transition Specialists), until the Service Commencement Date, with notification to Vendor; provided, however, in no event shall such list identify fewer than six hundred (600) Retained Employees nor more than seven hundred (700) Retained Employees. Nothing herein shall be deemed to indicate that Vendor or any Subcontractor is prohibited or otherwise restricted from employing any of the Retained Employees (other than the restrictions imposed by Section 10.3). In the event Vendor or any Subcontractor desires to employ any of the Retained Employees, Vendor or such Subcontractor shall notify the State of such desire, which notice shall identify those employees and describe the functions to be performed by them. If any Retained Employee becomes employed by the Employer, then (i) such Retained Employee shall be deemed to be one of the Transferred Employees for all purposes, and (ii) the Employer shall cooperate with the State as reasonably required to provide the State a reasonable transition time frame for identifying, hiring, and training a successor employee to perform the functions which such Retained Employee was providing to, or was anticipated to provide to, the State and as may otherwise be required to assure that the State is able to perform the State Retained Activities.

## **3.4** Service Locations and Utilization of State Assets

### **3.4.1** *Service Locations Generally*

- (1) Vendor shall operate, maintain, repair and manage the Vendor Service Locations as necessary or reasonably appropriate in connection with the Services. The State may, as a Change, designate additional Service Locations in the counties in which Vendor Service Locations are

located or the counties in which State Service Locations are located as the State in its discretion determines appropriate or desirable for performing the State Retained Activities or delivery of the Services. Vendor may initiate changes to Service Locations in the counties in which Vendor Service Locations are located or add Service Locations in the counties in which State Service Locations are located in accordance with Section 3.4.3(2); however, any resulting Change shall not result in an increase in Fees.

- (2) The DFR Eligibility Intake and Determination Preparation activities are currently conducted at various locations throughout the State of Indiana. At the Service Commencement Date, Vendor and the State will operate, maintain, repair and manage the Service Locations identified, respectively, as Vendor Service Locations and State Service Locations.
- (3) Schedule 4 [Service Locations] contains a list of the Service Locations that will be maintained at the expense of the State through June 30, 2007 at which Vendor may conduct the Services (“**Temporary Service Locations**”). After June 30, 2007, Vendor will establish a Vendor Service Location as a continuation or replacement for each Temporary Service Location in the same municipality as each respective Temporary Service Location, to the extent such Temporary Service Location is a Vendor Service Location.
- (4) All of the functions and responsibilities of an individual Service Location shall be performed and made available at each Service Location in operation from time to time (except for those Service Locations at which Project Employees do not have primary face-to-face interactions with Clients in the performance of the Services). Vendor, in its discretion, may submit a recommendation to the State that the functions of a particular Vendor Service Location be transitioned to another Vendor Service Location in the manner contemplated by Section 3.4.3(2).
- (5) When working at any of the Vendor Service Locations, all Project Employees and State employees will comply (i) with Vendor’s standard, reasonable and customary workplace security, administrative, safety and other policies and procedures applicable at such location and (ii) the rules, regulations, policies and procedures of any third party lessor or sub-lessor of a Vendor Service Location.

#### **3.4.2**     *Use of Temporary Service Locations*

After June 30, 2007, (i) if none of DFR, DCS or any other State Agency desire to continue to lease space at a Temporary Service Location, and if Vendor wishes to continue to utilize such location, it will be the sole responsibility of

Vendor to acquire rights to use such location from the owner thereof, in which event, the State will reasonably cooperate with Vendor in obtaining any necessary lease assignment, and (ii) if the State, DFR, DCS or any other State Agency continues to lease any Service Location that was theretofore a Temporary Service Location, Vendor may not use such location unless further arrangements are made with DFR, DCS or such other State Agency independent of this Agreement.

### **3.4.3**      *Vendor Location Plan*

- (1) Vendor shall ensure that any lease for any Vendor Service Location (other than a Temporary Service Location) shall include provisions allowing the State, any Successor, or any designee of the State to assume Vendor's position as lessee under such lease without obtaining the consent of the lessor, effective upon Termination.
- (2) Except as set forth in Section 3.4.3(4) and Section 3.4.3(5), in the event that Vendor desires to make any changes in the location of any of the Vendor Service Locations after the Service Commencement Date, whether to add additional Vendor Service Locations, close one or more Vendor Service Locations, or relocate any of the existing Vendor Service Locations, Vendor shall give the State at least ninety (90) days prior notice of such proposed change for the State's approval, which notice shall include a reasonably detailed description of the change and the basis for such change, a site plan for the new location as applicable, the form of lease for the new location as applicable, the plan for staffing the new location, and such other information as may be relevant and material to making such change. The State shall have a period of thirty (30) days following receipt of notice of the proposed change to approve or disapprove the change in its discretion, and if not approved within that time, the change shall be deemed disapproved. During such thirty (30) day period, the State shall use reasonable efforts to make its determination promptly. If not approved by the State in such period, the State and Vendor shall cooperate reasonably to modify the proposed change to address the State's reasonable requirements to approve such change. Any failure to resolve any differences shall be resolved pursuant to the Dispute Resolution Procedures. Upon approval, Schedule 4 [Service Locations] shall be deemed amended to reflect and incorporate the change as approved.
- (3) Upon the occurrence of a Force Majeure Event or any sudden and material increase in the number of Clients utilizing the Services beyond that which might reasonably be anticipated, Vendor shall be entitled to provide the Services at a location other than a Service Location on a temporary basis (not to exceed ninety (90) days) in order to assure that the needs of Clients for the Services are adequately

handled and that the Services are available on a continuous basis. Vendor may make this determination in its discretion, and any additional charges associated therewith shall be determined in an equitable manner in accordance with the Change Order Process.

- (4) Notwithstanding the above provisions, and without limiting the obligations of the Parties to maintain a Service Location in each County, the Service Locations identified on Schedule 5 [State Leases and Service Centers] will be managed as set forth in the Initial Transition Plan and the Transition Plan and Section 3.4.1 and will not be subject to Section 3.4.3(2).
- (5) The State shall have the right to approve the specific city and address location of any new Service Centers. The State shall have a period of fifteen (15) days following receipt of notice from Vendor of the proposed site location to approve or disapprove the city and address, which approval shall not be unreasonably withheld. If such city and address is not approved within such fifteen (15) day period, such city and address shall be deemed approved.

#### **3.4.4** *Minimum Service Location Requirements*

Except as otherwise approved by the State in its discretion, Vendor shall cause each Vendor Service Location to satisfy, at a minimum, the following standards (“**Minimum Service Location Requirements**”): (i) appropriate signage identifying such Service Location, (ii) in Service Locations at which Project Employees have primary face-to-face interactions with Clients, appropriate accommodations for Clients to provide Personal Information in a setting designed to ensure privacy for such activities, (iii) compliance with applicable zoning and other legal requirements which apply to a particular Vendor Service Location, and (iv) posting of notices and other announcements required by applicable Law or as reasonably required by the State. In the event a Vendor Service Location does not meet the Minimum Service Location Requirements as of the Service Commencement Date, the Parties will discuss in good faith a reasonable action plan to implement or adapt such Minimum Service Location Requirements for such Vendor Service Location. To the extent it is unreasonable for Vendor to implement such Minimum Service Location Requirements or the implementation thereof would add material cost to Vendor because of circumstances that exist as of the Service Commencement Date (e.g., existing leases/contracts, environmental circumstances), the Parties will negotiate in good faith a mutually acceptable exception to the Minimum Service Location Requirements as a Change.

#### **3.4.5** *Use of Vendor Service Locations*

Unless otherwise approved by the State in its discretion, Vendor may use any Vendor Service Location only in connection with the provision of the Services

and not in the provision of services to other clients or customers of Vendor or any of the Subcontractors. To obtain such approval, Vendor shall submit a written proposal describing in reasonable detail the activities proposed to be conducted at such Vendor Service Location, the proposed co-utilization of such Vendor Service Location, the impact on the delivery of the Services from such Vendor Service Location, the design for assuring the separation of the performance of the Delegated Activities from the other proposed activities, and the procedures to be implemented to safeguard any Protected Information maintained or available at such Vendor Service Location.

#### **3.4.6** *Voluntary Community Assistance Network*

Vendor will include as part of the Vendor Service Environment the development of a voluntary network of Community Organizations and other venues at which Clients may have increased opportunities to access the Services in a manner designed to achieve the State's policy objective of increased availability, including, in some cases, outside normal business hours and at locations other than the Service Locations (the "**Voluntary Community Assistance Network**"). Vendor shall commence development and implementation of the Voluntary Community Assistance Network during Transition and shall maintain such Voluntary Community Assistance Network during the Term. The Communications Plan shall include additional information regarding the development, implementation and management of the Voluntary Community Assistance Network. Vendor does not currently anticipate any financial remuneration or investments of assets in developing, implementing, maintaining or managing the Voluntary Community Assistance Network; provided, however, Vendor retains the right, in its discretion, to provide any such remuneration or make any such investments if and when appropriate but at no expense to the State.

#### **3.4.7** *Utilization of Vendor and Subcontractor Resources*

To the extent necessary for the State's receipt of the Services and subject to the terms of this Agreement, including the provisions in Article 11 and any applicable third party licenses, the State shall be entitled to utilize during the Term the Services components that are provided by Vendor or its Subcontractors under this Agreement, including the System, Equipment, Hardware, Software, Documentation, and Deliverables provided by Vendor or its Subcontractors hereunder.

#### **3.4.8** *Utilization of State Resources*

From and after the Service Commencement Date, in order to ensure continuity in the Services being available to the Clients, Vendor and the applicable Subcontractors shall be entitled to access and reasonable use rights, at no cost to Vendor or the applicable Subcontractors, for the Term or such other time

periods identified herein, to the following resources of the State currently utilized by the State with respect to the Programs:

- (1) All Service Locations, including the software, hardware, equipment, office furnishings, and fixtures, within such facilities (the “Facility Assets”), to the extent utilized by the State to provide the support within the scope of the Services, as follows:
  - (A) The Service Locations and their Facility Assets, for all Service Locations until and through June 30, 2007;
  - (B) The State Service Locations and their corresponding Facility Assets for the Term; and
  - (C) The Facility Assets for the Vendor Counties, as of the Service Commencement Date until the date set forth in the Transition Plan.
- (2) The Managed Contracts.
- (3) Any materials on hand as of the Service Commencement Date (with no obligation of the State to replenish the same) and any other items utilized or made available by the State at the Service Locations for the purposes of providing the Services.
- (4) To the extent required to perform the Services, (i) Vendor shall be entitled to use the Systems of Record utilized or made available by the State, and the State’s ITN, and (ii) Vendor shall utilize and fully participate in the ITN, but only to the extent required to perform the Services and for other incidental and immaterial use of the ITN that may arise during the Term.

Between the Effective Date and the Service Commencement Date, Vendor and its Subcontractors shall be entitled to reasonable access and use rights, at no cost to Vendor or the applicable Subcontractors, to the resources set forth in this Section 3.4.8, in order to prepare for commencement of the Services; provided, however, that such access and use rights and Vendor’s and its Subcontractors’ activities in connection therewith shall not impair the State’s support and administration of the Programs.

### **3.4.9**     *Use of State Assets*

The State, at the State’s expense, shall be responsible for obtaining all consents and approvals to provide to Vendor and the applicable Subcontractor access and utilization rights regarding the following assets of the State or provided by the State: all Preexisting Records with respect to any current Clients in the State’s possession or control prior to the Service Commencement Date, the State Service Locations and the items referenced in

Section 3.4.8 above. The State shall be responsible for obtaining any consents of any other Person, if any, which may be required to provide the right to utilize the applicable Service Locations.

#### **3.4.10** *Third Party Contract Management*

Vendor will be responsible for the management and oversight of the third party provider contracts for the Help Centers (“**IMPACT Contracts**”) and for the CCDF program (“**CCDF Contracts**”) (collectively with the IMPACT Contracts, the “**Managed Contracts**”), through and including September 30, 2007 for the IMPACT Contracts and September 30, 2008 for the CCDF Contracts. The Managed Contracts in effect on the Effective Date are set forth on Schedule 18 [Managed Contracts]. In connection therewith, Vendor shall (i) validate that the invoices from such third party providers are accurate based upon procedures established by the State, (ii) conduct annual reconciliation and audits as may be reasonably required, (iii) inform the State of any concerns regarding such third party provider’s invoices, charges, and performance or failure to perform, and (iv) otherwise provide normal and customary operational oversight of the Managed Contracts and the performance of the respective third party provider thereunder. The State shall remain the party in privity with such third party providers (not the Vendor or its Subcontractors), and shall remain financially responsible for all payments under such Managed Contracts. Vendor is not responsible for such third party provider’s performance or failure to perform.

#### **3.4.11** *Assigned Leases*

The State shall assign to the Key Subcontractor identified by Vendor, and Vendor shall cause such Key Subcontractor to accept such assignment, effective as of July 1, 2007 or such other date as the State and the applicable Key Subcontractor otherwise agree, the leases referenced in part 1 of Schedule 5 [State Leases and Service Centers] (“**Assigned Leases**”) on a form of assignment of leases acceptable to the State. The State either has or shall obtain the right to assign such leases to the identified Key Subcontractor at no cost to Vendor or such Key Subcontractor for such assignment. The State will remain liable for all actions and liability arising under or related to the leases that occurred or accrued prior to the effective date of the respective lease assignments. As of and following such assignments, each such Key Subcontractor shall assume all obligations with respect to the leases assigned to it and shall have the right in its discretion to modify, terminate, maintain or extend such leases, in accordance with the terms of such leases and subject to Section 3.4.3 (other than Section 3.4.3(2)).

#### **3.4.12** *Use of Temporary Service Locations*

The State shall negotiate in good faith with the applicable Key Subcontractors identified by Vendor the right for such Key Subcontractors to use a mutually

agreed upon square footage of facility space at the facilities identified in Schedule 4 [Service Locations] as “Vendor Financially Responsible As Of 7/1/2007.” To the extent the State and such Key Subcontractors agree to such use arrangement, the State and such Key Subcontractors shall agree upon the appropriate terms, conditions, and contract (each a “**Use Arrangement**”), independent of this Agreement. Vendor is not a party to such Use Arrangements, shall have no responsibility or liability for the terms and conditions of such Use Arrangements, and the State’s rights and remedies with respect to such Use Arrangements shall be as set forth in such Use Arrangements.

### **3.5 Technology Investments**

Vendor will make the investments in technology contemplated by the Technology and Security Plan attached as Appendix IV [Technology and Security Plan]. Vendor will make such other investments in technology as reasonably required from time to time to keep reasonably current the System, including Equipment, Software and other technologies provided by Vendor in performing the Services for the State, so that the State will receive the benefits of upgrades in technology through improved performance, functionality and recoverability, to the extent necessary for Vendor to provide the Services and achieve the Performance Standards. Vendor will be proactive in identifying opportunities to implement new technologies that will improve the Services and support thereof.

### **3.6 Governance and Procedures**

#### **3.6.1 Governance Plan**

To govern their relationship and activities under this Agreement, the Parties have adopted the Governance Plan attached as Appendix V [Governance Plan], which includes (i) a description of the committees and governance processes that the Parties have formed or will form, and (ii) the governance procedures and processes to be used for delivery of the Services.

#### **3.6.2 Meetings**

- (1) From time to time after the Effective Date, the State may direct a schedule of meetings to be held between each Party’s appropriate representatives to discuss each Party’s performance under this Agreement and such other matters relating to this Agreement as the State deems appropriate in addition to those contemplated by the Governance Plan. Either Party may request additional meetings at any time.
- (2) The Party calling the meeting will prepare and circulate an agenda sufficiently in advance of each meeting to give the participants an opportunity to prepare for the meeting and will make such changes to



the agenda as the other party may request. For regularly scheduled meetings, (i) Vendor shall be presumed to have called such meetings, and (ii) the agenda will include standard topics identified pursuant to the procedures in the Governance Plan. A participant designated by the State will chair all such meetings. At the State's request, or as provided in the Governance Plan, Vendor will prepare and circulate minutes promptly after each meeting.

### **3.6.3**      *Procedures Manual*

- (1) Beginning promptly after the Effective Date, the State shall develop, with Vendor's review and assistance, an as-is procedures manual regarding the State's existing procedures that will delineate the requisite processes and procedures for all eligibility determinations for the Programs ("**As-Is Procedures Manual**"). The As-Is Procedures Manual shall be completed prior to the Services Commencement Date. The Parties shall perform the Services, the Delegated Activities and the State Retained Activities, as applicable respectively to such Parties, pursuant to the As-Is Procedures Manual, except where otherwise agreed or as set forth in the Transition Plan or the Statement of Work, until replaced by the State-approved Steady State Procedures Manual. Attached as Appendix VI-A [As-Is Procedures Manual] is a draft table of contents for the As-Is Procedures Manual. The As-Is Procedures Manual will be organized generally in accordance with Appendix VI-A, but may include additional sections or provisions as appropriate.
- (2) The As-Is Procedures Manual will describe the activities Vendor will undertake in order to deliver the Services and coordinate with the State Retained Activities for the period from the Service Commencement Date through completion of Transition for any particular regional roll-out as set forth in the Initial Transition Plan and the Transition Plan, as applicable. The As-Is Procedures Manual must be commercially reasonable and reasonably suitable and sufficient for use by Vendor to understand the procedures necessary and useful for performing the Services at the Service Locations where the Vendor Service Environment has not been implemented.
- (3) Vendor will deliver a draft procedures manual to the State with respect to the Vendor Service Environment within ninety (90) days after the Service Commencement Date ("**Steady State Procedures Manual**") for the State's review, comment and approval. The Steady State Procedures Manual must be comprehensive (addressing all relevant components of the Services), detailed and customized to the Modernization Project and the Vendor Service Environment contemplated by this Agreement, and must include drafts of any Interaction Models. Attached as Appendix VI-B [Steady State

Procedures Manual] is a draft table of contents for the Steady State Procedures Manual. The Steady State Procedures Manual will be organized generally in accordance with Appendix VI-B, but may include additional sections or provisions as appropriate.

- (4) The Steady State Procedures Manual will describe the activities Vendor proposes to undertake in order to deliver the Services and coordinate with the State Retained Activities for the remaining Term following completion of Transition for any particular regional roll-out as set forth in the Transition Plan, including those direction, supervision, monitoring, staffing, reporting, planning and oversight activities normally undertaken to provide services of the type Vendor is to provide under this Agreement. The Steady State Procedures Manual will include any Interaction Models developed to document specific processes or interactions between the Parties. The Steady State Procedures Manual also will include descriptions of the acceptance testing procedures approved by the State, Vendor's problem management and escalation procedures, and the other standards and procedures of Vendor pertinent to the State's interactions with Vendor regarding the Services. The Steady State Procedures Manual must be commercially reasonable and reasonably suitable and sufficient for use by the State to understand the procedures necessary and useful for performing the Services and reasonably suitable and sufficient for use by any Successor to provide a seamless transition at Termination.
- (5) Vendor will incorporate or address each of the comments, recommendations or suggestions of the State regarding any draft of the Steady State Procedures Manual proposed by the Vendor and will finalize the Steady State Procedures Manual within thirty (30) days after the later of (i) delivery by the State of such comments, recommendations or suggestions, and (ii) if there are differences to be resolved between Vendor and the State with respect thereto, resolution of any discussions and negotiations regarding such differences. The final Steady State Procedures Manual will be subject to the approval of the State.
- (6) The Steady State Procedures Manual approved by the State will be considered an operational document that Vendor may revise with the approval of the State Project Manager without the need to amend this Agreement. Vendor will promptly update the Steady State Procedures Manual to reflect changes in the operations or procedures described therein.
- (7) After approval of the Steady State Procedures Manual and when required by the Transition Plan or otherwise determined by mutual agreement of the Parties, the Parties will perform the Services, the Delegated Activities, and the State Retained Activities, as are

respectively applicable to such Parties, in accordance with the most recent State-approved version of the Steady State Procedures Manual.

- (8) Within thirty (30) days after the end of each Contract Year, Vendor will provide a status report to the State summarizing all changes to the Steady State Procedures Manual during such Contract Year and shall deliver a copy of the Steady State Procedures Manual marked to reflect the cumulative changes thereto during such Contract Year.
- (9) Intellectual property rights in the Procedures Manuals shall be governed by Article 11.

### **3.7 Quality Management**

Vendor will establish continuous quality management and improvement programs and will follow the quality assurance procedures, including its “Lean Six Sigma” programs, set forth in the Quality Management Plan attached as Appendix VII to help ensure that the Services will be performed with a high degree of professional quality and reliability and in accordance with the Performance Standards.

### **3.8 Performance Standards**

#### **3.8.1** *Performance of the Services*

Vendor will ensure that the Services will be performed and delivered in a manner that (i) meets or exceeds the required levels of performance, including the Performance Standards specified in or pursuant to this Agreement, (ii) is effective, efficient and courteous to the Clients, and (iii) uses Commercially Reasonable Efforts to support the State’s achievement of its Policy Objectives.

#### **3.8.2** *Performance Measurement*

Satisfactory performance of this Agreement by Vendor will be measured by:

- (1) Adherence to all the terms of this Agreement, including all covenants, obligations, representations and warranties;
- (2) Performance in accordance with and compliance with the Modernization Project work plans, schedules, and milestones agreed to by the Parties;
- (3) Performance of the Services in accordance with all applicable requirements of this Agreement, including the Performance Standards set forth in Schedule 10 [Performance Standards];
- (4) Satisfactory results of Audits by the State, its representatives, or other authorized Persons in accordance with Article 9 (with all results of such Audits being addressed in accordance with the Governance Plan);

- (5) Attendance at and participation in the DFR financial review and other meetings conducted from time to time by FSSA (both internally and with the public);
- (6) Timeliness, completeness, and accuracy of required reports;
- (7) Determination by the State of (i) Vendor's satisfactory performance of the Services and the Delegated Activities, and (ii) Vendor's satisfactory oversight and management of the Subcontractors; and
- (8) Vendor's efforts to assist the State in achieving the Policy Objectives.

### **3.9 Cooperation**

#### **3.9.1 *General Obligations***

The Parties will reasonably cooperate with one another, in good faith and in accordance with the provisions of this Agreement, to effect the intents and purposes of this Agreement. The cooperation contemplated by this Section 3.9.1 shall be subject to the provisions hereof that allow a Party to exercise discretion.

#### **3.9.2 *Cooperation between the State and Vendor***

Vendor will cooperate with and work with the State's personnel, contractors, subcontractors and third-party representatives as requested by the State. The State will cooperate with Vendor and use reasonable efforts to ensure that the State's contractors for other State programs cooperate with Vendor as reasonably required in connection with the delivery of Services.

#### **3.9.3 *Cooperation with State and Federal Administrative Agencies***

Vendor will ensure that all Subcontractors and Project Employees will cooperate with the State or other Governmental Body at no additional charge to the State for purposes relating to the administration of this Agreement and the Services, including the following purposes:

- (1) the investigation and prosecution of fraud, abuse, and waste in the programs within the scope of the Programs;
- (2) Audits;
- (3) testimony in any Proceedings relating to the Services or this Agreement (subject to reservation of applicable legal, procedural and substantive rights);
- (4) assistance to Clients in securing public assistance services, making referrals to other State Agencies with responsibility for any Public

Assistance Programs, and participating in and facilitating necessary interfaces and communications with such other State Agencies (including DCS); and

- (5) delivery of information to FSSA and investigators or legal staff of other State Agencies.

In the event the activities of Vendor contemplated by this Section 3.9.3 materially impair the ability of Vendor to perform the Services, the Parties shall negotiate in good faith an equitable adjustment to the Statement of Work and the Fees, as applicable, which adjustment shall be implemented through the Change Order Process. For any Proceeding under clause (3) above that is an administrative eligibility hearing, Vendor's or Subcontractor's relevant Project Employees will participate in such hearings to communicate facts regarding the applications they processed and the eligibility factors that led to their recommendations.

#### **3.9.4**      *Cooperation with Other Service Providers*

- (1) The State may award supplemental contracts for work related to this Agreement, or any portion thereof. The State reserves the right to award a contract for such supplemental work to one or more potential service providers. In such event, the State will require such service providers reasonably to cooperate to the extent required by the State, if such an arrangement is in the best interests of the State, provided that the State will have no liability for any failure of such service provider to so cooperate or for the timeliness or quality of such cooperation, so long as the State otherwise continues to meet its obligations under this Agreement.
- (2) Except as may be required in the performance of its obligations under this Agreement, Vendor will act in good faith, will cooperate fully with such other service providers, and will not (i) commit any act that may interfere with the performance of work by any other service providers or (ii) fail to perform any act required in the performance of the Services that may interfere with the performance of work by any other service providers.
- (3) When the State so requests, subject to the terms and conditions of this Agreement, including those with respect to the provision of information, confidentiality and intellectual property, and Vendor's reasonable security requirements, Vendor will allow parties interested in procuring State contracts, during the procurement process therefor, to have access to the System, the Documentation and the Service Locations to the extent necessary to pursue the applicable procurement.

### 3.10 State Reserved Rights

#### 3.10.1 *Renegotiation of Agreement Terms*

Notwithstanding anything in this Agreement to the contrary, and without limiting the State's other rights under this Agreement, the State may at any time during the Term notify Vendor that the State has elected to renegotiate this Agreement or certain specified terms of this Agreement. Upon Vendor's receipt of any notice pursuant to this Section, Vendor and the State will undertake good faith negotiations of such terms of the Agreement. Any changes, modifications or amendments to the Agreement must be mutually agreed by the Parties and implemented through the Change Order Process.

#### 3.10.2 *Reprocurement of the Services or Procurement of Additional Services*

Notwithstanding anything in this Agreement to the contrary, the State may at any time issue requests for proposals or offers to other potential contractors for performance of any portion of the Services covered by this Agreement or services similar or comparable to the Services. If the State elects to procure the Services or any portion of the Services from another service provider in accordance with this Section, the State will have the termination rights and obligations set forth in Section 16.3.2.

### 3.11 Changes in Services

#### 3.11.1 *Mandatory Changes*

- (1) In the event of any Legal Change which in the State's determination affects this Agreement or affects Vendor's performance of the Services, the State may direct Vendor to modify the Services and any of the Attachments (to the extent such Attachments describe the scope of Services), as may be necessary in the State's discretion to comply with applicable Law following the Legal Change, as set forth in this Section 3.11.
- (2) If the State determines that any modification, supplement or revision to the Services is appropriate to respond to changes in the marketplace, for the State to more effectively receive the Services or deliver the Services to the Clients, to reflect a change that is appropriate to meet the Policy Objectives or to reflect changes in the scope of the Delegated Activities, Vendor shall implement any such Change to the Services which the State directs (a "**Directed Change**"), as set forth in this Section 3.11.
- (3) If a Mandatory Change prevents Vendor's performance of some or all of the Services or if Vendor reasonably determines that any Mandatory Change would have a Material Adverse Effect on Vendor's ability to perform the Services at the applicable Performance Standards, Vendor

shall propose a reasonable solution that implements the intent of this Agreement as closely as practicable and minimizes any Change to the Services. If such proposal is not acceptable to the State, the State and Vendor shall negotiate in good faith to reach a mutually acceptable revision to the Services to reflect the applicable Mandatory Change and an equitable adjustment to the Fees.

- (4) Any reduction in the Services pursuant to a Mandatory Change shall be subject to Section 16.3.5 and Section 16.6.6 to the extent applicable.

### **3.11.2** *Implementation of Mandatory Changes and Legal Changes*

The State shall deliver notice to Vendor of modifications the State will require to implement a Mandatory Change, the effective date of a Legal Change (if applicable), and the date by which the State requires the modification to be implemented (“**Change Notice**”). Subject to Section 3.11.4, Vendor will (i) use Commercially Reasonable Efforts to implement the required or directed modifications by the implementation date set forth in the Change Notice, and (ii) in any event will implement modifications applicable to a Legal Change on or prior to the effective date of the Legal Change, so long as the State has provided Vendor a Change Notice within a time period that Vendor has sufficient notice to implement such Legal Change by such date using Commercially Reasonable Efforts.

### **3.11.3** *Voluntary Change Request*

Either Party may request a Change to the Services by providing a written Change Request to the other Party and to the Change Control Board.

### **3.11.4** *Nexus to Services*

If Vendor has reasonably determined that a Change which is the subject of a Mandatory Change or a Change Request from the State (a) is not related to the Services, (b) is not a service that is within the then core competencies of Vendor’s or its Primary Subcontractors’ service delivery organizations, or (c) violates then existing Vendor written internal policies, and that, therefore, Vendor refuses to make the requested Change as a result of any or all of (a), (b), or (c), Vendor shall so notify the State promptly after receipt of a Change Notice or a Change Request from the State (and in any event within ten (10) Business Days) of such determination and refusal. In this event, (i) Vendor shall have no liability to the State for failing to implement a Directed Change or the State’s Change Request, and (ii) as to Legal Changes, the State and Vendor shall negotiate in good faith an appropriate course of action for the timely implementation of the Legal Change. The State may, however, submit to the Dispute Resolution Procedures the issue of whether such Change meets the conditions described above in (a), (b), or (c). If a Directed Change

requires compliance with any federal or state cost accounting regulations, Vendor in its discretion may decline to implement such Directed Change until the Parties mutually agree, in their respective discretion, on appropriate pricing and other terms and conditions to reflect such compliance.

### **3.12 Change Order Process**

#### **3.12.1 *Change Analysis***

Within fifteen (15) days (or such longer period as the Parties may mutually agree) following receipt of a Change Notice or a Change Request from the State, or simultaneously with Vendor's delivery of a Change Request, Vendor will prepare and deliver to the State and the Change Control Board a written Change Analysis, in form and substance acceptable to the State. At a minimum, a Change Analysis will be a written assessment and evaluation of the impact of the proposed Change on the then-current scope, price, and performance of the Services in accordance with the time schedule agreed between the Parties and will include the following:

- (1) a description of the proposed Change;
- (2) an analysis of the impact of the proposed Change on the following (as appropriate given the nature of the proposed Change):
  - (A) scope of the Agreement;
  - (B) projected or anticipated savings, if any;
  - (C) Performance Standards;
  - (D) delivery dates;
  - (E) the Continuity Plan;
  - (F) any other Plan; and
  - (G) any other matter reasonably requested by the State or reasonably considered by Vendor to be relevant;
- (3) a list of work products or deliverables required from each Party to implement the proposed Change;
- (4) a timetable for implementation of the proposed Change;
- (5) any changes to the Fees, including an analysis, with supporting documentation, of the reasons Vendor believes the Fees will be materially impacted by the proposed Change;



- (6) an assessment of the added value of a proposed Change to the State and to meeting the Policy Objectives;
- (7) an assessment of whether any or all of the activities identified in the proposed Change constitute New Services; and
- (8) any consequent amendments to the Agreement required to implement the proposed Change.

### **3.12.2** *Change Order Procedures*

The Parties will cooperate with each other in good faith in discussing the scope and nature of each Change Request and related Change Analysis. The Change Control Board will meet to discuss the Change Request, Change Analysis, and any other matters concerning the Change to determine whether Vendor shall proceed with the implementation of the proposed Change. In the event that more than one (1) Mandatory Change or Change Request is pending at the same time, the Change Control Board shall establish the priority and sequence for addressing such Changes. The Parties will evidence any Change by executing a written Change Order containing a description of the Change, the number of reasonably anticipated person-hours to be expended by Vendor to implement the Change, any anticipated increase or decrease in workload which may be caused to comply with such Change once implemented, a timeframe for implementing the Change, any modification to any of the Attachments necessary or appropriate to reflect such Change and revisions to the Fees (if any) as the Parties shall mutually agree.

### **3.12.3** *Change Order Fees*

- (1) Vendor agrees that (i) any Change which is implemented during the Transition will not result in any increase in the Fees unless such Change results from a Legal Change (other than a Proposed Policy Change on Schedule 2 [Contemplated Policy Changes]), a Directed Change or any Change Request relating to an expansion of or change to the Services, and (ii) any Change after the Transition will not result in any increase in Fees unless expressly provided herein or as may be established pursuant to the Change Order Process.
- (2) If a Mandatory Change materially affects the scope, schedule, cost and/or manner of performing the Services (“**Material Change**”), the Parties will execute appropriate Change Orders to implement the Mandatory Change and will negotiate in good faith any changes in the Fees to reflect the impact of the Mandatory Change on the Services and the costs thereof. Otherwise, there will be no change in the Fees arising out of a Mandatory Change.

- (3) If there is a dispute with respect to the effect of a Mandatory Change on performance of the Services or the revisions to the Services to reflect the Mandatory Change, the dispute shall be resolved in accordance with the Dispute Resolution Procedures. Subject to Section 3.12.3(4), Vendor acknowledges that it will not delay implementation of any Mandatory Change due to any changes in the Fees which either the State or Vendor proposes to make to reflect the impact of the Mandatory Change on the Fees associated therewith.
- (4) Vendor shall commence implementation of a Mandatory Change, despite a dispute between the Parties regarding the Fees to be charged for such Mandatory Change, as follows:
  - (A) The difference between the charges proposed by the State (“**State’s Offer**”) and the charges proposed by Vendor (“**Vendor’s Proposal**”) shall be deemed disputed fees (“**Mandatory Change Disputed Fees**”).
  - (B) Vendor shall commence the performance and implementation of the Mandatory Change, and the State shall pay Vendor the charges at the rates set forth in the State’s Offer during the times that the aggregate amount of the Mandatory Change Disputed Fees is less than or equal to Five Hundred Thousand Dollars (\$500,000). At any time that the amount of the Mandatory Change Disputed Fees exceeds Five Hundred Thousand Dollars (\$500,000), Vendor shall continue the performance and implementation of the Mandatory Change, and the State shall pay Vendor the charges at the rates set forth in the Vendor’s Proposal (other than the amounts already being withheld as Mandatory Change Disputed Fees by the State pursuant to this Section).
  - (C) The amount of the Mandatory Change Disputed Fees shall be subject to the terms of Section 4.2(5). The Parties shall expeditiously seek to resolve such dispute pursuant to the Dispute Resolution Procedures.
- (5) Any reference to a Change shall not necessarily mean that such Change will require a change in the Fees.

#### **3.12.4** *Minor Changes*

Notwithstanding any other provision of this Agreement, each Change Order requiring no more than one hundred sixty (160) person-hours by Vendor for its implementation (a “**Minor Change**”) shall be performed without additional charge to the State, if such person-hours are consistent with the resources then being used by Vendor to provide the Services; provided that the person-hours

for all Minor Changes in any Contract Year shall not exceed, in the aggregate, nine hundred sixty (960) person-hours. In determining the number of hours required for a Change Order, the Parties shall give consideration to related Change Orders, and the hours for any changes which are functionally interdependent and should reasonably be considered part of the same Change shall be aggregated for purposes of determining the one hundred sixty (160) person-hours threshold. This determination shall be made by the Change Control Board.

**3.12.5** *Right To Contract With Other Service Providers*

Notwithstanding any other provision of this Agreement, the State retains the right to contract with one or more service providers for any matters that would be the subject of a Change Order.

**3.12.6** *Approval of Change Orders*

The State reserves the right to condition the approval of any Change Order on the review, input and approval of any Governmental Body that the State deems appropriate with respect to the Change which is the subject of the Change Order.

**3.12.7** *Priority of Change Orders*

In the event either Party reasonably determines that all Change Orders that are in the process of implementation and which require actions to be taken by such Party, cannot be accomplished within the timeframes for such Change Orders or which would be impractical to implement at the same time due to workload constraints and other relevant factors, the priority in which the Change Orders shall be pursued shall be as follows: first, Legal Changes, then Directed Changes, and then all other Changes. Any other conflict in timing shall be resolved by the Change Control Board.

**3.13** Information Reporting and Information Access

**3.13.1** *Reporting Requirements*

Vendor will provide to the State the reports described in Schedule 7 [Required Reports] with the frequency described in Schedule 7.

**3.13.2** *Report Modifications and Additions*

Reports to be provided by Vendor, which are described in Schedule 7 [Required Reports], will be modified as to format and frequency during the Term as reasonably requested by the State. Vendor will also provide the State with such other reports relating to the Services as the State may request. Upon receipt of the State's request, the Parties will work together in good faith to ascertain whether the report is required on an on-going or one time basis,

and whether it can be obtained at no additional expense from the Services Connection Portal. Any such modifications or new reports shall be reflected in a Change Order but with no change in the Fees unless such modifications or new reports require more than a reasonable level of effort.

### **3.13.3**     *Real Time System Access*

- (1) Vendor will provide those individuals designated by the State as members of the State's Modernization Project leadership team with access to IT and business metrics through the Services Connection Portal. The Services Connection Portal is an Internet-accessible reporting tool that provides the respective State and Vendor Modernization Project leadership teams the means to view the status of Indiana's eligibility business online and in near real-time. This includes the implementation of an operational dashboard view that provides rapid access to IT and business metrics (e.g., problem status, change history, asset information, and historical service level attainment metrics).
- (2) Views and reporting capabilities will be customizable by the user to meet the individuals' specific needs. *Ad hoc* query capabilities into the data repository will provide the State and Vendor the ability to extract information that meets *ad hoc* business interests and needs.

## **3.14**     Plan Approval Procedures

### **3.14.1**     *Approval of Plans and Modifications*

- (1) The Effective Date Plans are deemed approved by the Parties in the respective forms attached to this Agreement.
- (2) The Parties acknowledge that the SCD Plans must be delivered and approved prior to the Service Commencement Date. Therefore, the Parties have agreed on the time periods set forth in Schedule 6 [SCD Plan Review Timeframes] for the State to review, comment and approve each SCD Plan. During the applicable time periods, the State shall use reasonable efforts and Vendor shall use Commercially Reasonable Efforts to prepare the SCD Plans in form and content that the State will approve prior to the expiration of the applicable period for the respective SCD Plan. If the State does not specifically approve or disapprove any such SCD Plan within the applicable time period, such SCD Plan shall be deemed approved. In connection with any disapproval of an SCD Plan, the State shall provide a description, in reasonable detail, of its reasons for disapproval. Vendor shall promptly modify any such SCD Plan to address the reasons stated for disapproval and resubmit such SCD Plan to the State for approval together with a copy of such SCD Plan, as modified, marked to show

all changes compared to the most recent version thereof to which the State had provided its comments. Any updates to any of the SCD Plans shall be subject to the processes contemplated by this Section 3.14.1; provided that the period for approval shall be determined by the State Project Manager and the Vendor Senior Program Executive. The Service Commencement Date may be changed by mutual agreement of the Parties.

- (3) Except as specifically provided in Section 3.14.1(1) or in Section 9.1.3, in connection with any Plan or modification of any Plan required to be delivered by Vendor to the State for review, comment or approval hereunder, the State and Vendor shall in good faith and within thirty (30) days following the Closing, agree on time periods for the State to review, comment on and (as applicable) approve such Plans or modifications as may arise during the Term. During the review period established for the State pursuant to such agreement, the State shall use reasonable efforts to make its determination promptly. Notwithstanding such efforts of the State to review and approve such Plan within the requisite time period, if the State does not approve such Plan or modification within that time period, such Plan shall be deemed disapproved. In connection with any disapproval, including a deemed disapproval, the State shall provide a description, in reasonable detail, of its reasons for disapproval. Vendor shall promptly modify such Plan to address the reasons stated for disapproval and resubmit such Plan to the State for approval together with a copy of the Plan, as modified, marked to show all changes compared to the most recent version thereof to which the State had provided its comments.
- (4) The State and Vendor will cooperate as reasonably required to finalize each Plan as promptly as possible following the disapproval of any such Plan.
- (5) In the event the State fails to approve the Continuity Plan or the Steady State Procedures Manual or any modifications thereto within the mutually agreed time period, Vendor shall comply with the requirements of the most recently approved version of each such Plan or if no such Plan has been approved, the requirements of such proposed Plan as may be commercially reasonable to assure that Vendor performs the Delegated Activities and that the Services are performed, until such time as the State and Vendor have finalized and approved such Plan or any modifications thereto.
- (6) In the event any Plan has been deemed approved without express approval by the State, the State reserves the right to submit comments and recommendations to Vendor at any time following such deemed approval. In such event, Vendor shall modify the applicable Plan as

reasonably required to accommodate such comments and recommendations and thereafter shall implement and comply with such modifications. Any such modification shall be processed as a Change.

- (7) Any Plan which is approved pursuant to this Agreement shall be deemed to be an Attachment to this Agreement, and the most recently approved Plan shall supersede and replace all prior versions of such Plan.

### **3.14.2** *Update Rights and Obligations*

The State and Vendor shall update each Plan to the extent requested under this Agreement in compliance with the approval procedures of this Section 3.14. Revisions to each Plan shall also be made as part of any Change contemplated by Section 3.11, provided that in addition to any other requirements applicable to changes in the Plans, any proposal by a Party with respect to an update shall include a reasonably detailed description of the update, the basis therefor, the benefits anticipated to be achieved, and any adverse impact on the Services or the delivery thereof by Vendor or on the State Retained Activities. For any update which Vendor proposes, Vendor shall simultaneously deliver a copy of the proposed revised Plan marked to show all changes compared to the most recent version thereof. Any update is subject to review, comment and approval by the State and shall be deemed rejected if not approved by the State within thirty (30) days of receipt of the notice of such update. The State shall use reasonable efforts to approve or reject any such update within such period.

\* \* \* \* \*

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## ARTICLE 4 FEES AND FUNDING

### 4.1 General Fee Structure

The Fees to be paid to Vendor consist of the following categories and shall be determined as follows:

#### 4.1.1 *Fixed Fee*

- (1) Subject to adjustments to the Fixed Fee resulting from client application levels that fall within the agreed ARC Bandwidths and RRC Bandwidths set forth in Schedule 8 - A [Variable Fees] (which incremental adjustments are referred to as “**Fee Adjustments**”), the State shall pay Vendor a Fixed Fee in accordance with Schedule 8 – B [Fixed Fee], payable monthly in arrears in accordance with IC 5-17-5.
- (2) All payments shall be made in arrears in conformance with State fiscal policies and procedures and State Laws in effect from time to time and, as required by IC 4-13-2-14.8, by electronic funds transfer to the financial institution designated by Vendor in writing from time to time. The initial designated financial institution and funds transfer information is set forth in Schedule 9 [Electronic Funds Transfer Instructions]. No payments will be made in advance of receipt of any goods or services that are the subject of this Agreement. Any changes in such State Laws which adversely affect the timing of or interest on payment of Fees shall be processed as a Change.
- (3) In the event of the State’s nonpayment of undisputed Fees because of inadvertent errors in the payment process, the State shall pay Vendor promptly following correction of such error, but in no event later than thirty (30) days following receipt of Vendor’s notification to the State of such nonpayment, provided that the State shall pay Vendor a late payment penalty (based on the percentage rate set forth in IC 5-17-5) on the amount of any unpaid undisputed Fees. Vendor’s notice(s) hereunder shall comply with Section 16.4.2(i) through (iii) and, at Vendor’s discretion, Section 16.4.2(iv).
- (4) Except as otherwise provided herein, Vendor will not be entitled to nor receive from the State any additional consideration, compensation, salary, wages, or any other type of remuneration for Services rendered under this Agreement. Specifically, by way of example but not of limitation, Vendor will not be entitled by virtue of this Agreement to consideration related to employees in the form of overtime, health insurance benefits, retirement benefits, disability retirement benefits, sick leave, vacation time, paid holidays, or other paid leaves of absence of any type or kind whatsoever, nor the costs associated with

transportation, delivery, and insurance relating to Vendor's performance of this Agreement, nor to any increases in the costs associated with the System including those related to increased costs in maintenance fees, license fees, and other costs associated with the System, nor any increase in costs associated with any operation, maintenance, repair or management of any of the Service Locations including increased costs in utilities, insurance, taxes, common area maintenance charges, or any other costs imposed on Vendor under any lease or other use right with respect to any Service Location.

#### **4.1.2**      *Service Levels*

- (1)      Schedule 10 [Performance Standards] sets forth the Service Levels ("**Service Levels**") under this Agreement.
- (2)      The Parties acknowledge and agree that the primary purpose of the Service Levels and of the Service Level Adjustments is to provide Vendor an incentive to achieve or exceed the Target for each Service Level. Vendor acknowledges that its efforts with respect to the Service Levels shall not adversely affect or diminish in any manner Vendor's performance of all of the Delegated Activities whether or not subject to a Service Level.
- (3)      Commencing as of the SLA Commencement Date, the Fixed Fees to be paid to Vendor during any SLA Contract Year may be adjusted for that SLA Contract Year, either upward or downward, based upon achievement of the Service Levels. Any such adjustment shall be effective as of the end of such SLA Contract Year, as set forth in Section 4.1.2(9). The Target Percentage for each Service Level ("**Target**"), as agreed to by Vendor and the State, is set forth on Schedule 10 [Performance Standards], along with the Low Threshold percentage and Stretch Goal percentage for each Service Level and the Percentage at Risk attributable to such Service Level.
- (4)      Vendor shall (i) make a calculation in accordance with Schedule 10 [Performance Standards], and (ii) deliver such calculation to the State not later than the fifteenth (15th) day of the second month following the end of each calendar month during each such SLA Contract Year, as to the actual performance of Vendor for each such Service Level for that month. Within the time period set forth in Section 4.1.2(9), the Fixed Fee for that SLA Contract Year will then be adjusted, either upward or downward, based on the aggregate of such monthly adjustments. In no event will the Fixed Fee be adjusted upward or downward for any Service Level for any SLA Contract Year by more than the amount at risk applicable to such Service Level for that SLA Contract Year, as shown in Schedule 10. The adjustment to the Fixed



Fee based on Vendor's performance of each Service Level shall be calculated separately.

- (5) The calculation for each Service Level Adjustment shall be performed as follows:
- (A) If actual performance for the Service Level is below the Low Threshold for that SLA Contract Year, the Fixed Fee for that SLA Contract Year shall be reduced by an amount equal to the product of (i) the SLA Fixed Fees attributable to that SLA Contract Year and (ii) the maximum percent at risk applicable to that Service Level for that SLA Contract Year.
  - (B) If the actual performance for the Service Level is between the Low Threshold and the Target for that SLA Contract Year, the Fixed Fee for that SLA Contract Year shall be reduced by an amount equal to the product of (i) the SLA Fixed Fees attributable to that SLA Contract Year, times the maximum percent at risk applicable to that Service Level for that SLA Contract Year, and (ii) a fraction, the numerator of which is the absolute difference between the actual performance for that month and the Target, and the denominator of which is the absolute difference between the Low Threshold and the Target.
  - (C) If the actual performance for the Service Level equals the Target for that SLA Contract Year, there shall be no adjustment to the Fixed Fee for that SLA Contract Year.
  - (D) If the actual performance for the Service Level is between the Target and the Stretch Goal for that SLA Contract Year, the Fixed Fee for that SLA Contract Year shall be increased by an amount equal to the product of (i) the SLA Fixed Fees attributable to that SLA Contract Year, times the maximum percent at risk applicable to that Service Level for that SLA Contract Year, and (ii) a fraction, the numerator of which is the absolute difference between the Target and the actual performance for that SLA Contract Year and the denominator of which is the absolute difference between the Target and the Stretch Goal.
  - (E) If the actual performance for the Service Level exceeds the Stretch Goal for that SLA Contract Year, the Fixed Fee for that SLA Contract Year shall be increased by an amount equal to the product of (i) the SLA Fixed Fees attributable to that SLA Contract Year, and (ii) the maximum percent at risk applicable to that Service Level for that SLA Contract Year.

- (6) In addition to any other remedies available to the State hereunder, if Vendor fails to meet the Low Threshold for the same Service Level for three (3) consecutive months or for any five (5) of the preceding nine (9) months, Vendor shall (i) investigate, assemble and preserve pertinent information with respect to, and report on the causes of, the problem, including performing a root cause analysis of the problem, (ii) advise the State, as and to the extent requested by the State, of the status of remedial efforts being undertaken with respect to such problem (including, as necessary, the preparation and implementation of a Corrective Action Plan), (iii) minimize the impact of and correct the problem to begin meeting the Service Level, and (iv) take appropriate preventive measures with a goal of preventing a recurrence of the problem.
- (7) Not later than sixty (60) days following the end of each SLA Contract Year, the State will report to Vendor on the State's assessment of Vendor's actual performance for the preceding SLA Contract Year in relation to the Service Levels set forth in Schedule 10 [Performance Standards] and the Service Level Adjustments based on such performance. If Vendor fails to object to the report within ten (10) Business Days of its receipt thereof, then the report shall be deemed to have been approved by Vendor and shall be binding upon Vendor. If Vendor objects in writing within such ten (10) Business Day period, then any dispute shall be resolved in accordance with the Dispute Resolution Procedures.
- (8) The Parties will use their respective reasonable efforts to calculate the Service Level Adjustments in a manner commensurate with the foregoing intents and purposes and, to the extent calculation of the Service Level Adjustments cannot be accomplished in accordance with the foregoing, shall negotiate in good faith to resolve any issues with the calculation of the Service Level Adjustments.
- (9) Within ninety (90) days after the end of each SLA Contract Year, Vendor and the State shall cooperate to produce a statement indicating for such SLA Contract Year the Service Level Adjustments along with a statement of the amount, if any, which each Party owes to the other ("**Reconciliation Statement**"). Any amounts not in dispute shall be remitted promptly to the appropriate Party; provided, that in the event of a dispute regarding whether Vendor is in breach of its obligations under this Agreement and any Service Level Adjustment related to the subject matter of the dispute is attributable to Vendor, the State shall be entitled to withhold payment of the Service Level Adjustments until the breach is cured, subject to Section 4.2(5).
- (10) In the event there is a Termination of the Services associated with a Service Level, and such Services Termination Date is effective as of or

following the last day of the third month of such SLA Contract Year, the Parties agree that the Service Level Adjustment shall be calculated based upon the prorated portions of such SLA Contract Year, SLA Fixed Fees, and Vendor's actual performance during such period. In the event such Services Termination Date is less than three (3) months into such SLA Contract Year, no Service Level Adjustment shall be applied for such partial SLA Contract Year.

- (11) The State shall be entitled from time to time (but not more than once during any six (6) consecutive month period) to direct the addition of new Service Levels or substitution of new Service Levels for previous Service Levels as the State in its discretion determines appropriate to best ensure that the Policy Objectives are being satisfied; provided, however, that (i) any such changes shall not result in an increase in the total amount of the SLA Fixed Fees that is at risk for all Service Levels during any period, (ii) any direction may address multiple changes, and (iii) no such direction will be given prior to the Steady State Date. The State shall give Vendor notice describing such changes in reasonable detail, which notice shall be delivered at least thirty (30) days prior to the date set in such notice for the changes to be effective. The Parties will then negotiate in good faith as to the allocation of at-risk percentages among Service Levels, the methodology for measuring, tracking and reporting on such new or substituted Service Level, the methodology for determining the appropriate Target, Stretch Goal and Low Threshold metrics, the effective date of the Service Level, and the impact, if any, to the SLA Fixed Fees for adding or removing such Service Level.
- (12) The State and Vendor acknowledge that in the event that any Change Order results in an adjustment to the SLA Fixed Fees, the State and Vendor shall negotiate such adjustment in good faith and with a view to avoiding duplication of any increases or decreases in the Service Level Adjustments arising out of the Change which is the subject of the Change Order.
- (13) Examples of the calculation of Service Level Adjustments are included in Schedule 10 [Performance Standards].

#### **4.1.3**     *Material Assumptions*

The Parties have negotiated the Fees in reliance upon the material assumptions set forth in Schedule 11 [Material Assumptions] (“**Material Assumptions**”). The Parties acknowledge that other than such Material Assumptions, Vendor has not relied upon any other assumptions that are material to this Agreement, the Services, or the Fees (or any components thereof). Vendor acknowledges that any changes to any of its internal, implied or inherent assumptions which are not included in the Material Assumptions

shall be at its risk and shall not serve as a basis for requesting a Change or an increase in the Fees and that an inaccuracy or error in any of the Material Assumptions shall not automatically entitle Vendor to any Change which it may request, but any such Change shall be made solely pursuant to the Change Order Process. At the reasonable request of Vendor or the State, the Parties shall engage in good faith negotiations of any Changes to address any inaccuracy or error in one or more of the Material Assumptions.

#### **4.1.4**      *Expense Reimbursement*

Except as otherwise expressly provided in this Agreement, no expenses incurred by Vendor in connection with its provision of the Services, including expenses for travel in the ordinary course of providing the Services, will be reimbursed. Expenses for extraordinary travel requirements will be reimbursed only if specifically approved in advance by the State Project Manager. If reimbursable, expenditures made by Vendor for travel will be reimbursed by the State in accordance with the State Travel Policies and Procedures as specified in the applicable Financial Management Circular then in effect. The current version of the applicable Financial Management Circular (No. 2003-1) is available at [http://www.in.gov/idoa/services/travel/travel\\_policy.pdf](http://www.in.gov/idoa/services/travel/travel_policy.pdf) (subject to changes in the website). Out-of-state travel requests must be reviewed and approved by the State Project Manager for availability of funds and for appropriateness per the Financial Management Circular guidelines.

#### **4.1.5**      *Exclusion of Incidental Charges*

Vendor will not seek from the State fees or other charges for tasks, functions, or activities that are incidental or ancillary to the delivery of the Services. For the purposes of this Section 4.1, the phrase “incidental or ancillary” means:

- (1) All tasks, activities, approvals, permissions, or business functions that are considered normal, routine, customary, related, subordinate and required for the delivery of Services in the regular course of business; and
- (2) All tasks, activities, approvals, permissions, or business functions that are considered normal, routine, customary, related, subordinate and required for the delivery of the Services under the Continuity Plan approved by the State in accordance with this Agreement.

### **4.2**      Fee Disputes

Disputes regarding payment of all or any portion of a Fee to Vendor (including disputes as to whether all or any portion of a Fee is owed to, or should be withheld from, Vendor) will be processed as follows:

- (1) The Party disputing the Fee shall notify the other Party of such dispute in writing and describe in reasonable detail the reason for the dispute, and the dispute shall be resolved pursuant to the Dispute Resolution Procedures.
- (2) Subject to Section 4.2(5), if the State is unable to verify Vendor's entitlement to payment of all or part of any invoiced Fees, the State may in its reasonable discretion withhold payment of the unverified portion of the Fees from payments to Vendor.
- (3) Subject to Section 4.2(5), the State will not be required to pay any disputed portion of the Fees unless and until the dispute is resolved in accordance with the Dispute Resolution Procedures.
- (4) Notwithstanding any such dispute, Vendor must continue to perform its obligations (including the Services) under this Agreement pending resolution of such dispute so long as all undisputed amounts continue to be paid to Vendor.
- (5) In the event a Fee dispute involves an amount that, in the aggregate with all other disputed amounts under this Agreement, equals more than one-twelfth (1/12) of the then current annual Fixed Fee which dispute is not resolved prior to the end of the month following the month in which the dispute arises but which if resolved adversely to the State would result in a payment from the State to Vendor, the State shall deposit the disputed amount into either (i) escrow with a national banking institution with operations based in the State of Indiana providing escrow services to be held in an interest-bearing account (with such interest being paid to the Parties in proportion to the allocation of the disputed funds to the Parties and paid to the Parties promptly after the resolution of the dispute) pursuant to a mutually acceptable escrow agreement, or (ii) a specially designated account of the State authorized and approved by the Treasurer of the State that assures that such amounts will be available for payment to Vendor, if applicable, at the resolution of such dispute. Notwithstanding any provisions of this Agreement to the contrary, the State may not withhold payments (including any amounts paid into escrow) to Vendor that exceed in the aggregate more than one-sixth (1/6) of the then current annual Fixed Fee payable to Vendor hereunder. Any amounts in excess thereof shall be paid promptly to Vendor subject to a reservation of rights by the State.

### **4.3 Inflation**

#### **4.3.1 *Adjustments***

The Fixed Fees shall not be adjusted for inflation unless the rate of inflation determined by the ECI for a Contract Year exceeds an annual rate of 6% (compounded annually and compared to the ECI for the fourth (4th) quarter of 2006), in which event the Parties shall negotiate an equitable adjustment to the Fixed Fees.

#### **4.3.2 *Substitute Inflation Indices***

If the ECI is no longer published or its content and format is substantially changed, the State and Vendor will substitute another reasonably comparable index published at least annually by a mutually agreeable source. If the ECI base year is redefined to another year, the State and Vendor will continue to use the ECI, but will convert the base year ECI to the new base year by using an appropriate, mutually-determined conversion formula.

### **4.4 Payment Procedures and Conditions**

#### **4.4.1 *Submission of Invoices***

Vendor shall submit monthly invoices for the Fees on the form of invoice attached as Exhibit A. Vendor will modify the format of such invoice during the Term as reasonably requested by the State, subject to Section 4.6 and Section 9.3.1(2). If such modifications can be provided utilizing existing tools and reports, any such modification shall be reflected in a Change Order but with no change in the Fees. Otherwise, such modified invoice shall be performed as a Minor Change.

#### **4.4.2 *Scope of Invoicing***

Prior to the Service Commencement Date, and from time to time thereafter, the State shall provide Vendor with the percentage of the total Fees that should be applied to the following Programs: TANF, Food Stamps, Medicaid, and CCDF. In each monthly invoice, Vendor shall allocate the Fees for such period in accordance with such percentages.

#### **4.4.3 *Availability of State and Federal Funding***

- (1) This Agreement is expressly conditioned on the availability of state and federal appropriated funds.
- (2) Except as otherwise provided in this Agreement, Vendor understands and expressly assumes all risks associated with the commitment of delivery of the Services which relate to the failure, termination or suspension of funding to the State, delays or denials of required

approvals with respect to funding or approval of New Services, and cost overruns not reasonably attributable to the State.

- (3) The State will use reasonable efforts to ensure that such funds are available for the fulfillment of the State's obligations under this Agreement.
- (4) The State will use reasonable efforts to provide reasonable advance notice to Vendor upon learning that funding for this Agreement will be adversely affected by State or federal appropriations.

#### **4.4.4** *Payment Processing Requirements*

Vendor shall comply with all administrative and clerical payment processing requirements of the State generally applicable to vendors to the State in order for payments to be processed.

#### **4.4.5** *Required Forms*

Vendor will use only the approved form of invoice as provided by the State or as mutually agreed by the Parties, which invoice may be modified as reasonably required from time to time as a Change (but without a Fee adjustment related thereto for any non-material modification) and that it will not amend, revise, or supplement any such form and will not substitute any other form for the approved form of invoice. In the event that Vendor submits any purchase order, bill of lading, acknowledgement, receipt or other writing which contains any terms other than those in this Agreement or the approved form of invoice, such additional terms are deemed rejected and of no force or effect. In any event, this Agreement and the terms of the approved form of invoice shall control regardless of the sequence of execution or language in any other document or writing.

### **4.5** Taxes

Vendor shall be responsible for any sales, use, excise and other similar taxes and duties payable by Vendor on any goods or services used or consumed by Vendor in providing the Services where the tax is imposed on Vendor's acquisition or use of such goods or services and the amount of tax is measured by Vendor's cost in acquiring such goods or services. The State shall be responsible for the amount of any sales, use, excise or other similar taxes and duties that are imposed by federal Law, or any Law that applies to the State, on the Fees charged by Vendor under this Agreement; provided, however, the State shall have no liability or responsibility for any other Taxes of Vendor or any Subcontractor, including any Taxes on the income of a Vendor or any Subcontractor. The State represents that, as of the Closing Date, pursuant to IC 6-2.5-5-16, the State is exempt from paying gross retail sales tax.

## 4.6 Federal Participation

### 4.6.1 *Federal Funding*

The Parties acknowledge that a portion of the Services will be funded, in part, by federal funds granted by USDOA and HHS. Such federal funds comprise a substantial portion of the funds available to the State to pay for the Services and are provided pursuant to federal and State Laws that authorize the State's participation in joint federal - State public assistance and other human service programs. The Parties further acknowledge that, as a condition of such federal financial participation, the State must obtain the approval of USDOA and HHS for all or a portion of this Agreement.

### 4.6.2 *Approval Process*

The Parties acknowledge that (i) the State is solely responsible for preparing and submitting any applications to the appropriate federal agencies for any approvals that may be needed regarding this Agreement (including any applications for federal financial participation), for the completeness and accuracy of any applications and other submissions to such agencies in connection therewith, for complying with all federal financial participation regulations and for preparing and submitting all associated federal reports, and (ii) Vendor makes no representation regarding the adequacy of any Record or invoice for purposes of federal financial participation laws or other federal government reimbursement requirements (provided that nothing in the foregoing clause shall diminish any of Vendor's obligations to perform the Services or to provide accurate invoices). Vendor will cooperate with the State as the State may reasonably request to provide any Records and other relevant information in the possession or control of Vendor which are relevant to and as may be reasonably requested by the State in connection with the preparation and accurate completion of any such applications and submissions.

## 4.7 Interest on Overdue Payments

The State will in good faith perform its required obligations hereunder and does not agree to pay any penalties, liquidated damages, interest, or attorneys' fees, except as permitted by Laws of the State, including IC 5-17-5, IC 34-54-8, and IC 34-13-1. Notwithstanding the provisions contained in IC 5-17-5, to the extent required by Laws generally applicable to contractors doing business with the State, any liability resulting from the State's failure to make prompt payment shall be based solely on the amount of funding originating from the State and shall not be based on funding from federal or other sources.

\* \* \* \* \*

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## **ARTICLE 5 CLOSING DELIVERABLES**

### **5.1 Documents Delivered by Vendor**

At the Closing, Vendor has executed and delivered, or caused to be delivered, to the State the following:

- (1) this Agreement;
- (2) the Attachments that constitute agreements to which Vendor or a Subcontractor is a party;
- (3) Certificate of Good Standing for Vendor from the State of New York;
- (4) Certificate of Authority from the State of Indiana;
- (5) Officer's Certificate of Vendor;
- (6) the Initial Transition Plan;
- (7) Conditional Assignment of Subcontracts;
- (8) Certificate of Subcontractors from each Primary Subcontractor and all other Subcontractors whose Subcontract is in effect on the Closing Date;
- (9) Attornment Certificate from each Primary Subcontractor;
- (10) the Undertaking;
- (11) the Guaranty;
- (12) ACORD Form 27 regarding required insurance, and evidence of waivers of subrogation rights by insurers;
- (13) a signatory attestation from each of the individuals executing this Agreement, any of the deliverables identified in this Section 5.1, and any Material Agreements in effect on the Effective Date on behalf of Vendor, each Key Subcontractor, and each Primary Subcontractor and each other Subcontractor listed on Schedule 14 [Subcontractors] with respect to which any deliverable is executed on behalf of such respective Subcontractor;
- (14) a conformed copy of each Subcontract which is in effect on the Effective Date, certified as true and complete by Vendor (which the State acknowledges may reflect redaction of pricing, personal information, and other mutually agreed matters);

- (15) tax clearances from the Indiana Department of Revenue and the Indiana Department of Workforce Development as to Vendor and each Primary Subcontractor that each of them does not owe any outstanding sales, use, income taxes, or unemployment taxes to the State and is current in all filings;
- (16) the Memorandum of Understanding of even date herewith between the State and Vendor regarding economic development; and
- (17) such other documents and items as are reasonably necessary or appropriate to effect this Agreement and the consummation of the transactions contemplated hereby or which may be customary under local law and which counsel to the respective parties to this Agreement determine are necessary or appropriate for such purpose.

Upon delivery of the documents referred to in this Section 5.1, the State will submit this Agreement and the attachments for approvals and signatures as required by IC 4-13-2-14.1 and IC 4-13-2-14.3, and shall take all steps reasonably necessary to expedite such approvals.

## **5.2 Documents Delivered by the State**

At the Closing, the State has executed and delivered, or caused to be delivered, to Vendor the following:

- (1) this Agreement;
- (2) the Attachments that constitute agreements to which the State is a party;
- (3) the datafile regarding personnel information referenced in Section 3.3.1(1); and
- (4) such other documents and items as are reasonably necessary or appropriate to effect this Agreement and the consummation of the transactions contemplated hereby or which may be customary under local law and which counsel to the respective parties to this Agreement determine are necessary or appropriate for such purpose.

## **5.3 Simultaneous Delivery**

The Parties acknowledge that their respective obligations under this Agreement, and any of the other agreements, certificates or other documents delivered in connection with the Closing, shall be effective upon the consummation of the Closing, and all such deliverables shall be deemed to be delivered simultaneously as of such consummation.

\* \* \* \* \*

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## **ARTICLE 6 REPRESENTATIONS AND CERTIFICATIONS**

### **6.1 Vendor Representations and Warranties**

Vendor represents and warrants to the State that, as of the Effective Date and every other date as of which these representations and warranties are deemed to be given:

#### **6.1.1**      *Formation and Good Standing*

Vendor is a corporation duly formed, validly existing and in good standing under the laws of the State of New York, and is duly authorized to conduct its business in the States of New York and Indiana and all other states where the failure to obtain such authorization would have a Material Adverse Effect on Vendor's ability to provide the Services. Vendor owes no outstanding reports to the Indiana Secretary of State.

#### **6.1.2**      *Power and Authority*

Vendor has the power and authority to enter into this Agreement and to do all acts and things and execute and deliver all other documents as are required hereunder to be done, observed or performed by it in accordance with the terms hereof.

#### **6.1.3**      *Enforceability*

This Agreement has been duly authorized, executed and delivered by Vendor and constitutes a valid and legally binding obligation of Vendor, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability for the rights of creditors generally and to general principles of equity.

#### **6.1.4**      *Non-Contravention*

The execution and delivery of this Agreement by Vendor and the performance by Vendor of the terms, conditions and provisions hereof has not and will not contravene or violate or result in a material breach of (with or without the giving of notice or lapse of time, or both) or acceleration of any material obligation of Vendor under (i) any Applicable Law; (ii) any material agreement, instrument or document to which Vendor is a party or by which it is bound; or (iii) the Constituent Documents of Vendor.

#### **6.1.5**      *No Consent*

No consent is required to be obtained by Vendor from, and no notice or filing is required to be given or made by Vendor with, any Person (including any Governmental Body) in connection with the execution and delivery by Vendor of this Agreement or the consummation of the transactions contemplated

hereby, except for such consents which have been obtained or that will be obtained in connection with this Agreement as provided herein.

**6.1.6**      *Compliance with Laws*

Vendor is in compliance with all Applicable Laws.

**6.1.7**      *Listings*

Without limiting the generality of the representation at Section 6.1.6, neither Vendor nor, to its Knowledge, any Affiliate of Vendor or any Subcontractor is (i) listed on any of the following lists maintained by the Office of Foreign Assets Control of the U.S. Department of the Treasury, the Bureau of Industry and Security in the U.S. Department of Commerce or their successors, or on any other list of Persons with which the State may not do business under applicable Law: the Specially Designated Nationals List, the Denied Persons List, the Unverified List, the Entity List, the Debarred List, or the Excluded Parties List System [<http://www.epls.gov>] (subject to changes in the website), or (ii) listed on the Suspended Vendor List of the Indiana Department of Administration.

**6.1.8**      *No Adverse Proceedings.*

There is no Proceeding, at law or in equity, or before or by any Governmental Body, pending or, to Vendor's knowledge, threatened against Vendor which is reasonably likely to materially or adversely affect Vendor's ability to perform hereunder or which challenges consummation of this Agreement.

**6.1.9**      *Licenses and Authorizations*

Vendor has obtained, and/or has caused each of its Subcontractors as of the Effective Date to have obtained, all licenses, certifications, permits, authorizations and approvals necessary to perform the Services under this Agreement from all third parties and from all Governmental Bodies that regulate any or all aspects of Vendor's and such Subcontractor's performance of this Agreement which are required to be obtained by Vendor and the Subcontractors hereunder prior to the Effective Date, but exclusive of those which the State needs to obtain (if any) with respect to the State Retained Activities.

**6.1.10**     *Payment Arrears*

Neither Vendor nor any Subcontractor of Vendor is presently in arrears in payment of its Taxes, permit fees or other statutory, regulatory or judicially required payments to the State.

**6.1.11**     *No Indebtedness to the State*

Vendor is not indebted to the State, and Vendor is not subject to an outstanding judgment in a suit by the State against Vendor for collection of any balance of any indebtedness to the State. For purposes of this Section, “indebtedness” is any amount of money that is due and owing to the State and is not currently under dispute.

**6.1.12**     *Financial Resources*

Vendor has the financial resources to fund the capital expenditures required for it to perform under this Agreement without advances by the State or assignment of any payments by the State to a financing source.

**6.1.13**     *No Enforcement Actions*

Vendor has no current, pending, outstanding, or, to its Knowledge, threatened, criminal, civil, or enforcement Claims or Proceedings initiated against it by the State pending, and agrees that it will immediately notify the State of any such Claims or Proceedings.

**6.1.14**     *Retention of Consultant*

Vendor has not retained or promised to retain any Person, or utilized or promised to utilize a consultant, that participated in the State’s development of specific criteria of this Agreement or who participated in the State’s selection of Vendor or approval of any Subcontractor for the Modernization Project.

**6.1.15**     *Tax Filings*

Vendor has filed all tax returns which are due with respect to the State of Indiana and has paid all Taxes due and owing to the State of Indiana or to any taxing authority within the State of Indiana.

**6.2**     Survival

All of the representations and warranties in this Article 6 and Section 11.8, and any other express representation of either Party under this Agreement shall survive the Closing.

**6.3**     Confirmation of Representations

Within thirty (30) days of the first day of each Contract Year, Vendor shall provide the State with (i) a Certificate for Annual Confirmation of Representations in the form attached hereto as Exhibit B from Vendor, and (ii) a Certificate of Subcontractor, in the form attached hereto as Exhibit C, from each Person that is a Subcontractor as of such first day.

#### **6.4 Disclaimer of Warranties**

OTHER THAN AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THERE ARE NO EXPRESS WARRANTIES, AND THERE ARE NO IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. VENDOR DOES NOT REPRESENT OR WARRANT UNINTERRUPTED OR ERROR-FREE OPERATION OR ABSOLUTE SECURITY OF ANY GOODS OR SERVICES.

\* \* \* \* \*

[Reminder of this page intentionally left blank]

## **ARTICLE 7 VENDOR COVENANTS**

### **7.1 Compliance with Laws**

In addition to and not in limitation of any other provisions of this Agreement, Vendor agrees and covenants as follows:

#### **7.1.1**      *Compliance with Laws Generally*

Vendor shall comply with, and shall require each Subcontractor to comply with, all Laws that are applicable to Vendor or such Subcontractor, as the case may be, in its and their performance of this Agreement and the Services, including all Laws regarding operation of Service Locations, interface with and privacy of individuals seeking public assistance, taxes, employment, employee benefits, environmental laws, anti-terrorism and financial disclosure, regulatory requirements, and telephone solicitation and licensing provisions, to the extent that the foregoing are applicable to Vendor or any Subcontractor, respectively, in the provision of the Services, in addition to the Laws applicable to Vendor or the applicable Subcontractor described in the remaining subsections of this Section 7.1. Vendor shall perform the legal compliance-related obligations as described herein or in the Statement of Work, provided that notwithstanding anything to the contrary in this Agreement, the State acknowledges that Vendor and its Subcontractors do not provide legal, accounting, or audit services to the State for which a professional license is or would be required.

#### **7.1.2**      *Immigration*

Vendor shall comply with the requirements of the Immigration and Nationality Act, as amended (8 U.S.C. §1101 *et seq.*), including the Immigration Act of 1990 and the Immigration Reform and Control Act of 1986 regarding employment verification and retention of verification forms for any individual(s) hired on or after November 6, 1986, who will perform any labor or services under this Agreement.

#### **7.1.3**      *Ethics and Conflict of Interest Requirements*

Vendor, for itself and its Subcontractors and their respective agents, authorized representatives and employees, acknowledges and agrees that in the performance of the Services pursuant to this Agreement, it is imperative that the general public and the Clients have confidence that the conduct in providing the Services is above reproach.

- (1)      Persons having a Business Relationship with the State
- (2)      Vendor, for itself and its Subcontractors, and their respective agents, authorized representatives and employees, shall comply with all Laws

that apply to Persons who have a business relationship with the State, as set forth in IC 4-2-6 and IC 4-2-7, and the regulations promulgated thereunder.

(3) Project Employee Ethics Requirements

- (A) With respect to any and all relations with Clients, Vendor will adhere, and will cause each Subcontractor to adhere, with respect to their respective Project Employees, to 42 IAC 1-5-1(a) and (b) [relating to the solicitation, acceptance or receipt of a gift, favor, service, entertainment, food and drink, and travel expenses] to the same extent as if such Project Employee were a State employee for purposes of such regulation.
- (B) Vendor shall require each of its Project Employees, and shall cause each Subcontractor to require each of their respective Project Employees, to not (i) solicit or accept compensation for the performance of Services from any Person other than that compensation paid by Vendor or any Subcontractor to such Project Employee in the ordinary course of business, (ii) benefit from, or permit any other Person to benefit from, Protected Information acquired in the course of providing Services except as permitted or required by Law, and (iii) solicit, require or accept political contributions of any kind from or on behalf of any Client during the performance of any of the Services.

**7.1.4** *Anti-Kick Back*

Vendor shall comply with the Anti-Kickback Act of 1986, 41 USC §§ 51-58 and Federal Acquisition Regulation 52.203-7 (July 1995).

**7.1.5** *Drug Free Workplace*

Vendor shall make a good faith effort to provide and maintain a drug-free workplace. Vendor will give notice to the State within ten (10) days after receiving actual notice that Vendor or an employee of Vendor has been convicted of a criminal drug violation occurring in the workplace in Indiana. In that respect and with respect to Vendor's or any Subcontractor's facilities in Indiana used to provide the Services, Vendor certifies and agrees that it shall provide, and shall cause each Subcontractor to provide, a drug-free workplace by:

- (A) Publishing and providing to all of their respective Project Employees a statement notifying them that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in Vendor's or such Subcontractor's workplace, and specifying the



actions that will be taken against employees for violations of such prohibition;

- (B) Establishing a drug-free awareness program to inform their respective Project Employees of (1) the dangers of drug abuse in the workplace; (2) Vendor's policy of maintaining a drug-free workplace; (3) any available drug counseling, rehabilitation, and employee assistance programs; and (4) the penalties that may be imposed upon an employee for drug abuse violations occurring in the workplace;
- (C) Notifying all Project Employees in the statement required by subparagraph (A) above that as a condition of continued employment in performance of the Services, the employee will (1) abide by the terms of the statement; and (2) notify Vendor or such Subcontractor of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;
- (D) Notifying in writing the State within ten (10) days after receiving notice from a Project Employee under subdivision (C)(2) above, or otherwise receiving actual notice of such conviction;
- (E) Within thirty (30) days after receiving notice under subdivision (C)(2) above of a conviction, imposing the following sanctions or remedial measures on any Project Employee who is convicted of drug abuse violations occurring in the workplace: (1) taking appropriate personnel action against such Project Employee, up to and including termination; or (2) requiring such Project Employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state or local health, law enforcement, or other appropriate agency; and
- (F) Making a good faith effort to maintain a drug-free workplace through the implementation of subparagraphs (A) through (E) above.

#### **7.1.6**      *MBE/WBE*

- (1) Vendor shall comply with the requirements of IC 4-13-16.5 and 25 IAC 5 to maximize the utilization of minority business enterprises (each a “**MBE**”) and women business enterprises (each a “**WBE**”) in the procurement and contracting processes. Vendor shall implement its MBE/WBE Participation Plan, attached hereto as Appendix VIII [MBE/WBE Participation Plan], to achieve a minimum average participation rate of seven percent (7%) for MBEs and ten percent (10%) for WBEs of the aggregate of the Fees paid over the Term. Vendor shall provide the State with the plans and the reports required by 25 IAC 5-3-4 in a timely and accurate manner. Notwithstanding the foregoing, in no event shall the respective participation rates of

MBEs and WBEs be less than five percent (5%), for the period between July 1, 2007 and June 30, 2009. All MBEs and WBEs must be certified by the Indiana Department of Administration, Minority and Women Business Enterprises Division. The requirements of this Section 7.1.6(1) shall also be reflected in the MBE/WBE Participation Plan.

- (2) Contemporaneously with any annual report required by 25 IAC 5-3, Vendor shall provide a report to the State of (i) MBEs and WBEs engaged as Subcontractors that have participated in its Mentor-Protégé Program during the preceding Contract Year, if any, and (ii) the percent of the Fixed Fees that were actually paid to the MBEs and WBEs for the prior Contract Year.
- (3) Vendor will comply with the provisions of this Section 7.1.6 with respect to replacement of Subcontractors as described in Section 14.6.4.
- (4) To the extent there is a material reduction in or Change to the Services, Vendor and the State shall, in good faith, discuss the impact, if any, such material reduction or Change may have on Vendor's obligations under this Section 7.1.6.

#### **7.1.7** *Non-Discrimination and Affirmative Action Obligations*

##### **(1)** Federal Non-Discrimination Laws

In the provision of the Services, Vendor shall comply with, and shall cause each Subcontractor to comply with, all applicable federal Laws regarding non-discrimination, including: (i) the Civil Rights Act of 1964, 42 U.S.C § 2000 *et seq.* (1981); (ii) the Civil Rights Act of 1991, P.L. 102-166; (iii) Executive Order Number 11246, 30 Fed. Reg. 12,319 (1965), reprinted in 42 U.S.C. § 2000(c) note, as amended by Executive Order Number 11375, 32 Fed. Reg. 14,303 (1967) and by Executive Order Number 12086, 43 Fed. Reg. 46,501 (1978); (iv) the Age Discrimination Act, 42 U.S.C. §§ 6101-6106 (1981); (v) the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1967); (vi) the Rehabilitation Act of 1973, 29 U.S.C. §§ 793-794 (1981); and (vii) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1990).

##### **(2)** State Non-Discrimination Laws

Pursuant to the Indiana Civil Rights Law, specifically including IC 22-9-1-10, and in keeping with the purposes of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, Vendor and its Subcontractors shall not discriminate against any employee or applicant for employment

relating to this Agreement or in connection with the Services with respect to the hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment, because of the employee or applicant's race, color, national origin, religion, sex, age, disability, ancestry, status as a veteran, or any other characteristic protected by federal, state, or local law ("**Protected Characteristics**"). Furthermore, Vendor shall comply with applicable Laws prohibiting discrimination based on the Protected Characteristics in the provision of the Services. Nothing in this covenant shall be construed to imply or establish an employment relationship between the State and any applicant or employee of Vendor or any Subcontractor.

#### **7.1.8**      *Environmental Protection Obligations*

##### **(1)**      Federal Compliance

In the provision of the Services, Vendor shall comply with, and shall cause each Subcontractor to comply with, the applicable provisions of federal environmental protection laws as described in this Section:

- (A)      the Pro-Children Act of 1994 (20 U.S.C. §6081 *et seq.*), as applicable, regarding the provision of a smoke-free workplace and promoting the non-use of all tobacco products;
- (B)      any applicable provisions relating to the institution of environmental quality control measures contained in the National Environmental Policy Act of 1969 (42 U.S.C. §4321 *et seq.*) and Executive Order 11514 (entitled "Protection and Enhancement of Environmental Quality");
- (C)      any applicable provisions relating to required notification of facilities violating the requirements of Executive Order 11738 (entitled "Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans"); and
- (D)      applicable provisions relating to the protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (21 U.S.C. § 349; 42 U.S.C. §§ 300j-9).

##### **(2)**      State Compliance

In the provision of the Services, Vendor shall comply with, and shall cause each Subcontractor to comply with, any applicable provisions requiring conformity of federal actions to State (Clean Air) Implementation Plans under §176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §740 *et seq.*).

- (3) Notwithstanding anything to the contrary in this Agreement or elsewhere, Vendor shall have no responsibility (including for remediation or otherwise) related to any environmental or safety condition existing prior to the Service Commencement Date on, in, under, above, by or near any State or third party facility or property or former State or third party facility or property.

#### **7.1.9**      *Recognition of Mandatory Energy Efficiency Standards*

In the provision of the Services, Vendor shall recognize and comply with, and shall cause each Subcontractor to recognize and comply with, mandatory standards and policies relating to energy efficiency, if any, that are contained in the State's energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-165).

#### **7.1.10**     *Assistance to FSSA*

Subject to Section 3.11, Section 4.6, and Section 7.1.1, Vendor shall assist FSSA in complying with any FSSA Laws and the performance of the State Retained Activities.

### **7.2**      **Vendor Covenants**

In addition to, and not in limitation or derogation of, any other covenants of Vendor contained in this Agreement, Vendor agrees and covenants to perform each of the covenants in this Section 7.2:

#### **7.2.1**     *Affirmative Covenants*

- (1) Vendor shall perform the Services in a good and workmanlike manner, consistent with sound commercial practices of Persons engaged in the delivery of health and human services in government operations of a similar type and with professional standards used in well-managed operations performing services substantially similar to the Services.
- (2) Vendor shall, and shall cause all Project Employees and Subcontractors to, (i) obtain and maintain all required permits, licenses, certifications, authorizations, and approvals necessary to perform the Services (other than those which the State is required to obtain and maintain), and (ii) comply with all Laws that are applicable to this Agreement and to any such Project Employees or Subcontractors or that govern any such Project Employee's or Subcontractor's performance of the Services required to be performed by them or it, all in accordance with Section 7.1.1.
- (3) Vendor shall pay each of the Subcontractors promptly, pursuant to the terms of the applicable Subcontractor agreements, the amounts, if any, owing to the Subcontractors from Vendor for goods and services

rendered by the Subcontractor in connection with the Modernization Project.

- (4) Vendor shall provide, and shall cause each Key Subcontractor to provide, to the State within thirty (30) days after the public release of audited financial statements (on a consolidated basis if applicable) of Vendor and each Key Subcontractor, respectively, prepared in accordance with GAAP on a consistent basis consisting of a balance sheet, an income statement and a statement of cash flows for the preceding fiscal year, to the extent and in such form as such documents are generally provided to the public by Vendor and its Key Subcontractors in the ordinary course.
- (5) Subject to the terms of this Agreement, Vendor shall respond to a reasonable request of the State relating to the Services and within the scope of this Agreement for information, assistance, or support within the timeframe reasonably specified by the State.

#### **7.2.2** *Negative Covenants*

- (1) Except as otherwise provided herein, Vendor shall not limit or restrict, through a covenant not to compete, employment agreement or other contractual arrangement, the State's ability to contract with Subcontractors or employees of Vendor and hereby waives its right to limit or restrict such employment or engagement by the State.
- (2) Except as otherwise provided herein, Vendor shall not commence any additional work under this Agreement or change the scope of the work under this Agreement until authorized in writing by the Parties. No claim for additional compensation shall be made in the absence of a prior approval executed by all Parties hereto.
- (3) Subject to Section 3.4.3(3) and Section 8.3, (i) Vendor shall not perform, or permit any Subcontractor to perform, any of the Delegated Activities at a location outside the United States of America, and (ii) Vendor shall not maintain any Service Location outside the State of Indiana.

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## ARTICLE 8 CONTINUITY OF SERVICES

### 8.1 Continuity Obligations Generally

Vendor recognizes that the Services are vital to the State and must be continued without interruption other than as contemplated by this Agreement. Prior to the Steady State Date, Vendor shall develop and deliver and be prepared, as of the Steady State Date and throughout the Term, to implement a Continuity Plan containing, among other things, the items set forth in this Article 8 and Schedule 23 [Continuity Plan Requirements], addressing the handling of interruptions to the Services, whether caused by a Force Majeure Event or otherwise. At least one hundred twenty (120) days before the Steady State Date, Vendor shall submit a detailed Continuity Plan to the State for its review, comment and approval. Such Continuity Plan, and any amendments thereto, must at all times be acceptable to and approved by the State. Review and acceptance of any Continuity Plan shall be the responsibility of the State; provided that Vendor will cooperate with and assist the State in conducting such reviews as the State may from time to time reasonably request. Upon approval of the Continuity Plan, such Continuity Plan shall be deemed to be Appendix IX [Continuity Plan] and shall be considered a Plan under this Agreement for all purposes. If a Force Majeure Event occurs during the Term prior to finalizing any Continuity Plan (or modification thereof), Vendor shall use, to the extent applicable, the State's Disaster Recovery Plan for the Systems of Record as modified or amplified by any terms for the Continuity Plan that have been agreed to by the State during Transition and implemented by Vendor in accordance with the Transition Plan.

### 8.2 Elements of Continuity Plan

The Continuity Plan shall provide, at a minimum, for the following: (i) providing an alternate electrical power source for uninterrupted services, (ii) designating one or more facilities (each a “**Disaster Recovery Site**”) or separate computer resources to which Vendor shall move the affected portion of any Services upon the occurrence of a Force Majeure Event requiring such a relocation (including a Force Majeure Event at a Disaster Recovery Site), which Disaster Recovery Sites for this Agreement shall be the two Major Service Centers, (iii) equipping each Disaster Recovery Site with data processing resources sufficient to provide all Services in compliance with all Performance Standards, regulatory requirements and terms and conditions of this Agreement, and (iv) specifying all procedures for the determination or declaration of a Force Majeure Event, which determination or declaration may not be unreasonably withheld or delayed by either Party. In the event of a Force Majeure Event, Vendor shall use Commercially Reasonable Efforts to resume delivery of the Services (including via electronic access) utilizing the Disaster Recovery Site in the timeframe provided in the Continuity Plan; provided that to the extent one or more Force Majeure Events materially and adversely affects or prevents performance of the Continuity Plan, Vendor shall provide the State with a plan, as a Change, to resume delivery of the Services no later than seven (7) Business Days thereafter at all Service Locations other than those at which the Force Majeure Event has rendered impractical the delivery of the Services at such Service Locations.

### **8.3 Relocation**

Vendor shall relocate, electronically or otherwise, all affected Services to a Disaster Recovery Site as expeditiously as possible after the occurrence of a Force Majeure Event (in the time frame and stages provided in the Continuity Plan), as reasonably required or appropriate for the uninterrupted delivery of the Services, and shall coordinate with the State all requisite telecommunications modifications necessary to achieve full connectivity to the Disaster Recovery Site within all Performance Standards. For any relocation contemplated by this Section 8.3, the State consents to the use of a Disaster Recovery Site outside the State of Indiana on a temporary basis (not to exceed ninety (90) days) as reasonably required to ensure the continuous and uninterrupted delivery of the Services and the State's ability to perform the State Retained Activities.

### **8.4 Periodic Testing**

Vendor shall periodically, and not less frequently than once each year, test the Continuity Plan to determine its sufficiency and the ability of Vendor, the Subcontractors, and the Project Employees to implement the Continuity Plan, including performing drills and practice disasters that simulate a reasonable range of anticipated disasters or Force Majeure Events. The State or its designee shall be given adequate prior notice of, and shall have the right to observe and comment on, each such periodic testing of the Continuity Plan.

### **8.5 Annual Review**

Vendor and the State shall annually review the appropriateness of the Continuity Plan in effect and mutually revise the Continuity Plan as reasonably required to assure continuity in the delivery of the Services.

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## ARTICLE 9 RECORDS AND AUDIT RIGHTS

### 9.1 Document Preservation

#### 9.1.1 *Records Maintenance Generally*

Vendor shall maintain, and shall require its Subcontractors to maintain, Records that, subject to Section 4.6 and other provisions of this Agreement: (i) are adequate to confirm that claims for State and federal eligibility funds and determinations for Services and related administrative charges are made in accordance with applicable Law, (ii) are sufficient to verify the accuracy and validity of Vendor invoices and all charges to the State incurred hereunder and (iii) are required to comply with Applicable Laws. Such Records, including all claims forms, shall be maintained and retained by Vendor or its Subcontractors, subject to Section 4.6 and other provisions of this Agreement as required by and for the time periods provided in 42 CFR 431.17, 45 CFR 74.53, 45 CFR 95.615, 7 CFR 277.14(j)(7) and 7 CFR 277.18(k) (“**Records Regulations**”), provided such time periods are during the Term and are as of or following the Service Commencement Date (or such longer period during the Term as the State may reasonably require), and provided further that any federal or state cost accounting regulations shall not apply to Vendor or any Subcontractor hereunder, except where, pursuant to a Change, any payment arrangements require compliance with any such cost accounting regulations. Upon the Services Termination Date (or the Contract Termination Date, if such Records are required for Vendor to perform the Disengagement Services), Vendor shall (i) return all Client Records and all State Records (Vendor may retain copies of State Records for which it retains licenses), and (ii) retain all Vendor Records for at least the period of time set forth in the Document Management Plan.

#### 9.1.2 *Preservation of Client Records and Database*

Vendor shall maintain, and shall require its Subcontractors to maintain, Records containing information regarding individuals and families who apply for any of the Programs and that fall within the scope of the Services in their respective possession or control (subject to Section 9.1.4) and for the time periods required by the Records Regulations provided such time periods are during the Term and are as of or following the Service Commencement Date) (or such longer period during the Term as the State may reasonably require).

#### 9.1.3 *Document Management Plan*

Vendor recognizes the importance of creating, maintaining and protecting Records developed in connection with the Services, including any Pre-Existing Records which the State may deliver or provide to Vendor that were created prior to the Service Commencement Date. Within sixty (60) days



after the Effective Date but in any event prior to the Service Commencement Date, Vendor shall develop and deliver a proposed document management plan regarding such Records to be attached as Appendix X [Document Management Plan] (“**Document Management Plan**”), which it shall submit to the State for its review, comment and approval. The Document Management Plan shall address policies regarding the following:

- (1) retention of and access to Records (whether in a tangible, electronic or digital form, or otherwise, including Records containing original signatures) and the transition of and return of such Records to the State;
- (2) a destruction policy;
- (3) a storage policy with respect to historical and current Records (whether tangible, electronic or otherwise);
- (4) a security policy with respect thereto; and
- (5) a system for accessing the Records as needed for (i) Vendor and its Subcontractors to perform the Delegated Activities and the obligations to provide access thereto in connection with a public documents request, a transition to a Successor, any Audit, or any other purpose for which the State desires to have access to such Records, and (ii) the State to perform the State Retained Activities.

#### **9.1.4** *Pre-Existing Records*

Except as otherwise provided in this Section, the State (and not Vendor) shall be responsible for creating, maintaining, storing and protecting all Records that pertain to periods prior to the Service Commencement Date (“**Pre-Existing Records**”), other than the Pre-Existing Records which the State and Vendor mutually agree are needed for Vendor’s performance of the Delegated Activities (“**Designated Pre-Existing Records**”). To the extent a federal auditor requires access to such Pre-Existing Records (e.g., for the purposes of ascertaining the program error rates), Vendor and the State shall work together to locate and provide such Pre-Existing Records to the federal auditor. The State and Vendor shall establish mutually acceptable processes for identifying and making available to Vendor and appropriate Subcontractors any Designated Pre-Existing Records needed by any of them to perform the Delegated Activities. During such time as Vendor or any Subcontractor has possession or control of any Designated Pre-Existing Records (or any other Pre-Existing Records), Vendor shall use and shall cause such Subcontractors to use, commercially reasonable methods to maintain, store and protect all such Pre-Existing Records in their respective possession or control. Vendor shall notify the State when any Designated Pre-Existing Records in the possession or control of Vendor or any Subcontractors are no longer needed to

perform the Delegated Activities. Promptly thereafter, the State shall provide instructions to Vendor for the return of such Designated Pre-Existing Records to the State, at the State's expense, or, in lieu thereof, shall enter into mutually acceptable arrangements with Vendor for Vendor to continue to maintain and store such Designated Pre-Existing Records.

## **9.2 Document Access and Inspection**

### **9.2.1** *Access to Records and System*

- (1) Upon written request or authorization of the State, Vendor shall provide, and shall cause its Subcontractors to provide, the officials and entities identified in this Section with prompt, reasonable, and adequate access to any Records in Vendor's actual or constructive possession that are directly pertinent or reasonably related to the performance of the Services or other obligations within the Delegated Activities. Vendor shall provide such access wherever Vendor, or any other Person acting as agent for or on behalf Vendor in any way, maintains such Records. Vendor further agrees to provide such access in reasonable comfort and to provide any furnishings, equipment, or other conveniences deemed reasonably necessary to fulfill the purposes described in this Section. Vendor will require its Subcontractors to provide comparable access and accommodations. Nothing herein is intended to provide such additional officials and entities any independent rights to access the Records which they do not otherwise possess.
- (2) Upon proper request therefor and to the extent required by applicable Law, Vendor shall, and shall cause the applicable Subcontractor to, provide a Client and the Client's authorized representative reasonable right of inspection of, and a reasonable number of copies of, the documents provided by such Client in connection with applying for, obtaining and maintaining eligibility for the benefits available to such Client under the Programs; provided that nothing herein shall be deemed to be a waiver of any right, defense, privilege, or claim of the State, Vendor or any applicable Subcontractor with respect to any Records relating to the documents so requested.

### **9.2.2** *Purpose of Access Request*

Any request by the State or federal agencies for access to Records may be for any purpose related to this Agreement, including Audit, financial management review, and contract administration including IVV, and the making of copies, excerpts, or transcripts.

### **9.2.3** *Persons Authorized Access*

The access required under this Article 9 shall be provided to the following officials and/or entities:

- (1) Office of the Governor of the State of Indiana;
- (2) USDOA;
- (3) HHS;
- (4) Inspector General of the United States;
- (5) United States Department of Justice;
- (6) United States Comptroller General;
- (7) Office of Inspector General of the State;
- (8) Office of the Attorney General of the State;
- (9) Indiana State Budget Agency;
- (10) Indiana State Board of Accounts;
- (11) FSSA (including any of its divisions);
- (12) Indiana Office of Technology;
- (13) Indiana Department of Administration;
- (14) Any State or federal law enforcement agency;
- (15) A special or general investigating committee of the Indiana General Assembly;
- (16) Any Contract Administrator or other quality assurance contractor, engaged by or on behalf of the State for this Agreement; and
- (17) Any other Governmental Body identified by the State that has authority to conduct an Audit with respect to the Services or otherwise related to this Agreement.

Such access shall apply to the respective successor agency(ies) and official(s) of the foregoing and to the respective designees of the foregoing.

## 9.3 Audits Generally

### 9.3.1 *General Provisions*

- (1) Subject to any statutory or regulatory rights or authority to the contrary possessed by the applicable auditing entity, this Section 9.3 will apply to all Audits pursuant to this Agreement. Any Audit by FSSA or by any Contract Administrator acting on behalf of FSSA shall be reasonably related to the performance by Vendor or any Subcontractor of the Services, the Delegated Activities, or their performance under this Agreement, any Material Agreement or any Subcontract. Nothing herein shall be deemed to be a waiver of the respective rights of Vendor or any Subcontractor to assert any applicable privilege or any right to protect their confidential and proprietary assets.
- (2) Other than as required by any Law that is statutory, or embodied in the Indiana Administrative Code (“**IAC**”) or any federal regulations, or by order of any court or other adjudicative body of competent jurisdiction:
  - (A) Vendor and Subcontractors shall not be required to provide access to any non-public information of Vendor or Subcontractors that relate to Vendor’s or Subcontractors’ (i) costs (other than to the extent that any pricing methodology under this Agreement is expressly based on a cost reimbursement basis), (ii) other customers or contractors, or (iii) internal or external audits (except as set forth in Section 9.9.2);
  - (B) Audits and other information requests and disclosures shall be subject to the intellectual property and confidentiality provisions of this Agreement and Vendor’s and Subcontractors’ reasonable security requirements;
  - (C) Audits may not be conducted on a contingency fee basis; and
  - (D) Vendor and any applicable Subcontractor shall not be required to provide any confidential or proprietary assets or information to any of the Persons identified on Schedule 20; provided that (i) none of the foregoing shall be deemed to restrict or limit the right or authority of any of the Persons identified in Section 9.2.3 to request any such information, and (ii) Vendor expressly reserves all rights, defenses and privileges to protect against the disclosure of such information.

### **9.3.2**      *Notice*

The State will provide Vendor with reasonable prior notice of an Audit, where the State Project Director or the State Project Manager has actual knowledge that such Audit will be conducted and giving such notice is feasible and appropriate and would not be contrary to, defeat the purpose of, or prejudice the conduct of the applicable Audit, but without notice if the State determines in its discretion that such adverse impact can reasonably be anticipated. The State will use reasonable efforts to ensure that the Audit will be conducted in a manner so as not knowingly to create a material risk of harm to persons or property.

### **9.3.3**      *Maintenance of Records*

Subject to Section 9.1.4, during the Term and for the time periods required by the Records Regulations from the Services Termination Date, upon the request of the State and at Vendor's expense, Vendor will make, and will require its Subcontractors to make, available to the State, or any Person identified in Section 9.2.3 that is conducting the relevant Audit, a reasonable number of copies of Records relative to the Services in Vendor's or the applicable Subcontractor's possession or control and which Vendor has not already returned to the State as may be relevant with respect to each Audit or otherwise reasonably related to the State's rights under this Agreement (provided that if copies are not permitted by applicable Law, then the originals of such Records).

### **9.3.4**      *Audit Access*

Upon request of the State, and in connection with any Audit, Vendor will promptly provide, and will cause its Subcontractors, agents, representatives, or any other person acting on behalf of Vendor to provide, promptly to such auditors, inspectors and examiners as the State may, from time to time designate, access to (i) Service Locations, facilities, or installations, in each case, to the extent used to provide the Services, (ii) the System, and (iii) the State Software and the State Client Data if stored on Vendor's equipment or the System.

### **9.3.5**      *Audit Assistance*

Vendor will cooperate fully with the State in the conduct of any Audit, including providing all Records in Vendor's actual or constructive possession that are requested by the State. Vendor must provide as part of the Services any assistance that such auditors and inspectors reasonably may require to complete any Audit and must cooperate in all reasonable respects with such auditors, inspectors and examiners.

### **9.3.6**      *Subcontractor Requirements*

Vendor covenants that it will include in any Subcontract a clause concerning the authority of the State, its designees and any of the officials and entities identified in Section 9.2.3 to investigate and to perform an Audit of funds received from the State by Subcontractors, either directly or indirectly through Vendor, and the requirement to cooperate with each Audit.

## **9.4**      Operational Audits

### **9.4.1**      *Annual Independent External Audit*

Without limiting any other provisions of this Article 9, to comply with Laws of the State, the State may contract with a Medicaid Auditor to perform annual independent external financial and performance audits of certain Medicaid vendors used by the State in the State's operation of the State Medicaid program. The Medicaid Auditor shall deliver to the State and Vendor a report of such Medicaid Auditor's findings and recommendations within thirty (30) calendar days of the close of each Audit. The expense of such Audit shall be paid promptly by the State.

### **9.4.2**      *Auditor Requests for Information*

Vendor understands that the Medicaid Auditor will make specific inquiries of Vendor's management for information, including financial information, relating to this Agreement and the Services. Vendor understands that as part of the Medicaid Auditor's audit procedures, the Medicaid Auditor may request, and, if requested, Vendor's management will provide to the Medicaid Auditor, a representation letter that acknowledges management's responsibility for compliance with the terms of this Agreement and provides a responsive, true, and accurate response to any reasonable requests of the Medicaid Auditor that are reasonably related to this Agreement and to the Audit being conducted by such Medicaid Auditor, subject to Vendor's reservation of all rights.

### **9.4.3**      *Vendor Representations During Audit*

Vendor understands and agrees that the Medicaid Auditor will also request that Vendor's management confirm certain representations made to the Medicaid Auditor during the Audit. The responses to those inquiries, and the related written representations of management required by generally accepted auditing standards, are part of the evidential matter that the Medicaid Auditor will rely on in preparing its Audit report.

### **9.4.4**      *Audit Software*

As part of the Services, Vendor must use such audit software as the State or its designees may provide to Vendor from time to time during the Term.

## 9.5 Federal Audits

From time to time and as required by Law, Vendor will submit to and participate in Audits by, and generally fulfill any and all requests for production of Records by any Governmental Body having jurisdiction over or regulatory authority with respect to the Services or any of the Programs, including HHS's Centers for Medicare and Medicaid Services, the Office of Inspector General of the United States, the USDOA Food and Nutrition Services, the United States Comptroller General and other federal departments or agencies or their agents, which regulate, oversee or govern any of the Programs for which the State receives federal financial participation, and for which, pursuant to this Agreement, Vendor has any duty or responsibility.

## 9.6 State Audits and Investigations

Vendor acknowledges that it may be required to submit to an Audit of funds paid through this Agreement and to any investigations into or with respect to the use of such funds as the State may request, including (i) an Audit conducted in accordance with IC 5-11-1 *et seq.* and audit guidelines specified by the State, and (ii) an Audit conducted in accordance with OMB Circular A-133. The Parties acknowledge that, as between the Parties, Vendor and the Subcontractors are "vendors" within the meaning of OMB Circular A-133.

## 9.7 Contract Administration

Vendor acknowledges that the State shall have the right to engage, at the State's expense, one or more third party contractors ("**Contract Administrator**") to (i) provide to the State independent, objective assessments and ongoing oversight of the Modernization Project (including the Transition and the Services) during the Term to determine compliance with specified requirements of this Agreement, (ii) provide to the State recommendations based on experience and "best practices" to address potential and actual risks to the Modernization Project, and (iii) otherwise assist the State in administering this Agreement. Vendor acknowledges that the Contract Administrator will be independent of Vendor and will report to and take direction solely from the State. Vendor shall cooperate fully with the Contract Administrator in the performance of such Contract Administrator's duties.

## 9.8 Inspection and Observation Rights

The State shall have the right at all reasonable times to inspect and observe the Service Locations and other locations or facilities of Vendor or the Subcontractors to the extent utilized in providing the Services and any other locations, if any, at which any Client Records or State Records are maintained or stored (but only to the area in which such Records are maintained or stored).

## **9.9** Corrective Actions

### **9.9.1** *Findings of Noncompliance*

Vendor shall, at its expense, take all steps necessary and sufficient to cause its or a Subcontractor's compliance with or correction of any finding (or threatened finding) of Vendor's or such Subcontractor's noncompliance with any terms of this Agreement in any Audit conducted under this Article. Vendor shall commence taking such steps promptly after receipt of notice or reports of such findings from the State. Such steps must include Vendor's delivery to the State of a Corrective Action Plan in accordance with Section 15.4 that addresses deficiencies identified in any Audit within thirty (30) days after Vendor's receipt of notice of any findings of noncompliance. If Vendor has a reasonable basis for disputing such findings, Vendor shall give notice to the State Project Manager within five (5) Business Days of Vendor's receipt of such findings, which notice shall include Vendor's basis for such dispute, such evidence or documentation supporting such basis as Vendor believes relevant to such dispute, and any proposed correction to such findings. Such dispute shall be addressed pursuant to the Dispute Resolution Procedures.

### **9.9.2** *Vendor Internal Audits*

During the Term (and, with respect to clause (i) below, for a period of two (2) years after the Services Termination Date), Vendor shall inform, and shall cause each Key Subcontractor to inform, the State that an internal audit includes (i) findings that may present a material financial or operational risk to the State regarding the delivery or performance of the Services identified in any internal audit of Vendor or such Key Subcontractor, or (ii) recommendations regarding improvements or changes to the processes used to deliver the Services to address the items in clause (i). At the State's reasonable request made promptly after receipt of such information, Vendor and each applicable Key Subcontractor shall make a presentation to the State at a meeting set at a mutually acceptable time by the State, Vendor and each applicable Key Subcontractor, within a reasonable time after such request. At such meeting, Vendor and the applicable Key Subcontractor(s) shall present a summary of the relevant findings and recommendations but shall not be obligated to provide the original or a copy of such internal audit, report or summary. The foregoing does not obligate Vendor or applicable Key Subcontractor(s) to violate any confidentiality obligations owed to any third parties.

## **9.10** Requests for Production of Documents

If Vendor is presented with a request for production of documents by any Governmental Body having jurisdiction over Vendor in connection with a Proceeding related to this Agreement or the Services (whether or not Vendor or the State is a party thereto) or with a *subpoena duces tecum* regarding any documents or Records which may be in its



possession or control by reason of this Agreement, Vendor shall give prompt notice to the respective general counsel for FSSA and IDOA, with a copy to the Office of the Attorney General of the State of Indiana, in each case at the address specified in Section 21.1. The State reserves the right to contest such request or *subpoena* by any means available to it before such documents or Records are submitted to the court, a Governmental Body, or to a Person making the request; provided, however, that Vendor shall not be obligated to withhold such delivery beyond that time as may be ordered by the court or such Governmental Body or required by applicable Law, unless such *subpoena* is quashed or the time to produce is extended.

## **9.11 Public Access Obligations**

### **9.11.1 *Agreement Documents Disclosable***

Vendor acknowledges that this Agreement, and all Attachments, with the exception of information Vendor has properly designated as “Confidential,” may be subject to disclosure under APRA. Vendor shall comply with the procedures set forth in Section 9.11.5 for designating information “Confidential.”

### **9.11.2 *Vendor Response to Public Access Requests while Performing Services under this Agreement***

APRA applies to public records of any public agency. Vendor is a contractor of a public agency and will maintain Records for the benefit of the State under this Agreement. Therefore, unless otherwise instructed or authorized to do so in writing by the State, Vendor, Subcontractors and Project Employees, shall not, on their own initiative, provide documents or information to any person making an APRA request. Vendor shall immediately refer any person making an APRA request to the person designated by the State to respond to such APRA requests, and shall keep appropriate documentation of the date such request was referred to the State and to whom.

### **9.11.3 *Vendor’s Obligation to Cooperate with State’s Obligations under APRA while Performing Services Pursuant to this Agreement***

- (1) As of the Effective Date, (i) if an APRA request is made orally or a written request is hand-delivered, IC 5-14-3-8 requires the State to respond within twenty-four (24) business hours after the request was received, and (ii) if an APRA request is received by facsimile, mail, or email, IC 5-14-3-8 requires the State to respond within seven (7) days after the request was received.
- (2) If the State receives an APRA request for information in the possession of Vendor, it shall notify Vendor of the request in writing. Vendor shall promptly forward to the State all non-exempt documents within Vendor’s possession responsive to the request, taking such

precautions as are required under this Agreement or APRA for the transmission of Confidential Information. If Vendor does not have in its possession any documents responsive to the APRA request, Vendor shall certify to the State that it has no information responsive to the request. Vendor shall cooperate fully with the State in the State's obligations under APRA, including the timeliness of any response to an APRA request. This obligation is in addition to, and not in lieu of, any obligations Vendor has elsewhere in this Agreement to provide the State access to Records in Vendor's possession.

**9.11.4** *Records Excepted from APRA Disclosure at the Discretion of the State*

In connection with the performance of Services pursuant to this Agreement, the State declares, without limitation of the exercise of the State's discretion under APRA to make any subsequent declarations, that Records and information described in IC 5-14-3-4(b) (8) [certain personnel information]; (10) [administrative or technical information that would jeopardize a record keeping or security system]; (11) [computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility] shall be excepted from APRA disclosure.

**9.11.5** *Responses to APRA requests for Vendor's Confidential Information*

If the State receives an APRA request that relates to information or documents in the possession of the State related to Vendor's or any Subcontractor's intellectual property, trade secrets, or other proprietary rights, the State shall promptly forward such request to Vendor for response. Vendor shall designate in writing which of those documents, if any, Vendor considers to be Confidential Information or otherwise excepted from public disclosure requirements and state with specificity the factual or legal basis for objecting to the disclosure of such documents. Vendor agrees and acknowledges that only information falling within a specific exemption permitted under IC 5-14-3-4 shall be designated as Confidential. Vendor shall mark each page of a document considered to be Confidential Information as "Confidential" or similar designation. The State shall promptly review the basis for Vendor's claim of confidentiality, and shall not disclose the documents subject to Vendor's claim if the State concurs with such claim, provided that if the State determines that its obligations under APRA require such disclosure, the State shall promptly notify Vendor of such determination and will not make such disclosure if Vendor or a Subcontractor obtains, prior to the expiration of the applicable timeframe to respond to such request, either an opinion from the Public Access Counselor that such disclosure is not required or a protective order or other relief from any court of competent jurisdiction in the State of Indiana preventing such disclosure.

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[Remainder of this page intentionally left blank]

## ARTICLE 10 PERSONNEL OBLIGATIONS

### 10.1 General Personnel Obligations

#### 10.1.1 *Staffing Levels*

The Employer shall employ and dedicate to the Modernization Project a sufficient number (in the aggregate) of Project Employees adequately trained to perform the Services. Vendor will bear the risk of the adequacy of the staffing levels and capabilities of the Project Employees. The State will employ a reasonably sufficient number of personnel or other service providers to fulfill the State's obligations to perform the State Retained Activities.

#### 10.1.2 *Status of Project Employees*

- (1) Vendor acknowledges that anyone employed by Vendor, the Employer or another Subcontractor to fulfill the terms of this Agreement (each a "**Project Employee**" and, collectively, the "**Project Employees**") is an employee of, is and will remain under the sole direction and control of, Vendor, the Employer or such Subcontractor, as the case may be, and is not an employee or under the direction or control of the State.
- (2) There is no employment relationship between any Project Employee and the State. Vendor will, or will cause the Employer and each applicable Subcontractor to manage, supervise and provide direction to Project Employees and cause them to comply with Vendor's obligations and restrictions under this Agreement. Vendor will make Project Employees aware of, and cause them to comply with, the State's safety and security policies while they are performing Services at State facilities or accessing the State Client Data or Systems, provided Vendor is given copies of or access to such policies in advance with opportunity for review and such policies do not materially expand or change Vendor's obligations under this Agreement. As between Vendor and the State, Vendor is responsible for all wages, salaries and other amounts due Project Employees, and for all tax withholdings, unemployment insurance premiums, retirement benefits and welfare plan contributions, and other employer obligations with respect to Project Employees. Vendor is responsible for the acts and omissions of Project Employees in the course of the applicable Project Employee's employment in the performance of the Services and this Agreement. The State shall be responsible for all employment-related matters and issues only with respect to its employees, including the Retained Employees.

#### **10.1.3**     *No Agency*

Except as expressly provided in this Agreement, neither Vendor, the Employer, any Project Employee, nor any Subcontractor may act in any sense as agents or representatives of the State.

#### **10.1.4**     *Employment Claims*

Vendor acknowledges that, as between Vendor and the State, any Claims of any individual arising out of the employment or alleged employment of such individual by Vendor, the Employer or a Subcontractor with regard to the Modernization Project (including Claims of discrimination arising out of the actions of Vendor, the Employer or any Subcontractor asserted against the State, Vendor, the Employer or a Subcontractor or any of their respective officers or agents) are, as between the State and Vendor, the sole responsibility of Vendor and are not the responsibility of the State. Vendor understands that any person who alleges a Claim arising out of employment or alleged employment by Vendor or a Subcontractor will not be entitled to any compensation, rights, or benefits from the State (including tenure rights, medical and hospital care, sick and vacation leave, paid time off, severance pay, or retirement benefits). Vendor will cause Project Employees (including the Transferred Employees) to be informed that the Project Employees will have no right to employment-related Claims against the State arising on or after the date of their hire by Vendor, the Employer or any Subcontractor.

#### **10.1.5**     *Turnover Minimization*

The Parties acknowledge that it is in their mutual best interests to keep the turnover of Project Employees to a reasonably low level, and Vendor will use Commercially Reasonable Efforts to do so. Accordingly, if the State believes that the turnover of Project Employees is excessive and so notifies Vendor, Vendor will provide the State with data concerning such turnover, and Vendor will meet with the State to discuss the reasons for, and impact of, the turnover. If appropriate, Vendor will submit to the State its proposals for reducing the turnover, and the Parties will mutually agree on a program to bring the turnover down to an acceptable level. Notwithstanding any transfer or turnover of Project Employees, Vendor remains obligated to perform the Services in compliance with the requirements of this Agreement.

#### **10.1.6**     *Training*

Vendor will, or will cause the Employer and each applicable Subcontractor to, properly train all Project Employees assigned to perform any of the Delegated Activities and to be qualified for the functions they are to perform. Vendor will, or will cause the Employer and each applicable Subcontractor to, provide (i) such training of the Transferred Employees as required by the Initial

Transition Plan and the Transition Plan, and (ii) training of all Project Employees as contemplated by the Procedures Manuals.

## 10.2 Employment Terms

### 10.2.1 *Procedures and Timing*

As of the Service Commencement Date, all Affected Employees who have accepted an offer of employment from the Employer (each a “**Transferred Employee**”) shall be hired by the Employer and thereafter shall no longer be considered employees of the State. Each Transferred Employee shall be re-badged as an employee of the Employer and shall be instructed to surrender his or her state employment identification to the State in accordance with the State’s standard practices.

### 10.2.2 *Layoffs or Reductions in Force*

As long as the State does not terminate this Agreement or materially reduce the Services, for the period commencing on the Service Commencement Date and ending twenty-four (24) months thereafter (the “**Protected Employment Period**”), no Transferred Employee shall be terminated by the Employer nor shall any such Transferred Employee be subject to a layoff or reduction in force by the Employer or be subject to a transfer to any other Subcontractor by the Employer without the consent of such Transferred Employee and without reasonable prior notice to the State of any proposed layoff, reduction in force or transfer; provided, that (i) the foregoing shall not apply to any Transferred Employee who is no longer a Project Employee due to the request of the State; and (ii) each Transferred Employee shall be subject to the normal and customary disciplinary policies of the Employer which may include progressive discipline involving suspensions and termination of employment. During the Protected Employment Period, up to four hundred (400) Transferred Employees may be offered a voluntary transfer by the Employer to Arbor, and no Transferred Employee shall be terminated or disciplined by the Employer solely because such Transferred Employee declines to be transferred to Arbor.

### 10.2.3 *Minimum Benefits*

The terms of employment relating to compensation levels, paid time off programs, and other general compensation and benefit terms, and of all employee benefits plans for which Transferred Employees may be eligible (“**Employee Benefit Plans**”), are set forth on Schedule 12 [Employee Benefit Plans for Transferred Employees] (collectively, “**Compensation and Benefit Terms**”). Vendor represents and covenants, and the State acknowledges, that the Compensation and Benefit Terms to be offered to Affected Employees are (i) as to compensation, at levels, on an hourly basis, not less than those that the State would have provided to the Affected Employees on the Service

Commencement Date, and (ii) as to benefits, generally comparable, on an overall basis, to the benefits package the State would have provided to the Affected Employees on the Service Commencement Date (which package has been described to Vendor as of the Effective Date), in either case, as if such Affected Employees had remained employees of the State. In determining comparability of the Compensation and Benefit Terms, the Parties considered that (i) the medical insurance plan offered by the Employer on the Service Commencement Date is comparable (from an economic value perspective) to the medical insurance plans to be offered by the State on the Service Commencement Date, and (ii) all other Compensation and Benefit Terms, in the aggregate, have an economic value that is comparable to the economic value of the other components of the State's compensation and benefits package. The analyses of the Compensation and Benefit Terms took into account any one-time or recurring supplemental payments made in order to achieve comparability, as set forth in Schedule 12. The Employer's commitment to provide comparability of salary on an hourly basis shall be for the Protected Employment Period, and any recurring supplemental payments offered to achieve comparability of the Employee Benefit Plans shall continue as to a particular Transferred Employee for so long as such Transferred Employee continues to be employed by the Employer in connection with providing the Services. All Transferred Employees will receive credit for all of their years of service with the State for purposes of eligibility and vesting for any Employee Benefit Plans sponsored by the Employer.

#### **10.2.4**     *Representation Regarding Employee Benefit Plans*

Vendor represents and warrants that, to its Knowledge, (i) after inquiry to the Employer, all of the Employee Benefit Plans under which the Transferred Employees are eligible to participate have been maintained, in all material respects, in accordance with their respective terms and all provisions of applicable Law, (ii) all amendments and actions required to bring each of such Employee Benefit Plans into conformity with all of the applicable provisions of ERISA and other applicable Laws have been made or taken except to the extent that such amendments or actions are not required by Law to be made or taken until a date after the Effective Date, and (iii) all such Employee Benefit Plans which are subject to the requirements of Section 409A of the Code, to the extent such plans are not "grandfathered" under that Section, comply with the requirements of Section 409A of the Code and have been administered in compliance with therewith.

#### **10.2.5**     *Discipline Procedures*

The employers of the Transferred Employees, including the Employer, will maintain, as part of their respective employment policies and practices, commercially reasonable procedures for addressing employee grievances and disciplinary issues. These procedures may vary by employer, are subject to change from time to time, but will continue to exist during the Term and be

available to the Transferred Employees. The State acknowledges that such policies of the Employer in effect on the Effective Date are deemed to be commercially reasonable.

**10.2.6**      *Vacation and Paid Time Off Arrangements*

To the extent provided in the State's promulgated rules, any vacation, sick pay or paid time off accrued by a Transferred Employee while employed by the State shall be paid by the State. All Transferred Employees shall receive credit from the Employer for their years of service with the State for purposes of future vacation, sick pay or paid time off earned under the Employer's policies; provided, however, that in no event shall a Transferred Employee receive fewer vacation days with the Employer than the number of vacation days per year such employee received as of the Service Commencement Date.

**10.2.7**      *Relocation Assistance*

If a Transferred Employee is assigned to a Service Location that is more than fifty (50) road miles from his or her existing work location with the State, such Transferred Employee will be entitled to receive a relocation allowance (at the Employer's expense) in an amount equal to Two Thousand Dollars (\$2,000.00), upon submission of reasonable proof from such Transferred Employee that he or she relocated his or her residence to a location which is less than fifty (50) road miles from such assigned Service Location.

**10.2.8**      *Career Advancement*

In order to provide the Transferred Employees with opportunities for career advancement and employment outside of the Modernization Project, the Transferred Employees will, during their employment with the Employer, be eligible for and receive access to the career path opportunities, including internal job postings, with the Employer and their respective Affiliates to the same extent as provided to other employees of the Employer or their respective Affiliates who are not employed in connection with the Modernization Project.

**10.2.9**      *Expiration of Protected Employment Period*

With respect to any Transferred Employees employed by the Employer on the last day of the Protected Employment Period who become Surplus Employees during the twenty-four (24) months immediately after the conclusion of the Protected Employment Period, (i) the Employer will provide such Surplus Employees with at least ninety (90) days prior notice of the effective date of their employment termination, and (ii) prior to the effective date of the applicable employment termination, the Employer or one of its Affiliates shall offer such Surplus Employees one employment opportunity to fill an open position within the Employer's or such Affiliate's project sites (not related to



the Services provided herein) within the State of Indiana for which such Surplus Employee has provided a complete and timely application and meets or exceeds the published qualifications for such opportunity, and such employment opportunity remains available. Vendor (or the other Subcontractors) may, solely within their discretion (respectively), offer such Surplus Employees a job opportunity within Vendor or the Subcontractor's companies (respectively), instead of, or in addition to, the Employer's or its Affiliates' offer. Notwithstanding anything to the contrary in this Agreement, the terms and conditions of the employment opportunities set forth in this Section 10.2.9 will be those that the applicable employer (including the Employer or its Affiliates) chooses to offer in its discretion.

### **10.3 Recruitment Restrictions**

#### **10.3.1** *Non-Solicitation of State Employees*

Vendor will not knowingly recruit, and will cause its Subcontractors to not knowingly recruit, for employment or employ in the State of Indiana for the performance of the Services any current or former employee of the State if employment by Vendor would violate any Law restricting employment following termination of employment with the State. Notwithstanding the foregoing, this Agreement will not prohibit solicitations through general public advertising or other publications of general circulation. The State represents that the Affected Employees are not subject to any existing Laws that would prevent their orderly transfer and acceptance of employment offers from the Employer in order to perform the Services under this Agreement; provided that the foregoing representation shall not apply to the ethical limitations of applicable Laws of the State with respect to any of the Affected Employees who were involved in the administration, negotiation or award of this Agreement.

#### **10.3.2** *Non-Compete Agreement Waivers*

Without limiting the covenants in Section 7.2.2, if the State determines that it would be in the State's best interest to hire a Project Employee of Vendor or any Primary Subcontractor, Vendor will waive, and will cause the Employer or applicable Primary Subcontractor to waive, irrevocably, any restriction on such Project Employee from any non-compete agreements that may be in effect with respect to employment by the State. Any such waiver or release will be at no cost to the State or the Project Employee.

### **10.4 Conduct Standards**

#### **10.4.1** *Conduct of Project Employees*

While performing the Services, each Project Employee must (i) not engage in unlawful conduct, (ii) comply with the applicable provisions of this

Agreement (including Section 7.1.3) and any Laws governing personal conduct applicable to such Project Employee, the violation of which can reasonably be expected to have an adverse effect on the integrity of the Programs, (iii) comply with the State's requests regarding personal and professional conduct generally applicable to the Service Locations, and (iv) otherwise conduct himself or herself in a businesslike and professional manner. If the State determines in good faith that a Project Employee is not conducting himself or herself in accordance with this Section, the State may provide Vendor with notice and documentation concerning such conduct. Upon receipt of such notice, Vendor must promptly investigate, or cause the applicable Subcontractor promptly to investigate, the matter and take appropriate action that may include (x) corrective or disciplinary action, or (y) removal or suspension of the Project Employee from the Modernization Project.

#### **10.4.2**     *Replacement of Project Employees*

- (1) At the request of the State, or in the exercise of Vendor's discretion, Vendor shall replace, or cause the Employer or the applicable Subcontractor to replace, any Project Employee (i) who is not adequately performing his or her assigned material responsibilities, (ii) who in the reasonable opinion of the State Project Manager, after consultation with Vendor or as determined by Vendor in its discretion, is unable to work effectively with the members of the State's staff or within the Modernization Project, or (iii) for other good cause.
- (2) Vendor shall cause the Employer or the applicable Subcontractor to replace any Project Employee of whom the Vendor's Senior Program Executive has Knowledge or has received notice from the Employer or the applicable Subcontractor that such Project Employee has engaged in any misappropriation or misuse of any Protected Information. Vendor will include in each applicable Subcontract the requirement that the Employer or the applicable Subcontractor shall notify Vendor's Senior Program Executive of such matters promptly after such matters become known by the Employer or the applicable Subcontractor.

#### **10.4.3**     *Qualification*

In the event of replacement of a Project Employee pursuant to this Section 10.4, Vendor will provide, or cause the Employer or the applicable Subcontractor to provide, a replacement Project Employee with comparable or greater skills and qualifications as soon as reasonably practicable and will do so in a manner that does not disrupt, in a material manner, the timely and effective delivery of the Services or performance of the Delegated Activities.

## **10.5 Key Vendor Positions and Key Personnel**

### **10.5.1** *Assignment Notification*

Key Vendor Positions and Key Personnel as identified on the Effective Date are set forth in Schedule 13 [Key Vendor Positions and Key Personnel], each of which and whom are approved as of the Effective Date. Before the initial and each subsequent assignment of an individual to a Key Vendor Position, Vendor will notify the State of the proposed assignment, introduce the individual to the State Project Manager and, consistent with Vendor's or the Key Subcontractor's (as applicable) personnel practices, provide the State a curriculum vitae and other information about the individual as reasonably requested by the State. Upon request by the State, Vendor will provide the State Project Manager an opportunity to interview the individual prior to the effectiveness of such assignment. If the State in good faith objects to the proposed assignment, the Parties will attempt to resolve the State's concerns on a mutually agreeable basis. If the Parties have not been able to resolve the State's concerns within five (5) business days following the State's objection, Vendor may not assign the individual to that position and must propose the assignment of another suitably qualified individual.

### **10.5.2** *Re-Designation of Key Vendor Positions by the State*

The State, with the consent of Vendor, may from time to time identify additional positions or change the designation of a position as a Key Vendor Position.

### **10.5.3** *Key Personnel Changes*

Vendor will give prompt notice to the State, and when reasonably possible at least ninety (90) days prior notice, of a proposed change in any Key Personnel. Replacement of any Key Personnel will be subject to the State's review and approval of the replacement individual. Vendor will discuss with the State any objections the State may have to such replacement. To the extent practicable, Vendor will arrange, at no charge to the State, for the proposed replacement to work side-by-side with the individual being replaced during a portion of the notice period to effectuate a seamless transfer.

### **10.5.4** *Residency Requirement for Key Personnel*

Other than those Key Personnel whose positions are described as transitional on Schedule 13 [Key Vendor Positions and Key Personnel], each person filling a Key Vendor Position shall maintain his or her principal residence within the State of Indiana while holding such position (allowing for a reasonable transition for any person who is first appointed to a Key Vendor Position).

#### **10.6** Applicability to an Employer

To the extent that the employer of any Project Employee is not Vendor, Vendor will contractually require the performance by such employer of the duties required of Vendor under this Article 10. Notwithstanding the foregoing, Vendor remains ultimately responsible for such performance of the duties under this Article 10 and Section 3.3.

\* \* \* \* \*

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**ARTICLE 11**  
**INTELLECTUAL PROPERTY AND INFORMATION TECHNOLOGY**

**11.1** Ownership and License of Software

**11.1.1** *License and Other Rights to Software*

(1) Vendor Software

During the Term and Disengagement Period to the extent necessary for the State to receive the Services, Vendor grants to the State and the State accepts from Vendor, a non-exclusive, fully-paid up, royalty-free, non-transferable right and license to use and display, any Vendor Software, together with associated Documentation and End-User Materials, that is used by Vendor to provide the Services. Notwithstanding anything to the contrary, nothing in this Section or elsewhere in this Agreement shall be construed as assigning, selling, conveying, or otherwise transferring any ownership rights or title in (i) Vendor Software, (ii) any Vendor or Subcontractor Pre-Existing Works or independently developed intellectual property, materials, software, methodologies, tools, or inventions, that are developed, conceived or created outside of the scope of this Agreement, or (iii) any Derivative Works to any of the foregoing, to the State or any other Person.

(2) Third Party Software

Except as otherwise provided in this Section 11.1.1(2), Vendor agrees to obtain, for the benefit of the State, from any Third Party Vendor or Subcontractor that provides Vendor Third Party Software to Vendor for use in providing the Services, a license grant similar to the license granted by Vendor pursuant to Section 11.1.1(1). If a Third Party Vendor does not agree to grant the license required above, then prior to utilizing any such Vendor Third Party Software, Vendor agrees to provide to the State copies of any license agreement for which the Third Party Vendor is agreeable to allow the State to review the license agreement to determine that the license grant set forth in such agreement provides the State with all necessary rights consistent with the short and long-term goals of this Agreement and is otherwise acceptable. Vendor shall assist the State to obtain such a license on commercially reasonable terms and shall confirm to the State that the Third Party Vendor product is, in its opinion and based on information reasonably available to Vendor in its business as a service provider, suitable for use in connection with the Services and may not be readily replaced with an alternative product from another provider. Subject to the terms and conditions of this Section 11.1.1(2), Vendor shall not use the Vendor Third Party Software in providing the Services without first

obtaining the State's prior written consent. Notwithstanding the foregoing, the Vendor Third Party Software listed in Schedule 21 [Vendor Third Party Software] is deemed approved by the State. Subject to the terms of the applicable license grant from the Third Party Vendor, at the end of the Term and Disengagement Period, Vendor shall assign to the State any license grant for the Third Party Software, if such license grant is not made directly to the State, subject to the right of Vendor to use such licenses in the performance of the Services. The State, at its expense, shall be responsible for obtaining all rights, licenses, and consents necessary for Vendor and Subcontractors to use all State Software and State Third Party Software, including associated Documentation and End-User Materials, for the performance of the Services.

(3) Software Maintenance

Vendor will, during the Term, maintain any and all Software products provided by Vendor or Subcontractor, including Vendor Third Party Software, in the performance of the Services (excluding State Software and State Third Party Software) at their most current version or no more than one version back from the most current version. However, Vendor may make written request to the State for a waiver from this requirement if it can establish to the State's reasonable satisfaction that (i) certain versions, in Vendor's reasonable judgment, would be likely either to prevent the State from using any functions, in whole or in part, or to cause or result in any deficiencies in the performance of the Services, and (ii) the version being utilized will be maintained in accordance with customary standards and will not pose any material risk to the Services.

(4) Rights after Termination

As requested by the State, Vendor shall obtain, grant, assign or otherwise transfer to the State the following rights and licenses at no additional cost for one time license charges (other than with respect to (D) below) upon Termination:

- (A) Vendor shall assign to the State its licenses to any commercially available Third Party Software deployed within the State's IT environment that is licensed to Vendor solely for Vendor's performance of the Services for the State and that is licensed for a one-time charge. Vendor shall assign to the State its licenses to any commercially available Third Party Software deployed within the State's IT environment that is licensed by Vendor solely for Vendor's performance of the Services for the State and that is licensed for a periodic fee, provided that the

State agrees to assume responsibility for such periodic fee upon the expiration of the Term.

- (B) Vendor shall grant the State a limited, irrevocable, fully paid-up (only as to any one time license charges), non-exclusive, royalty free (only as to any one time license charges), transferable (only to a Successor solely to provide services similar to the Services to the State), worldwide license to use and display, in a volume or amount equal to the highest number of copies or server installations utilized by Vendor during the last eighteen (18) months of the Term if no material reductions in Services scope occurred during such last eighteen (18) months of the Term to provide the Services (e.g. – one hundred (100) end-user licenses, five (5) server installations), any commercially available Vendor Software that is used by Vendor to provide the Services during the Term so that the State, or a duly appointed third party acting on the State's behalf, may continue to provide the Services contemplated by this Agreement. If there were material reductions in Services scope during the last eighteen (18) months of the Term, the “highest number of copies or server installations” in the foregoing sentence shall be measured only during the period of reduced Services scope. Vendor agrees to provide the State with additional numbers of licenses to any commercially available Vendor Software described above, as may be required by the State or a third party providing the Services under the State's control, under Vendor's then-standard terms and conditions with the State for commercially available Vendor Software (for clarity, at the State's expense, including for any one time license charges). Nothing in this subsection (B) shall be construed as requiring Vendor to provide support or maintenance in connection with any Vendor Software licensed under this subsection beyond the Term.
- (C) Vendor shall grant the State a limited, irrevocable, fully paid-up, non-exclusive, royalty free, transferable (only to a Successor solely to provide services similar to the Services to the State), worldwide license to use and display, any non-commercially available Vendor Software in a volume or amount equal to the highest number of copies or server installations utilized by Vendor during the last eighteen (18) months of the Term if no material reductions in Services scope occurred during such last eighteen months of the Term to provide the Services, provided that this subsection (C) shall not require Vendor to grant the State a license to non-commercially available Vendor Software that is not deployed in the State's IT environment to provide the Services or that is not otherwise

necessary for the State to maintain Service continuity upon expiration or termination of the Agreement. If there were material reductions in Services scope during the last eighteen (18) months of the Term, the “highest number of copies or server installations” in the foregoing sentence shall be measured only during the period of reduced Services scope. Vendor shall provide the State with additional licenses to any of the foregoing non-commercially available Vendor Software, as may be required by the State to provide the Services or as may be required by a Successor solely to provide services similar to the Services to the State, under commercially reasonable terms. Nothing in this subsection (C) shall be construed as requiring Vendor to provide support or maintenance in connection with any Vendor Software licensed under this subsection beyond the Term.

- (D) Vendor shall use Commercially Reasonable Efforts to obtain a license for the State to any Third Party Software deployed within the State’s IT environment and used to provide the Services that Vendor is not required to transfer to the State under this Section (e.g., Third Party Software used by Vendor to perform services for multiple customers or non-commercially available Third Party Software).
- (E) If requested by the State, the Parties shall mutually agree on applicable terms for Vendor's support and maintenance of any commercially available Vendor Software or non-commercially available Vendor Software that Vendor provides to the State under this Section after Termination.

#### **11.1.2**     *Developed Software*

##### **(1)**     Developed Vendor Software

- (A) The following Software developed pursuant to this Agreement by Vendor or its Subcontractors (alone or jointly with others) shall be considered “**Developed Vendor Software**”: (i) any Derivative Works of Vendor Software that constitutes a Pre-Existing Work; and (ii) any Derivative Works of Vendor Third Party Software provided by Vendor under this Agreement. As between the Parties, Vendor shall have all right, title and interest in and to Developed Vendor Software and all copies made from it.
- (B) Vendor hereby grants to the State a perpetual, worldwide, fully paid-up, non-exclusive, transferable (only to a Successor solely to provide services similar to the Services to the State),



worldwide license (i) to use all Developed Vendor Software (other than with respect to the Software described in clause (ii) of Section 11.1.2(2) which Vendor is not entitled to license to the State under Vendor's license with the third party software vendor and which the State is not entitled to use under its own license agreements with the third party) solely to provide services similar to the Services for itself, and (ii) to permit third parties to use all Developed Vendor Software (other than with respect to the Software described in clause (ii) of Section 11.1.2(2) which Vendor is not entitled under its license agreement with the third party software vendor to license to third parties unless such third parties are entitled to use such software under their own license agreements with the third party) that is developed specifically for use in the State's information technology environment, or that is otherwise necessary for the State to maintain Service continuity after transitioning responsibility for the Services to a third party, solely to provide services similar to the Services for the State.

(2) Developed State Software

- (A) The following Software developed pursuant to this Agreement by Vendor or its Subcontractors (alone or jointly with others) shall be considered "**Developed State Software**": (i) portions of Software which constitute Derivative Works of State Software provided by the State under this Agreement; (ii) portions of Software which constitute Derivative Works of, State Third Party Software provided by the State under this Agreement; and (iii) any Software not based on a Pre-Existing Work developed hereunder by Vendor or its Subcontractor as part of providing the Services contemplated by this Agreement and used in the System's production environment. As between the Parties, the State shall have all right, title and interest in and to the Developed State Software and all copies made from it both in Object Code and Source Code format.
- (B) Vendor hereby irrevocably assigns, transfers and conveys to the State, without further consideration, all of its right, title and interest in and to any invention(s), whether patentable or not, conceived and reduced to practice during the Term and embodied in Developed State Software. Vendor shall promptly notify the State of any such patent filings as it relates solely to invention(s) embodied in Developed State Software as set forth above. Any such patent(s) obtained by Vendor embodied in Developed State Software shall be obtained by Vendor in the name of the State of Indiana. Vendor shall execute any documents or take any other actions as may reasonably be

necessary, or as the State may reasonably request, to perfect the State's ownership of any patent(s) or pending application(s) covering any such invention(s) embodied in Developed State Software, without additional consideration.

- (C) Subject to the limitations with respect to State Confidential Information (other than information which would be deemed State Confidential Information solely due to coming within a category identified in the definition of Confidential Information), the State hereby grants Vendor an irrevocable, fully paid-up, non-exclusive, worldwide license to use, modify, distribute, and create Derivative Works of only that portion of Developed State Software that does not constitute a Pre-Existing Work of State Software (other than with respect to the Developed State Software described in subsection (B) of this Section 11.1.2(2) which the State is not entitled to license to Vendor under the State's license with the third party and which Vendor is not entitled to a license under its own license agreements with the third party) which includes the right to sublicense and otherwise permit third parties to do any of the foregoing. Subject to the limitations with respect to State Confidential Information (other than information which would be deemed State Confidential Information solely due to coming within a category identified in the definition of Confidential Information), the State shall grant contemporaneously with the assignment by Vendor, and hereby does grant to Vendor, a perpetual, worldwide, irrevocable, fully paid-up, non-exclusive license to make, have made, use, have used, sell, offer for sale, or distribute any portion of the Developed State Software that may be covered by any patent(s) obtained by Vendor pursuant to this Section 11.1.2(2) which includes the right to sublicense and otherwise permit third parties to do any of the foregoing. In the event that Vendor develops a Derivative Work to correct a defect or flaw in the Developed State Software licensed to Vendor pursuant to this Section, such Derivative Work shall be deemed to be Developed Vendor Software and shall be licensed to the State pursuant to Section 11.1.2(1)(B).

(3) Non-Software Materials

With respect to Non-Software Materials, each Party shall retain ownership in all Confidential Information and any other Pre-Existing Works owned by such Party that are incorporated into Non-Software Materials. Vendor hereby grants to the State an irrevocable, perpetual, worldwide, fully paid-up, non-exclusive license (i) to use, copy, modify, and create Derivative Works of Non-Software Materials solely to provide services similar to the Services for itself and (ii) to permit

third parties to use, copy, modify, and create Derivative Works of those Non-Software Materials that are developed specifically for use in the State's IT environment, or that are otherwise necessary for the State to maintain Service continuity after transitioning responsibility for Services to a third party, solely to provide services similar to the Services to the State. The State shall enter into a commercially reasonable non-disclosure agreement protecting Vendor's Confidential Information prior to providing any Vendor Developed Software or Non-Software Materials owned by Vendor to a third party, subject to any restrictions required by any federal or State Laws.

(4) Cooperation

Developed State Software shall be deemed "work made for hire" for the State for purposes of copyright law. If, and to the extent, any Developed State Software is not deemed "work made for hire" by operation of law, Vendor hereby irrevocably assigns, transfers and conveys to State without further consideration all of its right, title and interest in the copyrights in such Developed State Software. State and its assigns shall have the right to obtain and hold in their own name all copyrights in and to such materials. Vendor shall execute any documents or take any other actions as may reasonably be necessary, or as the State may reasonably request, to perfect the State's ownership of the copyrights in any such Developed State Software, without additional consideration. Nothing in this paragraph shall be deemed to affect a Party's ownership rights in Pre-Existing Works (including Software) including the ownership of any intellectual property rights therein.

**11.1.3** *State Participation*

The State shall have an absolute right to reasonably participate in the design, redesign, modification and day-to-day operation of the Services. The State shall have reasonable artistic, functionality and editorial control over any Developed Vendor Software and Developed State Software developed by Vendor or any Third Party Vendor that requires a graphical user interface, including without limitation, integration of all content, data, features and the look and feel of the graphical user interface. Subject to the Change Order Process, Vendor agrees to make any changes reasonably requested by the State to any Developed Vendor Software or Developed State Software.

**11.1.4** *Detailed Design Specifications*

Vendor shall, with the State's reasonable cooperation, develop detailed design specifications as it relates to the Developed Vendor Software and Developed State Software. With respect to Developed Vendor Software and Developed State Software, the detailed design specifications, where applicable, shall

include system flow charts, program descriptions, file layouts, report layouts and screen layouts. The detailed design specifications shall be delivered to the State in document and electronic form promptly after completion thereof (or of principal interior versions thereof). The State shall, in its reasonable discretion, have the authority to approve or disapprove of the detailed design specifications and shall have the right to suggest changes or appropriate modifications to the detailed design specifications.

**11.1.5** *Changes After Services Development*

After development of the Services is complete and the Services are fully operational, any material changes made to the functionality of the Services, other than as permitted in this Agreement, shall be made pursuant to the Change Order Process.

**11.1.6** *Code*

Vendor shall provide to the State, at the State's written request, in a suitable electronic format, a fully commented copy of any and all Source Code and Object Code for any Developed State Software developed under the terms and conditions of this Agreement. The State shall expressly have the right to use, modify, assign, copy and create Derivative Works based on any Developed State Software provided to the State pursuant to this Agreement. Vendor agrees to ensure that any Third Party Vendor providing Developed State Software shall agree to the terms and conditions of this Section.

**11.1.7** *Software Maintenance*

- (1) During the Term, except as provided herein or otherwise agreed, Vendor shall perform, and will cause Third Party Vendors of Vendor Third Party Software to perform, maintenance on any and all Software provided and used by Vendor in the provision of the Services, in accordance with applicable manufacturers' recommendations as necessary to provide the Services contemplated by this Agreement.
- (2) Except as provided herein or otherwise agreed in a Change Order, all fees, charges or expenses for maintenance to the Software provided and used by Vendor in the provision of the Services (including any increases therein and any such obligations to any Person, including any Third Party Vendor) are included in the Fixed Fee and shall be the sole responsibility of and paid for by Vendor.
- (3) With respect to any new third party maintenance agreements entered into by Vendor that are dedicated to the Services, Vendor shall use Commercially Reasonable Efforts to include in such agreements the ability to assign and have a Successor assume all obligations thereunder without cost by any Successor and without payment of any

fees or expenses for such assignment other than for periodic payments in commercially reasonable amounts for any periods beyond which the provider of such maintenance services has not been paid prior to the assumption thereof by a Successor.

#### **11.1.8**     *Proprietary Notices*

Vendor will include and reproduce the State's copyright and other proprietary notices and identifications provided by the State on any materials provided by the State that include such notices or identifications. The State will include copyright and other proprietary notices and product identifications on any portions of items owned by Vendor or a Subcontractor provided to the State that include such notices or identifications, as part of the Software, Vendor Software, Third Party Software or COTS.

#### **11.1.9**     *Virus Protection*

Vendor will not knowingly introduce, and will not knowingly permit the introduction by any Subcontractor of, any Viruses into the Services or any equipment, peripherals or networks that are used in performing the Services during the course of providing the Services or otherwise performing its obligations under this Agreement. Vendor will inform the State of any Virus infections on the System or any computers, peripherals or network to which the System is attached or linked promptly after becoming aware of such viruses.

#### **11.1.10**   *Liaison*

During the Term, Vendor shall provide a project director for information technology (the "**IT Director**") whose duties shall be to act as liaison between Vendor and the State as it relates to the Software used in the Services and shall provide the State with the identity and appropriate consent information for the IT Director.

### **11.2**     FSSA Proprietary Software

#### **11.2.1**     *Licenses Regarding FSSA Proprietary Software*

During the Term and the Disengagement Period, the State grants to Vendor and Subcontractors, and Vendor accepts from the State, a revocable and limited right to use FSSA Proprietary Software solely to facilitate and deliver the Services. This right shall include the right (i) to access, update, change and add to the State Client Data contained or stored in FSSA Proprietary Software for providing the Services, and (ii) to create, display and use Derivative Works based on State Client Data contained or stored in FSSA Proprietary Software as well as the right to develop Developed State Software that operate in conjunction with FSSA Proprietary Software as may be required or useful to deliver and provide the Services but not for any other

purpose. Vendor recognizes and agrees that the State shall own all right, title and interest in and to any Derivative Works created pursuant to this Section. To the extent not otherwise assigned or transferred in any other section of this Agreement, Vendor agrees to assign and hereby does assign, and agrees to obtain a similar assignment from any Third Party Vendor, all right, title and interest in and to any Derivative Work created based on any FSSA Proprietary Software or State Client Data to the State. The State represents that it possesses the necessary rights and interests in the FSSA Proprietary Software and the State Client Data to grant the license granted herein.

### **11.2.2** *ICES*

#### **(1)** Service Oriented Architecture (“**SOA**”) Based Interface to ICES

Vendor shall create a SOA-based interface to ICES and the Enterprise Services Bus (“**ESB**”) utilized by the State. This interface shall be approved by the IT Director as being in compliance with mutually agreed to standards and acceptance test criteria. Vendor shall work with the State to ensure all acceptance test criteria are met. A formal user acceptance approval shall be gained prior to using any interface to ICES in a production environment.

Vendor shall be responsible for the on-going maintenance, problem determination and resolution related to the interface set forth above including maintenance required to keep the interface consistent with State maintenance or performance levels whether related to network, security, application or ESB. Vendor will participate in change management activities required by the State or designees.

#### **(2)** ICES Changes

Vendor shall participate as a nonvoting member of the ICES Change Control Board (“**ICES CCB**”) and a duly appointed representative of Vendor shall attend all meetings of the ICES CCB as appropriate. Vendor shall give ICES CCB sufficient documentation and notice when an ICES change is required.

## **11.3** Web Site Development and Hosting Services

### **11.3.1** *Web Services*

#### **(1)** Scope of Services

Subject to the terms and conditions of this Agreement, Vendor shall timely perform the Services and deliver the materials or functionality set forth or described in this Agreement and on the applicable Attachments, and as otherwise subsequently agreed to in writing by the parties, in order to design, develop, implement, operate, maintain

and update a State-branded Web site on the World Wide Web portion of the Internet (the “**State Site**”), all in accordance with the specifications set forth in the Technology and Security Plan and in this Section 11.3. Vendor acknowledges and agrees that the State Site is to be a stand-alone Web site and as such, the State Site will be accessible by users of the Internet solely and directly through a URL designated by the State.

(2) Specifications

Vendor shall prepare and deliver to the State design specifications for the State Site that shall detail the design, technical and functional capabilities, look and feel, and other attributes of the State Site (the “**Site Specifications**”). Such delivery shall be made promptly after completion thereof and in any event thirty (30) days following the Service Commencement Date. The Site Specifications shall include (i) a design for the State Site in accordance with the terms and conditions of this Agreement, (ii) attributes of performance which the State Site will achieve, (iii) Deliverables to be provided by Vendor as part of the Services for the State Site, and (iv) design, development, testing, delivery, implementation, maintenance and update schedules for the State Site and any associated Deliverables. Vendor shall design the State Site to “look and feel” like a Web site owned and operated by the State as a governmental entity. Vendor represents and warrants that the State Site and related Deliverables shall conform in all material respects to the Site Specifications.

(3) Conversion of Data Content

Vendor shall convert, input, digitize or otherwise format as necessary all data content to be included in the State Site pursuant to the Site Specifications.

(4) URL Registration

Vendor shall submit and register the URL of the State Site reflecting the State as the owner of the State Site, if not already registered, with Internet search engines, directories, catalog services, indexes and other Internet search services that are approved in advance by the State. The State reserves the right to review and approve any entries describing the State Site which Vendor plans to submit.

(5) Non-Disclosure

Vendor shall not, without the prior written consent of the State, disclose, distribute or release to any unrelated third party, except Third Party Vendors and Subcontractors used by Vendor to help develop the

State Site, in any manner or medium, directly or indirectly or through its representatives, any State Confidential Information contained in: (i) the State Site, or any advertising, publicity or promotion materials (including without limitation, distribution through the Internet) related to the State Site or which include the name of the State or any trademark, trade name, or any abbreviation, contraction, or other embodiment thereof; and (ii) any materials or properties owned, controlled, licensed or otherwise proprietary to the State, whether or not such materials are incorporated into the State Site, prior to the planned public release of such materials.

### **11.3.2**     *Continuing Services*

(1)     Transfer of the State Site

Upon acceptance of the State Site by the State, Vendor shall transfer and implement the State Site and any corresponding Deliverables and Software to and on a plurality of host Internet servers at a location designated by Vendor (collectively, the “**Host Servers**”). All costs, fees and expenses associated with hosting the State Site on the Host Servers (including any increases therein and any such obligations to other Persons) are included in the Fixed Fee and shall be the sole responsibility of and paid for by Vendor.

(2)     Operation of the State Site

Vendor represents and warrants that the State Site and any Deliverables and Software, when operated on the Host Server, will function and perform in accordance with the Site Specifications and the Technology and Security Plan. Vendor shall, at no cost to the State, promptly provide any updates, revisions, and replacements necessary for the State Site to function and perform in accordance with the Site Specifications when operated on the Host Server.

(3)     Updates to the State Site

Following implementation of the State Site, Vendor shall perform updates to the State Site as may be required and any other updates reasonably requested by the State. All such updates shall become part of the State Site and shall be governed by the terms and conditions of this Agreement.

(4)     Usage Information

Vendor shall manage the recordation of and provide to the State monthly: (i) all information reflecting access and usage of the State Site, including without limitation, hits, visits, and click-throughs; (ii) all available information about users of the State Site; and (iii)



information directly or indirectly obtained from users accessing the State Site. Vendor shall maintain the strict confidentiality of all usage information in accordance with this Agreement.

### **11.3.3**     *Artistic Control*

The State shall have ultimate artistic and editorial control over the State Site, including without limitation, integration of all data content, and the design of the look and feel of the State Site. Vendor shall not publish, or otherwise display the State Site or any portion thereof identifiable to the State Site, without the prior approval of the State, subject to the terms of this Agreement.

### **11.3.4**     *Ownership of Content and Domain Names*

#### **(1)**     Content

All Content developed by Vendor or a Subcontractor hereunder utilized on the State Site or in connection with the System is and shall remain the property of the State, and all right, title and interest therein shall vest in the State and shall be deemed to be a “work made for hire” and made in the course of the Services rendered hereunder. To the extent that title to such Content does not, by operation of law, vest in the State or such Content is not considered works made for hire, all right, title and interest therein are hereby irrevocably assigned to the State. All such Content shall belong exclusively to the State with the State having the right to obtain and to hold in its own name copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. Vendor will give the State and any person designated by the State any reasonable assistance required to perfect the rights defined in this Section. Vendor will obtain an assignment of ownership from any Subcontractor that participates in the creation of such Content that assigns ownership in any portion of such Content to the State. The State acknowledges that the rights to the Content described herein do not extend to any Vendor Software or any Third Party Software utilized to display any Content, and the State’s rights with respect to such Vendor Software or Third Party Software after Termination shall be governed by and subject to Section 11.1.1(4).

#### **(2)**     Domain Names

The State Site shall have its URL under the domain name www.in.gov, which domain name is and shall remain the sole property of the State (the “**Primary Domain Name**”). In addition, Vendor shall register any other domain names that are necessary (and not reserved with network solutions) for the efficient and proper development and operation of the State Site, which domain names will ultimately

resolve to the Primary Domain Name (the “**Secondary Domain Names**”). All Secondary Domain Names shall remain the sole property of the State. To the extent that title to the Primary Domain Name and the Secondary Domain Names does not vest in the State by operation of law, Vendor hereby assigns all right, title and interests to the State that Vendor has, may have, or may hereafter have, if any, in and to the Primary Domain Name and Secondary Domain Names. Vendor shall promptly, upon the State’s request, execute any documents and submit any documents to Network Solutions, Inc. and any other agency that are necessary to give full force and effect to the foregoing assignment.

#### **11.3.5**     *Transfer of Services*

Upon Termination, Vendor shall, subject to the payments under Section 16.6.4, if any, and as part of the Disengagement Services contemplated by Section 16.6.1, provide reasonable assistance to the State and any Successor in assuming performance of those Services necessary for the continued and uninterrupted operation of the State Site.

### **11.4**     Data Processing Services, Database Ownership, Management and Exploitation

#### **11.4.1**     *Data Processing Services*

In accordance with the terms and conditions of this Agreement, to the extent expressly provided in a Statement of Work hereto, Vendor shall provide the State with, among other things, data processing, in both paper and electronic format, in accordance with and as a part of providing the Services (“**Data Processing Services**”). Vendor shall provide the Data Processing Services in compliance with the performance standards contemplated by this Agreement and shall implement necessary monitoring tools needed to measure the performance of the Data Processing Services. Vendor shall provide the State with complete, total and unfettered access to all State Client Data stored, gathered, received, or collected by Vendor in connection with providing the Services and such access, where the State Client Data is stored in a electronic format, shall include a secure manner to access the State Client Data electronically on a twenty-four (24) hour, seven (7) day a week, three hundred sixty-five (365) day a year basis.

##### **(1)**     Failure to Provide Data Processing Services in Accordance with Performance Standards

If Vendor is failing to provide Data Processing Services in accordance with the performance standards for providing the Services in this Agreement, upon the State’s request, Vendor shall (i) perform an analysis to identify the cause of such failure, (ii) correct such failure, (iii) provide the State with a report detailing the cause of, and

procedure for correcting, such failure, and (iv) provide the State with reasonable evidence that such failure will not reoccur. These actions shall be in addition to any and all rights, remedies, credits and damages to which, in a particular instance, the State may be entitled under this Agreement as a result of Vendor's failure to provide the Services in accordance with the performance standards in this Agreement.

(2) Modification of Services

The State may at any time request in writing that Vendor modify the Data Processing Services in a manner reasonably specified by the State. Subject to the Change Order Process, Vendor shall respond within fifteen (15) Business Days or an agreed timeframe by either declining in writing to make such modifications to the Data Processing Services or delivering to the State a complete proposal that includes an implementation schedule.

(3) Transmission of the State Client Data

Except as otherwise provided in this Agreement, Vendor shall be responsible for communications and transmission of the State Client Data in the provision of the Services while in Vendor's possession. Notwithstanding anything to the contrary in this Agreement, Vendor shall have no responsibility for the transmission or security of any State Client Data or other data over, in, or through ITN, any public telecommunications carrier, any Internet services provider, or by the State or any of its agents or other contractors.

(4) Network Services

The State shall provide wide area network access to the Systems of Record and other required State systems. Vendor will adhere to the requirements of IOT in planning and documentation to allow the State sufficient lead time to procure or re-locate the required network connections.

(5) Use of ITN

During the Term, Vendor shall use the ITN to provide all data links, network connections, telecommunication services, and other communication services required or necessary under this Agreement, except to the extent the Parties mutually agree to rely upon other more efficient or economical sources. Vendor shall be responsible for the following Vendor network responsibilities: (i) providing the necessary network hardware, Software, and interfaces at the Service Locations and Service Centers to connect to the ITN, and (ii) confirming,

coordinating, managing and monitoring the installation and maintenance by the State's Third Party Vendor ("**State's Network Provider**") of telecommunications lines and equipment providing the telecommunications connection between Service Locations and the point of presence at the Vendor's Service Centers. For these purposes, "point of presence" is the point up to and including which Vendor has operational responsibility under the terms and conditions of this Agreement. The State shall be responsible for paying the State's Network Provider for Vendor's use of the ITN during the Term as provided in Section 3.4.8.

#### **11.4.2**     *Data Sharing*

- (1) Vendor shall ensure that authorized State Agencies or other Persons expressly authorized by the State ("**Authorized Recipients**") have access to any State Client Data to which they are designated or authorized to have access. Vendor and the State shall cooperate with one another to develop plans and procedures with respect to the granting, managing, oversight, integrity and security of the access rights granted to Authorized Recipients and shall include such plans and procedures in the Technology and Security Plan. Vendor shall provide access to the State Client Data to Authorized Recipients only pursuant to and in compliance with the terms and conditions of the Technology and Security Plan. Vendor shall make any changes required to be made to the Services regarding such access rights as quickly as possible or on a reasonable timetable set forth by the State.
- (2) The State will cooperate as Vendor may reasonably request from time to time with respect to providing or for the benefit of Vendor or the appropriate Subcontractor access to databases which the State maintains, to which the State subscribes or which are otherwise available to the State and not reasonably available to Vendor or such Subcontractor. In the event that any such access is available with payment of an additional fee to a third party, such fee shall be paid by Vendor. The obligations of the State under this Section 11.4.2(2) shall not apply to the extent that access to any database prohibits providing access to Vendor or any Subcontractor or impose requirements, restrictions or costs that make such access by Vendor or a Subcontractor impractical, provided that Vendor shall be relieved of any responsibilities under this Agreement to the extent affected by not having such access.

#### **11.4.3**     *Ownership and Protection of Data and Confidentiality*

- (1) Ownership and Non-Disclosure of State Client Data

Notwithstanding Vendor's use and collection of State Client Data in connection with providing the Services, State Client Data is and shall remain the sole property of the State and may only be used by Vendor to provide the Services contemplated hereunder and in such a manner as the State determines in its discretion. The State shall have unlimited rights and access to all State Client Data received, developed, derived, documented or furnished to Vendor by Clients. During the Term and thereafter, Vendor shall not, without the State's prior consent (given or withheld in its discretion) (i) use the State Client Data, in any way whatsoever, directly or indirectly, by Vendor or any of its Affiliates, Third Party Vendors of Vendor Third Party Software, Subcontractors, or any entity operating on behalf of Vendor, or Subcontractor, other than in connection with providing the Services, (ii) sell, assign, lease, transfer or otherwise provide the State Client Data to any third party, entity, organization, or individual not expressly authorized in writing by the State, (iii) disclose the State Client Data, other than in connection with providing the Services or (iv) commercially exploit the State Client Data in any way, directly or indirectly, by or on behalf of Vendor or any Affiliates, Third Party Vendors of Vendor Third Party Software, Subcontractors, or any entity operating on behalf of Vendor.

(2) Access

Vendor acknowledges that the State shall have access, at any time and at any location, to any and all State Client Data in the possession, custody, or control of Vendor or an affiliate of Vendor, in whatever format.

(3) State Client Data Security

Vendor acknowledges that State Client Data constitutes Confidential Information of the State as well as Confidential Information of the individuals to which such information pertains. Vendor shall develop a Technology and Security Plan that shall be approved by the State pursuant to Section 3.14. The Technology and Security Plan shall provide specific details on the manner, Software, procedures (including security procedures for hiring, leaving or departing, and terminated employees), and safeguards that Vendor will implement while providing the Services that are designed to ensure the security and confidentiality of State Client Data. Vendor shall, and shall cause any of Vendor's employees, agents, representatives, and any Affiliates, any Project Employees and any Subcontractor or Third Party Vendor of Vendor Third Party Software that may be provided access to State Client Data to, comply with the Technology and Security Plan (including updates thereof). Vendor will periodically review and, subject to the Change Order Process and Section 3.14, update the security provisions of the Technology and Security Plan, at any time,

as new “threats” or “vulnerabilities” may be discovered in or to the Services. Vendor shall implement the updated Technology and Security Plan promptly. In addition to any rights of the State otherwise provided under this Agreement, Vendor shall, at the State’s sole expense, allow a Contract Administrator or an independent auditor designated or appointed by the State to conduct an annual review of Vendor’s security procedures to ensure that Vendor, Third Party Vendors of Vendor Third Party Software and Subcontractors are adhering to or otherwise following the Technology and Security Plan.

(4) Return of State Client Data

Upon Termination Vendor shall, for no additional consideration, deliver or cause to be delivered to the State, as and when the State directs, all State Client Data, respectively, in whatever form then maintained, including copies, backups or variations thereof, to the State. Vendor and any Affiliates acting on behalf of Vendor in any capacity, or any Subcontractor, shall not retain any State Client Data for any purpose whatsoever. Vendor will ensure that any Subcontractor shall promptly return any State Client Data upon Termination.

**11.4.4** *State Client Data Delivery and Cooperation Upon Termination*

Upon Termination, Vendor shall deliver to the State all State Client Data or State Confidential Information, in whatever form, in the possession, custody or control of Vendor. Vendor will ensure that any Affiliates, Third Party Vendors of Vendor Third Party Software and Subcontractors under the control of Vendor are subject to the same obligations. If any State Client Data is stored in a data format proprietary to Vendor, Vendor shall provide the State with a copy of the State Client Data in a standardized data format (e.g., PDF, TIF, JPG, GIF, etc.) chosen by the State. Upon Termination, Vendor shall also, without limiting the State’s right to receive Source Code or Object Code as set forth in this Agreement, cooperate with the State (including, without limitation, provide file layouts, tapes and interface formats) in the State’s efforts to arrange for the conversion, transfer and continued processing and storage of all State Client Data and State Confidential Information previously stored and processed by Vendor or any Affiliate. In addition, upon Termination, each Party shall assist the other Party in the orderly transfer of all aspects of State Client Data, tangible and intangible, as may be necessary for the orderly, non-disrupted continuation of the Services and the Modernization Project. Upon Termination, as part of the Disengagement Plan, (a) Vendor will develop, with the assistance of the State, a plan for the orderly transition of the Data Processing Services from Vendor to the Successor or another party designated by the State or to the State directly, and (b) Vendor will, if the State so requests, phase in the transition of the Data Processing

Services as contemplated herein on a schedule reasonably designated by the State.

## **11.5** Mandatory Use Rights and Federal Licensing Obligations

### **11.5.1** *Equivalent Access for the Visually Impaired and Other Persons with Disabilities*

Vendor expressly acknowledges that State funds may not be expended in connection with the purchase of an automated information system unless that system meets certain statutory requirements relating to accessibility by persons with visual impairments. Accordingly, to the extent expressly provided in the Statement of Work or any Change Order and required by Law, Vendor represents and warrants to the State that the System is capable, either by virtue of features included within the technology or because it is readily adaptable by use with other technology, of

- (1) providing equivalent access for effective use by both visual and non-visual means;
- (2) presenting information, including prompts used for interactive communications, in formats intended for non-visual use; and
- (3) being integrated into networks for obtaining, retrieving, and disseminating information used by individuals who are not blind or visually impaired.

For purposes of this Section, the phrase “equivalent access” means a substantially similar ability to communicate with or make use of the technology, either directly by features incorporated within the technology or by other reasonable means such as assistive devices or services that would constitute reasonable accommodations under the Americans with Disabilities Act or similar Laws. Examples of methods by which equivalent access may be provided include, but are not limited to, keyboard alternatives to mouse commands and other means of navigating graphical displays, and customizable display appearance.

### **11.5.2** *Federal Financial Participation License*

To the extent mandated under any federal statutes or regulations, including 45 C.F.R. §95.617 or 7 C.F.R. §277.18, all appropriate Governmental Bodies will have a fully paid-up, royalty-free, nonexclusive, and irrevocable license to reproduce, publish, translate, or otherwise use, and to authorize others to use for federal government purposes all Developed State Software and associated Documentation designed, developed, or installed with federal financial participation, including those materials covered by copyright but not proprietary software as defined in 45 C.F.R. §95.617(c) or 7 C.F.R. §277.18(k)(1)(iii). The rights of Governmental Bodies with respect to

Developed State Software designed, developed, or installed with federal financial participation shall be determined in accordance with 45 C.F.R. §95.617 and 7 C.F.R. §277.18. To the extent mandated under the foregoing Laws, state or local governments will have all ownership rights in Developed State Software or modifications thereof and associated documentation designed, developed, or installed with federal financial participation, and federal agencies will have a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use for federal government purposes, such software, modifications, and documentation.

## **11.6 Trademark Use Rights**

### **11.6.1 *License Grant from State***

The State hereby grants to Vendor a non-exclusive right and license to use during the Term and any Disengagement Period any trademark owned and used by the State on or in connection with providing the Services.

### **11.6.2 *Rights in Trademarks***

- (1) Vendor hereby acknowledges the State's right, title and interest in and to any State trademark used by Vendor in connection with providing the Services and the State's exclusive right to use and license the use of any respective trademark. Vendor shall not claim any title to any State trademark or any right to use any State trademark except as permitted by this Agreement. Vendor shall include all notices and legends with respect to the State's trademarks and trade names as are or may be required by applicable federal, state and local trademark laws or which may be reasonably requested by the State.
- (2) Vendor shall at no time adopt or use, without the State's prior consent, any variation of any trademark of the State, including translations, or any mark likely to be similar to or confusing with any trademark owned by the State. In the event that the State consents to any variation of any trademark, Vendor hereby agrees that the State shall own such new mark and may, at its cost and expense, file and obtain in the State's name all trademark registrations therefor.
- (3) Vendor shall not contest or deny the validity or enforceability of any State trademark or oppose or seek to cancel any registration thereof by the State, or aid or abet others in doing so, either during the Term or at any time thereafter.
- (4) Vendor shall provide the Services contemplated under this Agreement in a dignified manner, consistent with and enhancing the general



reputation of any trademark and the State, and in accordance with good trademark practice.

- (5) Any and all goodwill arising from Vendor's use of any State trademark shall inure solely to the benefit of the State, and neither during nor after the termination of this Agreement and the license granted hereunder shall Vendor assert any claim to any State trademark or such goodwill. Vendor shall not take any action that is detrimental to the goodwill associated with any State trademark.
- (6) Vendor shall, during the Term and after Termination, execute such documents as the State may reasonably request from time to time to ensure that all right, title and interest in and to any State trademark reside with the State.

### **11.6.3**     *Quality Standards*

Vendor shall furnish to the State prior to any use, for the approval of the State, copies of formats of all material on which any State trademark appears. The State shall have the right reasonably to approve or disapprove any or all materials. Any materials submitted to the State for approval shall be deemed rejected unless the State notifies Vendor to the contrary within thirty (30) days after receipt of such materials.

## **11.7**     Patent Use Rights

### **11.7.1**     *Vendor Patent Rights*

Vendor grants to the State, and the State accepts from Vendor, a non-exclusive, perpetual, irrevocable, royalty-free, transferable (only to a Successor solely to provide services similar to the Services to the State) license to any and all patent rights owned by Vendor that are incorporated into the System developed by Vendor to provide the Services solely as necessary for the State to receive the Services or, after the Term and Disengagement Period, to provide the Services for the State of Indiana (by itself or through a Successor). Vendor grants to the State, and the State accepts from Vendor, a non-exclusive, perpetual, irrevocable, royalty-free, transferable (only to a Successor solely to provide services similar to the Services to the State) license to any and all patent rights owned by Vendor that are conceived and reduced to practice hereunder during the Term in the course of developing the Developed Vendor Software and that are incorporated into the Developed Vendor Software to the extent necessary to use the Developed Vendor Software for its intended purpose. Vendor represents that it is authorized and has the right to grant licenses under any such licensed patents.

### 11.7.2 *Patent Claims*

Vendor shall not bring any Claim against any State Indemnified Person alleging infringement of any patents owned by Vendor where such infringement arises solely from the State's use of the Services. Vendor also shall obtain from its Third Party Vendors and Subcontractors their agreement not to bring any Claims against any State Indemnified Party alleging infringement of any Third Party Vendor or Subcontractor owned patents where such infringement arises solely from the State's use, or a third party acting on behalf of the State, of the System to provide the Services to the State.

## 11.8 Warranties Regarding the System

- (1) Vendor represents and warrants, and shall obtain the same representations and warranties for the benefit of the State from any Subcontractors, that (i) it owns and possesses all right, title and interest in Vendor Software necessary to enter into this Agreement and to convey the licenses granted herein or otherwise has the right to grant the licenses granted herein, (ii) Vendor or Subcontractor have not knowingly placed any code in any Software utilized in the System that is a Virus that may harm the System or end user equipment and systems or provide unauthorized access to the System or any State Client Data stored in the System, (iii) the Software is sufficiently functional to provide the Services in a manner that meets or exceeds the Minimum Functionality Requirements, and (iv) the Developed State Software has been developed in compliance with and meets or exceeds the Software Standard. Vendor shall install, or caused to be installed, a current and commercially suitable version of virus protection software and will update the virus protection software definitions and protections in accordance with the Technology and Security Plan attached hereto as Appendix IV [Technology and Security Plan].
- (2) Vendor represents and warrants, and shall obtain the same representations and warranties for the benefit of the State from any Subcontractors, that the Software, Deliverables, or any Services provided by Vendor or any Affiliate of Vendor do not infringe or misappropriate any right of, and will be free of any claim of, any Person based on copyright, patent, trademark, trade secret, or other intellectual property rights (other than Vendor or the applicable Subcontractor or Third Party Vendor, respectively), except with respect to the circumstances described in Section 17.4.3.
- (3) Vendor represents and warrants that Vendor has obtained a license for the Katz Patents which permits the System to be fully operational and functional in the Vendor Service Environment without infringement of

any of the Katz Patents, at no additional cost other than the Fees, which license is not transferable to a Successor.

- (4) Vendor represents and warrants, and will use Commercially Reasonable Efforts to obtain a similar representation and warranty from any Third Party Vendor of Vendor Third Party Software, if applicable, for the benefit of the State, that: (i) it owns and possesses all right, title and interest in the Software and Deliverables provided by Vendor necessary to operate and maintain the State Site and necessary to enter into this Agreement and to convey any licenses granted or property rights transferred herein as it relates to the State Site, (ii) Vendor or any relevant Third Party Vendor has not knowingly placed in the State Site any code that is a Virus that may harm the System or end user equipment and systems or provide unauthorized access to the State Site, (iii) the State Site meets or exceeds the Minimum Functionality Requirements, and (iv) the State Site has been developed in compliance with and meets or exceeds the applicable Software Standards.

#### **11.9 Assurance of Continued Use**

In case any item provided by Vendor to the State in the provision of the Services is held in any Proceeding to constitute an infringement or misappropriation (other than as a result of the exclusions in Section 17.4.3), and the use of such item is enjoined or restricted, Vendor will, at its own expense, either (i) procure for the State the right to continue using the item; or (ii) modify or replace the item to comply with the requirements set forth in this Agreement and to not violate any intellectual property rights or develop a reasonable work-around.

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## **ARTICLE 12 INSURANCE OBLIGATIONS**

### **12.1 Minimum Insurance Coverage**

#### **12.1.1 *Insurance Requirements***

During the Term, at Vendor's expense, Vendor will procure and maintain, at a minimum, the following insurance coverage in connection with Claims that may arise out of or result from this Agreement or the delivery of the Services, subject to customary exclusions.

- (1) Standard Worker's Compensation Insurance coverage;
- (2) Comprehensive General Liability Insurance, in broad form, with minimum liability limits of \$1,000,000 per occurrence and \$5,000,000 in the aggregate;
- (3) Errors and omissions coverage (including, as to ACS only, an identity theft endorsement) with minimum limits of \$1,000,000 per claim and \$10,000,000 in the aggregate;
- (4) Fidelity/crime insurance coverage covering employee dishonesty of \$10,000,000 per occurrence or loss and in the aggregate; and
- (5) Employment practices coverage of \$1,000,000 per claim and in the aggregate.

Vendor will provide the State with proof of such insurance coverage on ACORD Form 27 (or its equivalent) concurrently with the execution of this Agreement. Vendor will timely increase the amount of the above coverages to meet any State statutorily increased minimums that are generally applicable to entities doing business in Indiana.

#### **12.1.2 *Vendor Responsible for Deductibles***

Vendor is responsible for the payment of any and all deductibles stated in the policies.

#### **12.1.3 *State as Additional Insured***

Insurance coverage will be issued by insurance companies authorized by applicable law to conduct business in the State, and, for the policy set forth in Section 12.1.1(1), must name the State as an additional insured and, for the policy set forth in Section 12.1.1(3), must name the State as a "loss payee".

**12.1.4**     *Extended Reporting Period*

With respect to Vendor, each policy described in Section 0, (1), and (3) will be on a “per occurrence” basis, and the policy described in Section 12.1.1(2) and (4) will have an extended reporting period of two years. With respect to the Subcontractors, the insurance policies shall comply with this Section as set forth in Schedule 22 [Insurance Coverages Matrix]. When policies are renewed or replaced, the policy retroactive date must coincide with, or precede, the Effective Date.

**12.1.5**     *Failure to Maintain Insurance*

Subject to the provisions of Section 4.2, the State maintains the right to withhold payment of any Fixed Fees until proper evidence of insurance is provided.

**12.1.6**     *Notice of Change, Cancellation or Non-Renewal*

The insurance will provide for thirty (30) calendar days prior notice to be given to the State in the event coverage is substantially changed, canceled, or non-renewed to the extent Vendor is provided such notice. Vendor must submit a new coverage binder to the State to evidence no break in coverage.

**12.1.7**     *Notice of Event of Loss or Damage*

In the case of any event that gives rise to an insurable loss, claim or damage or other event that requires notice or other action under the terms of any insurance coverage described above, Vendor will be solely responsible for providing any required and appropriate notice and taking such action. The State shall reasonably cooperate with Vendor in such regard. Vendor will provide the State with contemporaneous notice and with such other information as the State may reasonably request regarding the event.

**12.1.8**     *No Limitation on Liability*

The Parties do not intend to shift all risk of loss to insurance. Vendor’s obligation to maintain insurance coverage in specified amounts will not act as a limitation or expansion on any other liability or obligation that Vendor would otherwise have under this Agreement. Similarly, the naming of the State as an additional insured or loss payee is not intended to be a limitation of Vendor’s liability under this Agreement and will in no event be deemed to, or serve to, limit Vendor’s liability to the State to available insurance coverage or to the policy limits specified in this Section 12.1, nor to limit the State’s or Vendor’s rights to exercise any and all remedies available to the State or Vendor under this Agreement, at law or in equity.

## **12.2 Subcontractor Insurance Requirements**

Vendor will require all Subcontractors to carry at a minimum all coverages set forth in Schedule 22 [Insurance Coverages Matrix] in the amounts set forth therein (or such coverages or such lower amounts to which the State may consent). As to the Subcontractors identified in Schedule 22, the State consents to the coverages and amounts set forth therein. For purposes of clarity, the Subcontractors shall not be required to comply with the requirements of this Article 12, to the extent set forth differently in Schedule 22.

## **12.3 Waiver of Subrogation Rights**

Vendor will ensure, and will provide evidence to the State that each Subcontractor agrees, that each of the insurers for Vendor and any Subcontractor will waive their rights of subrogation against the State. Evidence of such waivers will be provided to the State at the Closing.

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## ARTICLE 13 THIRD PARTY WARRANTIES

### 13.1 Assignment of Warranties

Upon Termination, to the extent Vendor transfers hardware or other tangible goods, equipment or other tangible assets (“**Tangible Assets**”) obtained from third parties to the State pursuant to the terms of this Agreement, Vendor will assign to the State, or pass through as applicable, all rights and privileges in and to any and all of the manufacturers’ warranties and indemnities that it currently has or may receive from third party manufacturers relating to each Tangible Asset, to the extent Vendor is permitted by the manufacturers or developers to make such assignments or pass-throughs to the State. This assignment or pass-through obligation shall apply with respect to all such Tangible Assets acquired during the Term on behalf of or for the benefit of the State. Such assignment or pass-through will be subject to all of the terms and conditions imposed by the respective manufacturers or developers with respect thereto. In the event that such warranties are not assignable, or if assignable with the consent of the warranty provider but such consent is not obtained, Vendor will so notify the State. If permitted by an underlying agreement, the State may be entitled to assign such warranties to any Person who succeeds to the ownership of or license rights with respect to the items to which the warranty applies, including any Successor.

### 13.2 Enforcement by State

If a warranty referenced in the first sentence of Section 13.1 is not assignable or if any required consent to such assignment is not obtained, Vendor, to the extent it has the right to do so, will grant the State, as of the date of the transfer of the underlying asset, the right to enforce such warranty in Vendor’s name and shall deliver such documents as reasonably required in order for the State to exercise such right.

\* \* \* \* \*

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## **ARTICLE 14**

### **SUBCONTRACTOR PROVISIONS**

#### **14.1 General Obligations**

Vendor shall be permitted to utilize the services of Subcontractors to perform portions of the Services, provided that (i) Vendor shall continue to have full responsibility and liability for the performance thereof in compliance with the terms of this Agreement, and (ii) none of the Services are performed outside the State of Indiana (other than as expressly contemplated by this Agreement). Vendor shall require and obtain from each Subcontractor a certificate in substantially the form of Exhibit C [Form of Subcontractor Certificate] and deliver such certificate to the State Project Director prior to utilizing such Subcontractor with respect to the Services or any of the Delegated Activities and at such other times as may be required in this Agreement.

#### **14.2 Approved Key Subcontractors and Primary Subcontractors**

The State shall have the right (i) to reject any Person proposed to be a Primary Subcontractor and (ii) to review, comment on and approve any Material Subcontract for work not previously subject to a Subcontract which materially differs from the existing Subcontract for the same work. The Key Subcontractors and the Primary Subcontractors selected as of the Effective Date for participation in the Modernization Project, and the components of the Services that each will perform, as listed on Schedule 14 [Subcontractors], and the respective Subcontracts for each of the Key Subcontractors and Primary Subcontractors, as submitted to the State prior to execution of this Agreement (with information relating to specific pricing, personal information and other mutually agreed upon matters redacted), are acceptable to and approved by the State as of the Effective Date.

#### **14.3 Material Subcontracts**

##### **14.3.1 *Approval of Material Subcontracts***

- (1) Vendor must submit a copy of any newly proposed Material Subcontract (other than those deemed approved pursuant to Section 14.2) to the State for the State's review, comment and approval in accordance with Sections 14.2 and 14.6; provided that if the State does not provide Vendor with notice of approval or any requested modifications thereto prior to the expiration of the 30-day period referenced in Section 14.6.1, the proposed Material Subcontract shall be deemed approved subject to the State's rights under Section 14.3.2.
- (2) The State reserves the right, but does not assume the obligation, to:
  - (A) reject the proposed Subcontract;
  - (B) suggest modifications to the proposed Subcontract; and



- (C) object to the selection of any new third party as a Primary Subcontractor.

#### **14.3.2** *No Waiver of State's Rights*

The State's failure to reject or request Subcontract modifications shall not act as a waiver of the State's rights to assert the same or similar rights at any later time during the Term.

#### **14.3.3** *Material Changes in Subcontract*

If any changes (including any such changes after execution thereof, but excluding changes to conform with this Agreement, a Change Order, or any changes requested by the State) occur in a Material Subcontract after submission thereof pursuant to Section 14.3.1(1) or in any Material Subcontract deemed approved pursuant to Section 14.2 and such changes are material to such Material Subcontract, Vendor shall resubmit such Subcontract for review, comment and approval under this Section 14.3.

### **14.4** Mandatory Subcontract Provisions

Each Subcontract shall include, either expressly or by reference, each of the Mandatory Subcontract Provisions contained in Schedule 15 [Mandatory Subcontract Provisions] with no changes, modifications or alterations other than those which the State in its reasonable discretion determines are acceptable.

### **14.5** Federal Approval of Subcontracts

If any Law requires that either of the Parties obtain the approval of any Governmental Body of any Subcontract (other than Subcontracts as in effect on the Effective Date with the Subcontractors identified on Schedule 14 [Subcontractors]), each Party shall cooperate with the other Party as reasonably required to prepare a complete and accurate application for such approval, to submit such application in a timely manner and to pursue such approval by appropriate and reasonable methods.

### **14.6** Selection, Certification and Replacement of Subcontractors

#### **14.6.1** *Notice of Proposed Subcontractors*

At least ten (10) days prior to entering into an agreement with a Person proposed to be a Subcontractor (and thirty (30) days for any Person proposed to be a Primary Subcontractor), Vendor must provide the State with the following:

- (1) The identity of any proposed Subcontractor;
- (2) Evidence reasonably satisfactory to the State regarding the proposed Subcontractor's ability to perform the subcontracted Services; and

- (3) A duly executed Subcontractor Certificate from such Person.

**14.6.2** *Vendor as Sole Point of Contact*

The State considers Vendor to be the sole point of contact with regard to contractual matters, including payment of any and all charges resulting from this Agreement. The State has no obligation, financial or otherwise, to any Subcontractor and shall not be deemed in privity with any Subcontractor (subject to the express assumption thereof pursuant to the Conditional Assignment).

**14.6.3** *Protection of State Confidential Information*

Vendor shall not disclose State Confidential Information to a Subcontractor unless and until such Subcontractor has agreed in writing to protect the confidentiality of such State Confidential Information in the manner required of Vendor under this Agreement by execution of the Confidentiality Agreement in the form attached as Exhibit D [Form of Confidentiality Undertaking for Subcontractors].

**14.6.4** *Replacement of Subcontractors*

- (1) At the request of the State, or in the exercise of Vendor's discretion, Vendor shall replace any Subcontractor (i) that has materially breached its Subcontract with Vendor and such breach, if capable of cure, was not cured within the time period permitted under the applicable Subcontract, (ii) who, in the reasonable opinion of the State Project Director after consultation with Vendor, or as determined by Vendor in its discretion, is unable to work effectively with the State because such Subcontractor has engaged in sustained, pervasive nonperformance of its Subcontract that has a material adverse impact on the State's ability to achieve its Policy Objectives, (iii) whose actions or omissions have triggered the State's rights to terminate this Agreement under either Section 16.3.1 or Section 16.3.4(3) in accordance with the terms thereof, or (iv) the State in its discretion directs the removal of such Subcontractor for any reason other than pursuant to clauses (i) through (iii) above.
- (2) Prior to requiring Vendor to replace a Subcontractor pursuant to Section 14.6.4(1)(ii), the State shall give notice ("**First Notice**") to Vendor of the State's desire to require such replacement, which notice shall contain a reasonable description of the State's reasons underlying such desire. Thereafter, the Parties shall work together in good faith on an expedited basis, meeting as frequently as reasonably requested by Vendor to resolve the State's concerns with such Subcontractor. In the event the Parties have not resolved the State's concerns within sixty (60) days following delivery of the First Notice to Vendor, the

State may provide Vendor with a second notice (“**Second Notice**”). If Vendor has not resolved the State’s concerns within thirty (30) days following delivery of the Second Notice to Vendor, the State may in its discretion provide Vendor with notice (“**Replacement Notice**”) requiring Vendor to replace such Subcontractor as set forth in subsection 14.6.4(4) below. If the State has not exercised its right to require Vendor to replace such Subcontractor within six (6) months following the State’s delivery of the First Notice, the State will be required to reinitiate the notice process set forth in this subsection for any subsequent requests to replace such Subcontractor.

- (3) In the event of the replacement of a Subcontractor, Vendor shall either provide a replacement Subcontractor with equal or greater skills and qualifications as soon as reasonably practicable or choose in its discretion to perform the applicable portion of the Services itself.
- (4) In the event such replacement is (x) at the State’s request pursuant to clause (ii) of Section 14.6.4(1), and the Parties have not resolved the State’s concerns within thirty (30) days following delivery of the Replacement Notice, or (y) at the State’s direction pursuant to clause (iv) of Section 14.6.4(1), then
  - (A) Vendor shall replace such Subcontractor, and shall exercise Commercially Reasonable Efforts to do so as promptly as practicable under the circumstances, but in no event later than two hundred ten (210) days following delivery of the Replacement Notice;
  - (B) the State shall be responsible for Vendor’s reasonable charges solely in connection with replacing the replaced Subcontractor, including additional software licenses (if any), training of trainers, procurement costs, and increased fees for their services (“**Replacement Charges**”) up to a maximum of one hundred ten percent (110%) of the amounts which otherwise would have been payable to the replaced Subcontractor for the Services to be provided by the new Subcontractor each Contract Year (such otherwise payable amount being deemed the “**Base Amount**”), with Vendor being responsible for such Replacement Charges in excess of one hundred ten percent (110%) of the Base Amount; provided that if such Replacement Charges exceed one hundred twenty percent (120%) of the Base Amount, Vendor shall not be obligated to make such replacement until Vendor and the State have negotiated in good faith an equitable allocation of any such Replacement Charges in excess of such one hundred twenty percent (120%) of the Base Amount; and

- (C) with respect to replacements pursuant to clauses (ii) and (iv) of Section 14.6.4(1), the State shall reimburse Vendor for (i) the Early Termination Close Out Payments, if any, payable to the replaced Subcontractor pursuant to the applicable Subcontract (provided that if the replacement is pursuant to clause (ii) of Section 14.6.4(1), the State's liability for Early Termination Close Out Payments under this clause shall be limited to seventy-five percent (75%) thereof), and (ii) if the replaced Subcontractor is ACS, 100% of the unamortized balance of the Deferred Fees applicable to ACS set forth Schedule 24 [Deferred Fees].

Notwithstanding any reimbursement hereunder, if the replaced Subcontractor is ACS or Arbor, the Parties in their discretion shall agree to an equitable solution with respect to the employment of the Project Employees employed by ACS or Arbor (as applicable). The State shall have such rights as applicable in accordance with the terms of this Agreement in and to any of the assets with respect to which the State has paid Early Termination Close Out Payments, and Vendor shall deliver, or cause to be delivered, all bills of sale and other appropriate transfer documents that the State may reasonably request to effectuate such transfer. Vendor shall provide the State or an independent Person designated by the State and reasonably acceptable to Vendor, with such evidence of the applicable Replacement Charges and the corresponding fees of the replaced Subcontractor as is reasonably required to determine the allocation of the Replacement Charges pursuant to this Section 14.6.4(4).

- (5) Replacement of any Primary Subcontractor will be subject to the provisions of Section 14.2 and this Section 14.6, as applicable. In replacing any Subcontractor, or performing any of the Services itself, Vendor will continue to comply with its MBE/WBE Participation Plan; provided that in the event the replaced Subcontractor is a MBE or WBE and there are no commercially reasonable MBE or WBE replacements for such Subcontractor in the State of Indiana, the Parties will agree upon an equitable solution to permit Vendor to meet or modify the MBE/WBE Participation Plan.
- (6) For the avoidance of doubt, the State is not liable to Vendor for any Replacement Charges or other reimbursements if the replacement of any Subcontractor is made at the State's request pursuant to clauses (i) or (iii) of Section 14.6.4(1), or at Vendor's discretion.

#### **14.6.5**     *Cooperation*

In the event of a replacement of a Subcontractor pursuant to Section 14.6.4, the Parties agree to cooperate and work together so as to avoid if possible or

otherwise to minimize any disruption in the timely and effective delivery or performance of the Services.

#### **14.7 Performance of Obligations by Subcontractors**

Vendor remains fully responsible for obligations, services, and functions performed by its Subcontractors to the same extent as if such obligations, services, and functions were performed by Vendor directly, and for purposes of this Agreement, such work will be deemed work performed by Vendor. If a Subcontractor is to be replaced pursuant to Section 14.6.4, Vendor may, upon notice to the State, elect to perform the portion of the Services theretofore performed by such Subcontractor.

#### **14.8 Conditional Assignment to the State**

##### **14.8.1 *Assignment of Subcontracts***

- (1) Vendor shall execute and deliver at Closing a Conditional Assignment of Subcontracts in the form attached as Exhibit G [Conditional Assignment of Subcontracts].
- (2) Notwithstanding the conditional assignment of any Subcontract, the State, in its discretion, exercised within thirty (30) days prior to the later of the Services Termination Date or the expiration of the Disengagement Period, as applicable to the portion of the Services terminated, may refuse to accept any such assignment of the related Subcontract.
- (3) In the event the State exercises its right to accept assignment of one or more Subcontracts pursuant to this Section 14.8, the State shall not be required to pay to Vendor the Early Termination Close Out Payments that are directly attributable to the performance of such assigned Subcontract(s), but, instead for each Subcontract assigned to the State, the State shall pay Vendor the following upon the applicable Services Termination Date:
  - (A) if the replaced Subcontractor is ACS, (i) the amount of the Deferred Fees for Vendor's Subcontract with ACS as set forth in Schedule 24 [Deferred Fees], plus (ii) Ten Million Dollars (\$10,000,000), if the applicable Services Termination Date is within Contract Years one through seven, or Five Million Dollars (\$5,000,000) if the applicable Services Termination Date is within Contract Years eight through ten; and
  - (B) for each assigned Subcontract with a Key Subcontractor (other than ACS) and each other assigned Primary Subcontract (other than those Subcontracts with an aggregate contract value of less than Five Million Dollars (\$5,000,000)), Five Million Dollars (\$5,000,000), if the applicable Services Termination

Date is within Contract Years one through seven, or Two Million Five Hundred Thousand Dollars (\$2,500,000) if the applicable Services Termination Date is within Contract Years eight through ten;

provided, however, that the provisions of this Section 14.8.1(3) shall not apply if all the Services contained within an applicable Subcontract are terminated by the State pursuant to Sections 16.3.1, 16.3.4(2), or 16.3.4(3), except that the unamortized balance of the Deferred Fees shall still be payable in such event.

- (4) For the avoidance of doubt, the State shall continue to be obligated to pay to Vendor the Early Termination Close Out Payments with respect to the Termination of any of the Services for which the State does not exercise its right to accept assignment of the applicable Subcontracts to the extent the State is obligated to pay such Early Termination Close Out Payments as set forth in Section 16.6.6.

#### **14.8.2**     *Attornment to State*

Prior to the effectiveness of any Subcontract, Vendor shall obtain and deliver to the State a duly executed Attornment Certificate in the form attached hereto as Exhibit E [Attornment Certificate] from each Subcontractor.

#### **14.9**     Payment to Subcontractors

The State may require certification or other evidence reasonably satisfactory to it that all payments due and owing to the Subcontractors with respect to any goods or services provided by such Subcontractors with respect to the Modernization Project are paid in accordance with applicable Subcontracts.

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## **ARTICLE 15 REMEDIES**

### **15.1 Remedies of Vendor**

#### **15.1.1**     *Nonpayment by the State*

In the event the State fails to pay Vendor any amounts hereunder, Vendor's sole remedies for such nonpayment shall be the termination of this Agreement pursuant to Section 16.4, recovery of all due and unpaid amounts, recovery of all applicable amounts under Section 16.6, including for any Disengagement Services, and, to the extent applicable and authorized by Law, payment of interest on any such amounts.

#### **15.1.2**     *Other Nonperformance by the State*

If the State fails to timely perform an obligation under this Agreement (other than a payment obligation) and Vendor demonstrates that such delay materially affects scope, schedule or cost of performing the Services, the Parties shall execute an appropriate Change Order in accordance with the provisions of the Change Order Process to account for such delay. Such Change Order will address appropriate reimbursement or other consideration for reasonable, necessary, actual and substantiated costs paid or incurred by Vendor that were directly caused by the State's delay. Notwithstanding the foregoing, Vendor shall not have the right to reimbursement for any costs beyond those permitted under this Agreement. The Change Order Process shall be Vendor's sole and exclusive remedy with respect to the State's delays in performance (other than with respect to non-payment, as provided in Section 15.1.1).

### **15.2 Remedies of the State**

#### **15.2.1**     *Remedies Non-Exclusive*

At any time and at the State's discretion, unless a remedy is expressly provided in this Agreement to be a "sole and exclusive" remedy, the State may impose or pursue one or more remedies for each item of breach and may pursue remedies on a case-by-case basis.

#### **15.2.2**     *Available Remedies*

At its discretion, subject to the Dispute Resolution Procedures to the extent applicable, the State

- (1) may impose or require, as the case may be, one or more of the following remedies for each breach (and will determine the scope and severity of the remedy on a case-by-case basis subject to the terms of this Agreement):

- (A) more frequent or more extensive monitoring of Vendor;
  - (B) right to perform additional or more frequent Audits;
  - (C) Termination of this Agreement in accordance with Article 16;  
or
  - (D) preparation, adoption and implementation of a Corrective Action Plan; and
- (2) may pursue any legal or equitable remedy available to the State, including the following:
- (A) Liquidated Damages in accordance with the terms of this Agreement;
  - (B) direct and consequential damages in accordance with the terms of this Agreement, including Reprocurement Costs (which the Parties stipulate are direct damages hereunder); and
  - (C) the remedies available under Section 15.2.7.

**15.2.3** *Notice of Imposition of Remedy*

The State will provide notice to Vendor of the imposition of any remedy under Section 15.2.2(1), with the exception of more frequent or more extensive monitoring, which may be unannounced, and with the exception of any Termination of this Agreement to which the provisions of Article 16 shall apply. Other than notices required to be given under applicable Laws or rules of civil procedure, prior notice under this Section 15.2.3 need not be given with respect to any legal or equitable remedy pursued under Section 15.2.2(2).

**15.2.4** *No Waiver*

Except as otherwise expressly provided herein, the State's pursuit or non-pursuit of any remedy does not constitute a waiver of any other remedy that the State may have at law or in equity.

**15.2.5** *Liquidated Damages and Service Level Credits*

- (1) Liquidated Damages or Service Level Credits may be assessed by the State in writing in the amounts and with respect to the matters set forth in Schedule 10 [Performance Standards]. Vendor and the State shall update Schedule 10 to reflect any Critical Transition Milestones established pursuant to the adoption of the Transition Plan.
- (2) The State may be entitled to Liquidated Damages and Service Level Credits if such failure is the fault of Vendor (or deemed to be the fault



of Vendor due to the actions or omissions of the Subcontractors) and is not caused or contributed to in any material respect by actions or omissions of the State, its agents, contractors or third parties (other than the Subcontractors), the State's prioritization or allocation of resources to or within the Modernization Project, or by a Force Majeure Event.

- (3) The Liquidated Damages and Service Level Credits prescribed in Schedule 10 [Performance Standards] and referenced in this Section are not intended to be in the nature of a penalty, but are intended to be reasonable estimates of the State's projected financial loss and damage resulting from Vendor's breach, including financial loss as a result of Modernization Project delays or other events identified in Schedule 10. Accordingly, in the event an event set forth in Schedule 10 occurs, the State may assess Liquidated Damages and Service Level Credits as set forth in Schedule 10.
- (4) The Liquidated Damages and Service Level Credits prescribed in Schedule 10 [Performance Standards] and referenced in this Section shall be the sole and exclusive remedy with respect to any consequential damages (and direct damages as provided below) arising out of or caused by the actions or omissions of Vendor giving rise to the same root cause for the failure to meet the applicable underlying Performance Standards; provided, however, that the foregoing shall not limit (i) any applicable State termination rights in Article 16, (ii) the ability of the State to recover any Vendor Federal Penalty, or (iii) the ability of the State to pursue a claim for direct damages to the State (but not, subject to clause (ii) above, for any other remedy) as to any Service Level Credit or Liquidated Damages that the State elects in writing not to receive from Vendor (or returns to Vendor) within ninety (90) days from the date the applicable Service Level Credit or Liquidated Damages becomes payable. Failure to meet any Performance Standards that arise out of or are related to a single event or a related series of events will be treated as a single failure for the purpose of calculating the Liquidated Damages and Service Level Credits payable by Vendor. In this event, Vendor shall credit the State for only one (1) Liquidated Damage and Service Level Credit, which shall be the one that is the highest dollar amount. For example, if Vendor's performance of the Services causes a failure of Vendor to meet one or more Service Level Targets or KPIs, Vendor shall pay or credit the State for only one such Service Level Credit or Liquidated Damage (which Vendor agrees shall be the one with the highest dollar amount), but not more than one. In the event Vendor is assessed a subsequent Liquidated Damage or Service Level Credit with respect to failures that arise out of or are related to a single event or a related series of events and for which Vendor has previously been assessed a Liquidated Damage or Service Level Credit, such subsequent

Liquidated Damage or Service Level Credit shall be reduced by the dollar amount of such prior Liquidated Damage or Service Level Credit.

- (5) If Vendor repeatedly fails to meet one or more Critical Transition Milestones, the State may assess Liquidated Damages for each such occurrence as provided in Schedule 10 [Performance Standards].
- (6) The State may elect to assess and collect undisputed Liquidated Damages (i) through direct assessment and demand for payment delivered to Vendor, or (ii) by deduction of Liquidated Damages as set-off against payments then due to Vendor for the Services or that become due at any time after assessment of the Liquidated Damages. The State will make such deductions until the full amount payable by Vendor is received by the State.

#### **15.2.6**     *Participation in Federal Sanctions*

- (1) In the event (i) the State pays a financial penalty to any federal Governmental Body, (ii) any federal Governmental Body reduces its federal financial participation with the State, or (iii) any federal Governmental Body requires the State to expend additional funds on any Program in lieu of a financial penalty or reduction in federal financial participation (collectively, **“Federal Penalties”**), in each case, solely as a result of the State’s failure to meet (x) federal TANF minimum work participation requirements for the All Family Participation rate (as set forth in 45 C.F.R. §§ 261.50-261.57) (**“Federal All Family Participation Target”**) or (y) federal Food Stamp error rate requirements (as set forth in 7 C.F.R. §275.23) (**“Federal Food Stamp Target”**), (individually a **“Federal Program Target”** and collectively, **“Federal Program Targets”**) during Steady State (collectively, a **“State Federal Penalty”**), for any FFY commencing after the Steady State Date, Vendor shall provide to the State, as a liquidated damage and subject to Cap III and Cap IV, as applicable, an amount (or applicable equivalent value) equal to fifty percent (50%) of the dollar amount of such State Federal Penalty (**“Vendor Federal Penalty”**), either by (a) a credit against the first Vendor invoice issued after the State’s actual payment of such State Federal Penalty, (b) a monthly pro-rated credit against the invoices for the Fees, during the period of time that the State would have received such reimbursement, but for the federal government’s imposition of such State Federal Penalty, or (c) to the extent mutually agreed between the Parties, by providing the State with modified Services or New Services at no cost or at a reduced charge in lieu of paying for all or part of Vendor Federal Penalty; provided such Services have an aggregate equivalent value to the State, considering the price to the State of the Services, of not less than the Vendor Federal Penalty. The

Vendor Federal Penalties shall be the sole and exclusive remedies for failure to meet the Federal Program Targets; provided, however, the foregoing shall not limit any applicable termination rights of the State set forth in Article 16.

- (2) With respect to the TANF Two Parent Family Work Participation requirement, the Parties (i) acknowledge that the status of this program makes it impractical to properly balance the allocation of responsibilities for the economics of non-compliance therewith, and (ii) agree that notwithstanding anything in this Agreement to the contrary, any participation of Vendor in any Federal Penalty related to the Two Parent Family Work Participation requirement shall only be to the extent mutually agreed by the Parties, which shall be implemented as a Change.
- (3) In the event Vendor has previously paid a Service Level Credit or Liquidated Damage arising out of the same events or series of events in the same FFY for which a State Federal Penalty has been imposed on the State, the net amount provided by Vendor shall be a notional amount equal to the Vendor Federal Penalty minus such Service Level Credit or Liquidated Damage.
- (4) To the extent the Laws setting forth such Federal Program Targets are materially modified during the Term, the Parties shall agree upon an equitable adjustment to the terms of this Section 15.2.6.
- (5) To the extent that, under the methodology set forth in the federal regulations, the amount of the State Federal Penalty is higher than it would have been had it been determined without regard to any actions of the State, or is not reduced or avoided, in either case because of the State's actions before or during the Term, the increased amount that is attributable to the State's prior actions shall be subtracted from the State Federal Penalty prior to calculating the Vendor Federal Penalty as set forth in this Section 15.2.6(1). For example, if the State is subject to a \$2,500,000 Federal Penalty for failing to meet the Federal Food Stamp Target during the two years prior to Steady State and, subsequently, fails to meet the Federal Food Stamp Target for the FFY commencing October 1, 2008 and is assessed a \$3,500,000 Federal Penalty (which included an additional \$1,000,000 as a result of the State's prior failure), the additional amount of \$1,000,000 will be subtracted from the Federal Penalty prior to calculating the Vendor Federal Penalty. In such event the Vendor Federal Penalty would be \$1,250,000 (i.e.,  $(\$3,500,000 - \$1,000,000)/2 = \$1,250,000$ ).
- (6) Any modifications to this Section 15.2.6 shall only be effective through a Change that is mutually agreed to by the Parties in their discretion.

- (7) During the Term (with the initial meeting being held within thirty (30) days after the Effective Date), the Parties shall (i) utilize the Strategic Policy Board as the responsible body for understanding, monitoring, tracking, and proactively recommending steps designed to ensure that the State and Vendor will meet the Federal Program Targets once the Vendor Services Environment has been fully implemented, (ii) assess the State's historical performance when compared to the Federal Program Targets, identify the root cause of any failures to achieve the Federal Program Targets, and assess whether the Vendor Services Environment will avoid such root causes, (iii) appoint subject matter experts who will advise the Parties throughout the Term regarding any recommended changes to the Federal Program Targets, and (iv) in the event it appears that the State and Vendor may not meet or exceed the Federal Program Targets, establish an action plan for working with the federal government and the subject matter experts to avoid, dispute, reduce, and mitigate the imposition of any Federal Penalties.
- (8) Vendor's obligations under this Section 15.2.6 shall survive Termination with respect to any Federal Penalties that relate to any failures that occur during the term of the applicable terminated Services.

#### **15.2.7** *Equitable Relief*

Vendor acknowledges that, if Vendor breaches (or attempts or threatens to breach) its obligations under this Agreement, the State may be irreparably harmed for which there may be no adequate remedy at law. In such a circumstance, the State may proceed directly to court to seek any available equitable relief without any obligation to institute the Dispute Resolution Procedures or to provide prior notice of its intent to sue.

### **15.3** Rights of Set-Off

The State will have a right of set-off with respect to any undisputed amount that is otherwise payable to it by Vendor pursuant to this Agreement. The State may deduct such undisputed amount from the Fees otherwise payable or expenses owed to Vendor under this Agreement until such time as the amount owed by Vendor to the State has been paid or credited to the State. Vendor waives any and all rights of set-off which may be available to it with respect to this Agreement.

### **15.4** Corrective Action Plans

#### **15.4.1** *Corrective Action Plan Usage*

At its option, as an additional remedy and without prejudice to any other remedy available to the State, the State may require Vendor to submit to the State a corrective action plan (a "**Corrective Action Plan**") to correct or

resolve a breach by delivery of a request for a Corrective Action Plan regarding such breach, which request shall include notice of the breach, a reasonably detailed description of the breach, and the date by which such Correction Action Plan shall be submitted. A Corrective Action Plan may be required in the following circumstances

- (1) a violation of a provision of this Agreement;
- (2) a failure to meet any Performance Standard or other agreed measure of Vendor's performance;
- (3) a failure of Vendor to be responsive to a reasonable request of the State relating to the Services and within the scope of this Agreement for information, assistance, or support within the timeframe reasonably specified by the State that is a breach of this Agreement;
- (4) any act of noncompliance described in any other provision of this Agreement, including any Attachment; or
- (5) any other circumstance when mutually agreed by the Parties pursuant to the Governance Plan.

#### **15.4.2** *Scope of Corrective Action Plan*

A Corrective Action Plan must provide

- (1) a detailed explanation of the reasons for the cited breach;
- (2) Vendor's assessment or diagnosis of the cause of the cited breach; and
- (3) a specific, commercially reasonable proposal to cure or resolve the cited breach.

#### **15.4.3** *Corrective Action Plan Deadline*

Vendor shall submit the Corrective Action Plan by the deadline set forth in the State's request for a Corrective Action Plan. The Corrective Action Plan is subject to approval by the State.

#### **15.4.4** *Determination of Adequacy*

The State will notify Vendor in writing of the State's determination as to the adequacy of the Corrective Action Plan. If the State approves Vendor's proposed Corrective Action Plan, the State may (i) condition such approval on completion of tasks in the order or priority that the State may prescribe, (ii) disapprove portions of Vendor's proposed Corrective Action Plan; or (iii) request additional or different corrective action(s).

#### **15.4.5**     *Rejection of Corrective Action Plan*

If the State rejects Vendor's written explanation or proposed Corrective Action Plan, and to the extent permitted under the terms of this Agreement, the State may pursue any other remedy, including Termination.

#### **15.4.6**     *Limitations on Acceptance by State*

The State's acceptance of a Corrective Action Plan under this Section will not:

- (1)     excuse Vendor's prior substandard performance;
- (2)     relieve Vendor of its duty to comply with Performance Standards;
- (3)     relieve Vendor of its duty to comply with the terms of this Agreement;  
or
- (4)     prohibit the State from pursuing other available remedies for continued substandard performance.

### **15.5**     State Reservation of Rights

#### **15.5.1**     *Prohibition on Additional Obligations*

While any breach of this Agreement is in existence and remains uncured, the State reserves the right to prohibit Vendor from incurring additional obligations or expenses, which would be the obligation of the State, during investigation of an alleged breach and pending approval of the Corrective Action Plan, if necessary, by Vendor or a decision by the State to terminate this Agreement for cause, so long as Vendor is relieved of any obligation it is unable to perform because of such prohibition.

#### **15.5.2**     *Right of Set-Off*

In the event a court of competent jurisdiction or an arbitrator renders a final judgment in a Proceeding unrelated to this Agreement against Vendor and in favor of the State, and Vendor's rights to appeal have been exhausted, to the extent that such judgment remains unsatisfied by Vendor, the State, upon notice to Vendor, shall be entitled to set off amounts due to Vendor hereunder up to the amount of such judgment that remains unsatisfied. Vendor also acknowledges that the State is authorized by statute to make set-offs under certain circumstances unrelated to performance under this Agreement. Nothing in this Agreement shall be construed to limit or waive the rights of the State to take any actions contemplated by IC 4-13-2-14.5, IC 5-22-16-4, IC 22-4-30-1, IC 22-4-31-7, or any other applicable Law of the State relating to the right of the State to attempt to recover Taxes owed to it.

**15.5.3**     *Waiver of Liquidated Damages, Service Level Credits or Vendor Federal Penalty*

If at any time the State determines Vendor has not met any Performance Standard due to mitigating circumstances, the State reserves the right to waive all or part of the Liquidated Damages, Service Level Credits or any Vendor Federal Penalty attributable thereto. All such waivers must be in writing, contain the reasons for the waiver, and be signed by the State Project Director.

\* \* \* \* \*

[Remainder of this page intentionally left blank]

## **ARTICLE 16 TERMINATION**

### **16.1** Termination Generally

This Agreement may only be terminated as provided in this Article 16. Except to the extent this Agreement expressly provides otherwise, termination by a Party will be without prejudice to and with full reservation of any other rights and remedies available to the Party. The State will not be obliged to pay any termination charges in connection with the termination of this Agreement except as expressly provided elsewhere in this Agreement or in this Article 16.

### **16.2** Termination on Expiration

This Agreement shall terminate on expiration of the Term without further action of the Parties.

### **16.3** Termination by the State

#### **16.3.1** *Termination for Cause.*

- (1) The State may terminate this Agreement, in whole or in part, for cause in any of the following circumstances:
  - (A) a breach by Vendor of this Agreement which is material considering this Agreement as a whole occurs which cannot reasonably be cured by Vendor within thirty (30) days after delivery of the Termination Notice (the “**Notice Period**”);
  - (B) a breach by Vendor of this Agreement which is material considering this Agreement as a whole occurs which can reasonably be cured by Vendor within the Notice Period but which has not been cured within the Notice Period unless Vendor (i) has submitted to the State within the Notice Period a Corrective Action Plan to cure the breach within sixty (60) days after the date Vendor receives notice of the breach from the State (the “**Extended Cure Period**”), (ii) proceeds diligently according to such Plan, and (iii) cures the breach within the Extended Cure Period (in which case the State’s termination shall become effective when Vendor fails to perform any one of steps (i), (ii) or (iii)); or
  - (C) a series of breaches of Vendor’s obligations, none of which individually, constitutes a breach of this Agreement which is material considering this Agreement as a whole, but which, in view of Vendor’s history of breaches, whether or not cured, collectively constitute a breach of this Agreement which is material when considering this Agreement as a whole,



provided that the State's notice to Vendor shall be provided within a maximum of three (3) months after the last such breach upon which the State bases its termination. For the purposes of clarity, the cure periods set forth in Sections 16.3.1(1)(A) and 16.3.1(1)(B), as appropriate, shall apply to a notice given under this Section 16.3.1(1)(C) as to any breach for which a cure period has not previously been provided.

- (2) Vendor's nonperformance of its obligations under this Agreement which would otherwise permit a Termination by the State under this Section 16.3.1 will be excused (including compliance with the Performance Standards) and Vendor will not be liable for any resulting damages or other liabilities, if and to the extent Vendor's nonperformance results from:
  - (A) a failure by the State to perform in any material respect the Retained Activities or any other obligations of the State under this Agreement, which remain uncured;
  - (B) Vendor's compliance with the State's written directions or required procedures; or
  - (C) failures of the Systems of Record to perform their functions in substantial conformity with their performance levels in effect on the Effective Date and such failures materially and adversely affect Vendor's ability to perform its obligations which are dependent on the functions performed by the Systems of Record;

but only if and to the extent that Vendor provides the State with reasonable notice of such nonperformance and uses Commercially Reasonable Efforts to perform notwithstanding the State's failure to perform (a "**Workaround**").

### **16.3.2**     *Termination for Convenience*

This Agreement may be terminated, in whole or in part, by the State whenever, for any reason, the State determines that such termination is in its best interest. Termination shall be effected by delivery to Vendor of a Termination Notice (i) at least thirty (30) days prior to the Services Termination Date if Termination occurs after completion of the Transition, or (ii) at least five (5) days prior to the Services Termination Date if Termination occurs during Transition. If the Termination is in part and not in whole, the Termination Notice shall specify the Services and the Delegated Activities to which the Termination applies. Vendor shall be compensated for Services properly rendered prior to the Services Termination Date. The State will not be liable to compensate Vendor for Services performed after the Services

Termination Date (other than for Disengagement Services and any other Services requested by the State which were not otherwise included in the Disengagement Services).

**16.3.3** *Termination Following a Change of Control in Vendor or a Key Subcontractor*

- (1) If, without the State's prior consent after prior notice of a pending Change in Control (which notice shall provide a reasonable description of such Change in Control and information regarding the Person who after such Change in Control will have such Control as the State may reasonably request), (i) another entity acquires Control, or acquires all or substantially all of the assets, of Vendor, whether directly or indirectly, in a single transaction or series of related transactions, or (ii) Vendor is merged with or into another entity, then, at any time during (but not after) the one hundred eighty (180) day period following the effectiveness of the Change in Control, the State may terminate this Agreement, in whole or in part, by giving Vendor at any time during such one hundred eighty (180) day period at least ninety (90) days prior notice specifying the terminated Services and designating the effective date of such Termination.
- (2) If, without the State's prior consent after prior notice of a pending Change in Control (which notice shall provide a reasonable description of such Change in Control and information regarding the Person who after such Change in Control will have such Control as the State may reasonably request), (i) another entity acquires Control, or acquires all or substantially all of the assets of a Key Subcontractor, whether directly or indirectly, in a single transaction or series of transactions, or (ii) a Key Subcontractor is merged with or into another entity, then, at any time during (but not after) the one hundred eighty (180) day period following the Change in Control, if any, the State may require Vendor to replace such Key Subcontractor (with Vendor itself or another Person) by giving Vendor at least ninety (90) days prior notice thereof. Any replacement shall be done in compliance with Section 14.6.4, with such replacement being deemed a replacement under Section 14.6.4(1)(iv). If Vendor fails to replace the applicable Key Subcontractor within the timeframe contemplated by Section 14.6.4 or to expressly undertake to perform the Delegated Activities being performed by such Key Subcontractor, the State may terminate this Agreement, in whole or with respect to that part applicable to the Key Subcontractor with respect to which the Change in Control occurred, upon thirty (30) days prior notice, but without any obligation for any payment of Early Termination Close Out Payments.

#### **16.3.4**     *Termination in Other Circumstances*

(1)     Force Majeure

If Vendor is unable to perform any of its material obligations under this Agreement for more than thirty (30) days after receipt by the State of notice of a Force Majeure Event, the State may, without a prior Termination Notice, immediately terminate this Agreement or, at the State's option, the State may terminate only the affected portions of this Agreement.

(2)     Insolvency Event

(A)     The State may terminate this Agreement, in whole or in relevant part (as to an Insolvency Event of a Key Subcontractor), without a prior Termination Notice, immediately upon the occurrence of an Insolvency Event (i) with respect to Vendor, or (ii) with respect to any Key Subcontractor if Vendor does not undertake and agree, in writing promptly in accordance with commercially reasonable practices following the applicable Insolvency Event, to perform or have performed by itself or by a Subcontractor, subject to the State's approval rights under Section 14.2 and Section 14.3, the Services provided by or to be provided by such Key Subcontractor; provided that in the event of a bankruptcy of a Key Subcontractor where approval to reject such Subcontract is not granted by the bankruptcy court, Vendor shall be permitted to use such Key Subcontractor to continue to provide the Services, so long as the Key Subcontractor is not in material breach of its Subcontract with respect to the provision of the Services.

(B)     Vendor and the State acknowledge, admit and agree that if Vendor becomes the subject of any petition for relief filed pursuant to the Bankruptcy Code, then to the extent provided by Law: (i) the State's exercise of any of its rights under this Agreement shall constitute a Proceeding by a governmental unit to enforce its police and regulatory power, and as such shall not be subject to any automatic stay imposed by Section 362 of the Bankruptcy Code or otherwise, and (ii) Vendor shall be entitled to immediate relief from any automatic stay imposed by Section 362 of the Bankruptcy Code or otherwise (to the extent any such stay is applicable), on or against the exercise of any and all of the rights and remedies available to the State, whether such rights and remedies arise under this Agreement or otherwise, and Vendor hereby waives the benefits of such automatic stay with respect to the State.

Vendor hereby consents to the foregoing and agrees to raise no objection to any such relief or to any request by the State for such relief; provided, however, that the foregoing shall in no way preclude, restrict or prevent Vendor from filing for relief under the Bankruptcy Code.

- (C) Vendor and the State acknowledge, admit and agree that this is an agreement under which applicable law excuses the State from accepting performance from any entity other than Vendor, and that the State has entered into this Agreement with Vendor in reliance upon Vendor's and its Key Subcontractors' unique knowledge, experience and expertise, and that of their respective Principals, in providing the Services and performing the Delegated Activities. For these reasons, Vendor and the State acknowledge, admit and agree that if Vendor becomes the subject of any petition for relief (a "**Bankruptcy Case**") filed pursuant to the Bankruptcy Code, then the State will be excused from accepting performance from Vendor, as debtor-in-possession ("**DIP**"), from a trustee of Vendor and from the assignee of any such DIP or trustee, and that this Agreement may not be assumed or assigned by Vendor, any DIP or trustee in any Bankruptcy Case without the State's prior written consent, which consent the State has the right to grant or withhold in its discretion.

(3) Wrongful Conduct

The State may immediately terminate this Agreement (or in the case of a Key Subcontractor, the State may require Vendor to terminate the applicable Key Subcontract), without a prior Termination Notice, if (i) there is felony conviction (including a plea of guilty, no contest or *nolo contendere*) against Vendor or any Key Subcontractor related to the performance of the Services, or (ii) the Vendor Senior Program Executive, the applicable comparable position at a Key Subcontractor, or any of their respective managerial direct reports become aware of the occurrence of any material violation of the respective corporate compliance programs of Vendor or the applicable Key Subcontractor designed to prevent matters described in clause (i) of this Section 16.3.4(3), and Vendor has not thereafter initiated and diligently pursued prompt corrective action with respect thereto after prior notice from the State. Vendor shall give prompt notice of any of the matters described in clauses (i) or (ii) of this Section 16.3.4(3) to the State Project Director after becoming aware of the same.

(4) Change in Law

The State may terminate this Agreement effective sixty (60) days after delivery of a Termination Notice to Vendor upon the occurrence of any action, including the adoption of any Law that, in the opinion of the State, either (i) has a Material Adverse Effect on the ability of Vendor or the State to perform their respective obligations hereunder or (ii) so changes the relationship between the Parties hereunder so as to render the terms and conditions of this Agreement ineffective.

(5) Funds Not Appropriated

When the fiscal body of the State makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of this Agreement, this Agreement shall be considered canceled. A determination by the fiscal body is final and conclusive.

**16.3.5** *Partial Terminations*

For any partial Terminations under this Agreement, the Fees shall be adjusted to reflect a fair and equitable portion for the remaining work, which shall include decreases for the work no longer provided and increases for the additional or different work that may be required because of the terminated Services, and the Services, Performance Standards, and other applicable provisions of this Agreement shall be equitably adjusted to reflect the impact of the terminated Services.

**16.3.6** *Termination Notice*

Other than as expressly provided otherwise, the State shall give Vendor notice of Termination ("**Termination Notice**") specifying (i) the basis for Termination under this Section 16.3, (ii) the effective date of Termination, or if applicable, the effective date of the Termination if cure is available but not achieved by such date, (iii) the scope of the Services terminated, and (iv) any other matters required by the provision under which the Termination occurs.

**16.3.7** *Services Termination Date*

Except as otherwise provided in this Agreement, the Services Termination Date will be the earlier of the date specified in the Termination Notice or the tenth (10<sup>th</sup>) anniversary of the Effective Date ("**Scheduled Expiration Date**"). Any cure period which extends beyond the Scheduled Expiration Date shall not effect an extension of the Scheduled Expiration Date. The State may at its option extend any Services Termination Date (up to two times as it elects), for up to an aggregate of twelve (12) months beyond the original Services Termination Date, in its discretion, by providing at least thirty (30) days prior notice of such extension, provided that Vendor shall be relieved from meeting

the Performance Standards to the extent directly and adversely affected by such extension(s).

**16.3.8**     *State's Rights After Termination*

Following any Termination of all or part of this Agreement, the State will have the right to procure the terminated Services on the open market or to bring such Services in-house and, subject to Vendor's reservation of rights to dispute any such Termination by the State which Vendor in its discretion determines to be improper, the State shall have the right to commence such procurement after delivery of a Termination Notice.

**16.3.9**     *Removal of Services in Lieu of Termination*

If the State is entitled to terminate this Agreement for cause pursuant to Section 16.3.1, the State may alternatively elect to cancel or remove from scope any Delegated Activities that are the subject of the breach or breaches giving rise to the right to terminate and any other Delegated Activities that are materially affected by such breach or breaches. Such cancellation or removal will be accomplished as a Directed Change via the Change Order Process. In such case, the Parties will negotiate in good faith to identify equitable adjustments to the Fees and other relevant terms necessary to reflect appropriately the removed portion of the Services. Any such cancellation or removal will be without prejudice to any other rights available to the Parties with respect to the breach or breaches.

**16.4**     Termination by Vendor

**16.4.1**     *State Failure to Pay*

Vendor may terminate this Agreement as of a date specified in a Termination Notice if, and only if, the State fails to pay Vendor when due amounts in excess of those authorized by Section 3.12.3, Section 4.1.1(3), or Section 4.2(5), and does not cure such failure or withholding by the end of the Notice Period set forth in Section 16.4.2.

**16.4.2**     *Notice of Overdue Payment*

Vendor's notice of overdue payment will (i) be sent to the attention of the State Project Manager, with a copy to the General Counsels of FSSA and of IDOA, (ii) expressly reference this Section 16.4, (iii) set forth the overdue amount and (iv) expressly state that Vendor may terminate this Agreement if such failure to make payment is not cured within thirty (30) days after the State's receipt of such notice.

#### **16.4.3**     *Other State Non-Performance*

The State's failure to perform its obligations under this Agreement (or cause them to be performed) will not constitute grounds for termination by Vendor (other than with respect to payment obligations as provided in Section 16.4.1 and Section 16.4.2).

#### **16.4.4**     *Additional Costs*

Notwithstanding anything to the contrary in this Agreement, Vendor shall have no duty to incur additional costs in performing a Workaround (other than as reasonably required in expending Commercially Reasonable Efforts to perform a Workaround). The State shall reimburse Vendor for the incremental labor charges and other expenses reasonably incurred by Vendor to meet the Performance Standards (and as to the Service Levels, to meet the Target Threshold) and perform its other responsibilities under this Agreement through a Workaround; provided that (i) to the extent practicable, Vendor notifies the State of such additional incremental charges and expenses and obtains the State's approval prior to incurring such costs, and (ii) Vendor uses Commercially Reasonable Efforts to minimize such costs. If and to the extent that the State declines to approve certain reasonable additional costs, Vendor shall not be obligated to proceed with the efforts associated therewith.

### **16.5**     Termination by Mutual Agreement

This Agreement may be terminated by mutual written agreement of the Parties effective as of the date set forth in such writing.

### **16.6**     Post-Termination Cooperation and Transition

#### **16.6.1**     *Transition to Successor Service Provider*

Vendor acknowledges that, upon Termination of this Agreement or Services for any reason, in whole or in part, either the State or another service provider (either, a "**Successor**") may provide services similar to the Services and the Delegated Activities (or such portion thereof related to the portion of this Agreement and the Services so terminated). In such event, Vendor shall furnish adequate and appropriate phase-out services ("**Disengagement Services**") pursuant to a Disengagement Plan ("**Disengagement Plan**"), which plan shall be executed prior to the Services Termination Date, with Disengagement Services commencing upon the direction of the State and continuing for up to six (6) months after this Agreement terminates or such longer period as the State may reasonably require (up to a maximum of an additional six (6) months) ("**Disengagement Period**"). The Disengagement Plan shall include the following assistance upon the State's request:

- (1) The Disengagement Plan shall provide that Vendor will exercise its Commercially Reasonable Efforts and cooperation to effect an orderly and efficient transition to the Successor.
- (2) The Disengagement Plan shall specify a training program and a date for transferring responsibilities for each division of work described in the Disengagement Plan, and shall be subject to the State's approval. Vendor shall provide sufficiently experienced personnel during the Disengagement Period to ensure that the Services are maintained at the required level of proficiency.
- (3) The Disengagement Plan shall provide appropriate and necessary details regarding the return of control of the Records, as set forth in Article 9, to the Successor including a list of the type of Records being returned, the format or location of such Records, the timing of the return during the Disengagement Services, and the individuals for each Party who will be responsible for such return.
- (4) The Disengagement Plan shall provide the details regarding the transfer of all dedicated Equipment to the Successor, to the extent included within the Early Termination Close Out Payments or otherwise purchased by the Successor, including the machine types, serial number, attached peripherals, manufacturer, warranty details, and, if applicable, any packing and shipment details. Upon receipt of payment for such Equipment, Vendor shall provide the Successor with an agreed upon bill of sale and other appropriate documents of transfer.
- (5) Vendor shall provide the State with the approved version of all Plans, together with the opportunity to discuss such Plans with the subject matter experts on Vendor's project staff to provide knowledge transfer to the State regarding the maintenance, management and implementation of the Plans.

#### **16.6.2** *Retransition of Employees*

In the event of a Termination for any reason, Vendor shall exercise Commercially Reasonable Efforts to assist the Successor in such manner as the State may reasonably request in hiring or rehiring of any Project Employees (dedicated to the terminated Services) by the Successor. Vendor shall allow as many of such employees as practicable and reasonably required to remain on the job to help the State maintain the continuity and consistency of the Services. Subject to applicable Law and the Employer's or applicable Subcontractor's policies, Vendor also shall disclose necessary personnel records and allow the State or the Successor to conduct interviews with such employees. Vendor shall provide the Successor with the applicable summary plan descriptions for the employee benefits of the to-be-transferred



employees. If any such employees are offered positions with the Successor and accept such offers, the Employer or applicable Subcontractor shall release such employees from employment with such employer at a mutually agreeable date.

**16.6.3** *Retransition of Service Locations*

In the event of a Termination for any reason, Vendor shall exercise, and shall cause the applicable Key Subcontractor to exercise, Commercially Reasonable Efforts to assist the State in such manner as the State may reasonably require in transferring control of any dedicated Vendor Service Locations to the Successor (including any Vendor Service Location located in any shared or co-located facility). Such efforts shall include, without limitation, the assignment of any real estate leases for such Vendor Service Locations to the State and the transfer of applicable Client Records, State Records, and equipment used in the delivery of the Services (as to such equipment, to the extent provided for in Section 16.6.6). Vendor shall use, and shall cause the applicable Key Subcontractor to use, Commercially Reasonable Efforts to effect such transfers at the time reasonably requested by the State so that any Services being conducted at the time of Termination shall continue without interruption.

**16.6.4** *Payment of Charges During Termination*

- (1) Vendor shall invoice, and the State shall pay, for all of Vendor's reasonable and customary charges which are incurred within the Disengagement Period for Disengagement Services Invoicing, and payment shall be made in accordance with Section 4.4.
- (2) Vendor shall invoice the State for Vendor's actual Early Termination Close Out Payments upon receipt of the State's Termination Notice, for the categories set forth in, and subject to the terms of, Section 16.6.6. Such invoices shall be payable by the State on the later of the Services Termination Date and sixty (60) days after receipt of such invoice. To the extent Vendor is not aware of the amount of such Early Termination Close Out Payments as of the date of Vendor's receipt of the Termination Notice, Vendor shall invoice the State within thirty (30) days after calculating such Payments, and the State shall pay such invoices in accordance with Section 4.4.

**16.6.5** *Continuing Performance*

Vendor's obligations under this Section 16.6 shall continue in effect after the Services Termination Date until the expiration of the Disengagement Period.

#### **16.6.6**     *Closeout Payments*

- (1) In the event of a Termination of this Agreement for any reason (other than a Termination by expiration), the State shall pay Vendor, to the extent applicable, the charges set forth in Sections 16.6.6(2) and 16.6.6(3)(F) below. In the event of a Termination of this Agreement for any reason (other than on expiration or upon a Termination as set forth in Sections 16.3.1, 16.3.4(2), 16.3.4(3), or 16.5, in any of which events, Vendor shall not be entitled to Early Termination Close Out Payments), the State shall pay the Early Termination Close Out Payments set forth in Section 16.6.6(3), 16.6.6(4) and 16.6.6(5) and subject to Section 16.6.6(6) if applicable.
- (2) The State will negotiate in good faith with Vendor to establish and pay Vendor's charges for completing the Disengagement Plan and providing the Disengagement Services, which shall be commercially reasonable charges. However, such charges will exclude work performed by Project Staff otherwise performing the Services and included within the Fees being paid by the State.
- (3) Vendor's and its Subcontractors' Early Termination Close Out Payments (as applicable and without duplication) shall be as follows:
  - (A) Vendor's and its Subcontractors' equipment costs net of any applicable depreciation or amortization as of the Services Termination Date;
  - (B) Vendor's and its Subcontractors' prepaid costs for software licenses which have not been fully amortized as of the Services Termination Date;
  - (C) Vendor's and its Subcontractors' early lease termination costs applicable to the period commencing with the Services Termination Date;
  - (D) Vendor's and its Subcontractors' unamortized leasehold improvements net of any applicable depreciation or amortization as of the Services Termination Date; and
  - (E) To the extent mutually agreed by the Parties, the unamortized balance of Vendor's and its Subcontractors' other reasonable and necessary actual charges incurred by Vendor or its Subcontractors' in connection with the Modernization Project as of the Contract Termination Date but will exclude budgeted but unexpended and avoided expenses and costs;
  - (F) Vendors and its Subcontractors' unamortized balance of the Deferred Fees, as set forth in Schedule 24 [Deferred Fees].

- (4) If the State is obligated to make Early Termination Close Out Payments under Section 16.6.6(1) above,
- (A) the Successor shall offer employment to all dedicated Project Employees (excluding the executive management employees of Vendor and its Subcontractors dedicated to the Modernization Project), subject to compliance with the Successor's initial employment policies relating to a drug screening and criminal background check, effective as of the later of (i) the Services Termination Date, or (ii) the last date on which such individual was performing Disengagement Services as set forth in this Agreement; and
  - (B) If the State has not provided Vendor at least seventy-five (75) days prior notice of Termination, then as to any such dedicated Project Employees who are not employed by the Successor as set forth in (A) above ("**Workforce Employees**"), the State shall also pay to Vendor (i) salary and benefit costs for each Workforce Employee for the period of time (x) between the date on which such Workforce Employee is no longer assigned to provide the Services or Disengagement Services, and (y) the date of Vendor's or the respective Subcontractor's reassignment of such Workforce Employee to another account (but in no event for more than seventy-five (75) days after the date on which the State and Vendor agree on the date on which such Workforce Employee is no longer required for the performance of the Services or Disengagement Services), and (ii) severance payments made by Vendor or any Subcontractors to any Workforce Employee, under Vendor's or the respective Subcontractor's then applicable severance plans applicable to similarly situated employees (but exclusive of any individually tailored severance arrangements), to the extent such Workforce Employee's employment is terminated within seventy-five (75) days following the date on which such Workforce Employee is no longer assigned to provide the Services or Disengagement Services but at the rates applicable on the date the State's obligations hereunder accrue.
  - (C) To the extent any dedicated Project Employee voluntarily terminates his or her employment prior to the later of the Services Termination Date, or the last date on which such individual is required for the performance of Disengagement Services as set forth in this Agreement, the State (i) shall be financially responsible for the reasonable costs for any steps reasonably required to retain sufficient employees for the required period, such as retention payments, as shall be set forth in the Disengagement Plan, but (ii) shall not have any

obligations under this Section 16.6.6(4) with respect to any such voluntarily terminated Project Employee.

- (5) If the State is obligated to make Early Termination Close Out Payments under Section 16.6.6(1), the State shall reimburse Vendor for any reasonable early termination charges in any third party contracts to which Vendor or a Subcontractor is a party and that are dedicated to the performance of the Services (but without duplication of any Early Termination Close Out Payments otherwise including such third party early termination charges). There are no third party termination charges applicable to the Services as of the Effective Date. As to any additional third party contracts dedicated to the performance of the Services that are entered into after the Effective Date, the State shall not be responsible for any early termination charges thereunder as part of Early Termination Close Out Payments unless the State has previously approved the same in writing.
- (6) In the event of a partial Termination of this Agreement, the State shall pay Vendor Early Termination Close Out Payments (had such payments been required for a Termination of this Agreement under this Section 16.6.6) that relate only to the portion of the Services that is terminated (pro-rated to the extent of any sharing of the resources between the terminated Services and the continued Services).

For purposes of this Agreement, the timeframe for any depreciation or amortization shall be the Term or, as to any equipment that is reasonably expected to be refreshed during the Term, the expected period of use in delivering the Services. For clarity, this provision does not control Vendor's and its Subcontractors' internal depreciation and amortization schedule, which Vendor and its Subcontractors shall choose in its discretion.

#### **16.6.7**     *Access to Records*

Subject to the terms of this Agreement, Vendor must provide the State all reasonable access to Records, facilities, and documentation as required to efficiently and expeditiously close out the Services under this Agreement. If any such Records are stored in a data format proprietary to Vendor or any applicable Subcontractor, Vendor shall provide, or as applicable cause the Subcontractor to provide, the State with a copy such Records in a standardized data format (e.g., PDF, TIF, JPG, GIF, etc.) requested by the State.

#### **16.6.8**     *Asset Transfer*

- (1) Subject to Article 11 and other provisions of this Agreement, and on or prior to the Contract Termination Date or the Services Termination Date, as applicable, Vendor shall execute and deliver (or cause to be executed and delivered by the appropriate Subcontractor or other

Person) all bills of sale, assignments and other documentation requested by the State to effectuate the transfer of good and marketable title to or, as applicable, use or license rights in all assets utilized in the delivery of the Services or the performance of the Delegated Activities, unless this Agreement specifically provides otherwise. The State shall pay Vendor for such assets in accordance with Section 16.6.6.

- (2) Vendor shall bear the risk of loss (other than to the extent that such loss is caused by the State) of the tangible personal property assets which are located at the Service Locations in the possession or control of Vendor or any Subcontractor and which are to be transferred to the State from Vendor or a Subcontractor pursuant to and as described in an agreed to Disengagement Plan until possession or control of such assets is delivered or provided to the State.
- (3) Any Client Records previously maintained by Vendor or any of the Subcontractors which are utilized in the provision of the Services and, subject to Article 11, any other Records related to any assets transferred to the State pursuant to this Section 16.6.8 shall be transferred to the State on or prior to the later of the Services Termination Date or the conclusion of the Disengagement Period.

#### **16.7 Scope of Termination**

Unless express reference is made to a partial Termination, any reference in this Agreement to a Termination shall be deemed to be a Termination of the entirety of this Agreement, and the phrase “any Termination” shall refer to whole and partial Terminations as applicable.

#### **16.8 Applicability to Key Subcontractors**

None of the events or circumstances in this Article 16 that relate to a Key Subcontractor shall apply if Vendor takes prompt action (i) to cause the Key Subcontractor to cure such event or circumstance within the applicable cure period, (ii) to terminate and replace such Key Subcontractor with a Subcontractor having equal or greater skills and qualifications in compliance with, to the extent applicable, Article 4, or (iii) to provide such Services itself and promptly cure the breach of such Subcontractor.

\* \* \* \* \*

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## **ARTICLE 17**

### **INDEMNIFICATION AND LIMITATION OF LIABILITY**

#### **17.1 No Indemnification by State**

Vendor for itself and its Subcontractors acknowledges that (i) tort claims against the State are governed by IC 34-13-3, which sets forth, among other things, various requirements regarding losses for which the State is not liable (IC 34-13-3-3), the maximum combined aggregate liability of the State (IC 34-13-3-4), requirements relating to the filing of notice against the State, the contents and delivery of such notice (IC 34-13-3-6 and IC 34-13-3-12), the denial of claims as a prerequisite to suit (IC 34-13-3-13), and the compromise and settlement of claims against the State (IC 34-13-3-14 and 15), and (ii) IC 34-51-2-2 provides that compensatory damages based on comparative fault are not applicable to tort claims against the State. The following provisions relating to indemnification notwithstanding, to the extent that the same are inconsistent with or in conflict with IC 34-13, the statute shall control and take precedence. The State and its agencies (as defined in IC 4-13-1-1), departments, officials, employees, representatives, contractors, agents and attorneys will in no circumstances indemnify Vendor, any Subcontractor or any of their Principals, employees, shareholders, agents, managers, representatives, attorneys, accountants, other advisors or any Person claiming by or through any of the foregoing. Vendor hereby acknowledges that it will have no right to seek any such indemnification and waives and releases any such claim for itself and for any Person claiming by or through Vendor.

#### **17.2 Indemnification by Vendor**

##### **17.2.1 *General Indemnification***

Subject to applicable limitations contained in this Agreement, Vendor will indemnify, defend (subject to the State's reserved rights to defend itself) and hold harmless the State and all State Indemnified Persons from any Losses related to (i) any Proceeding between Vendor and any Subcontractor to which the State becomes a Party (other than Losses caused by, or resulting from, fault of the State), and (ii) a Claim or Proceeding by or on behalf of any third party (A) for intangible property damage, to the extent caused by or arising from the negligence or intentional misconduct of Vendor and its employees, officers, agents, or Subcontractors, or Project Employees in the course of performing Vendor's obligations under this Agreement or any Subcontract or any Material Agreement, the foregoing subject to and within Cap III; (B) for tangible property damage or bodily injury or death, to the extent caused by or arising from the negligence or intentional misconduct of Vendor and its employees, officers, agents, or Subcontractors, or Project Employees in the course of performing Vendor's obligations under this Agreement or any Subcontract or any Material Agreement; or (C) for any matters arising out of or relating to this Agreement, any Subcontract or any Material Agreement (as to (1), (2), and (3) below, subject to and within Cap III) for any of the following:

- (1) any Claim by a third party to the extent caused by any wrongful action or omission by Vendor, any Subcontractor or any Project Employee, unless such Claim arises as a result of a breach of any provision hereof by the State, or from the negligence or willful misconduct of any State Indemnified Person;
- (2) any Claim by a third party to the extent caused by a breach of this Agreement by Vendor;
- (3) any governmental fines (other than as specified in Section 15.2.6) arising out of Vendor's noncompliance with or violation of any Laws in its performance of its obligations hereunder, provided that as to FSSA Laws, the foregoing shall apply only to Claims that accrue during Steady State;
- (4) any Infringement Claim that, subject to Section 17.4.3, (i) if true, would constitute a breach of any of Vendor's intellectual property representations, warranties, or obligations hereunder, (ii) arises out of the negligence or willful misconduct of Vendor, or (iii) any of the materials, Services, Systems, Software, Deliverables, Custom Software, Vendor Owned Software or the State Site (as to all the foregoing items, to the extent provided to the State by Vendor hereunder) or any portion thereof, infringes or violates any patents, copyrights, trade names, trade secrets, licenses, or other intellectual property rights of any third party; and
- (5) employment-related Claims accruing on or after the date of employment by any Project Employee with Vendor or a Subcontractor, except to the extent caused by the State.

#### **17.2.2** *Costs of Defense*

If Vendor provides the defense, Vendor will provide such defense and indemnification at Vendor's own expense and with counsel approved by the State, including the approval of the Office of the Attorney General for the State of Indiana. If Vendor determines that is necessary to retain counsel prior to obtaining approval by the Office of the Attorney General, it may do so subject to the right of the Attorney General to subsequently reject such counsel. If the State elects to defend itself with respect to a Claim as to which Vendor has an indemnification obligation under this Section 17.2, the State shall be responsible for its expenses (including reasonable attorney fees and disbursements) incurred by the State in connection with such defense.

## 17.3 Indemnification Procedures

### 17.3.1 *Notice of Claims*

In the event that any Claim for which Vendor would be liable to a State Indemnified Person hereunder is asserted against or sought to be collected from a State Indemnified Person by a third party, such State Indemnified Person shall promptly notify Vendor of such Claim or Proceeding and use reasonable efforts to provide to Vendor all reasonably available information requested by Vendor in order to enable Vendor to make an informed decision as to whether the indemnity is appropriate (the “**Claim Notice**”). The failure to provide the Claim Notice to Vendor promptly will not relieve Vendor of any Liability it may have to such State Indemnified Person giving the Claim Notice, except to the extent that Vendor demonstrates that the defense of such Claim or Proceeding is prejudiced by the State Indemnified Person’s failure to give such Claim Notice promptly. Vendor shall have ten (10) days from the delivery of the Claim Notice (the “**Claim Period**”) to notify the State Indemnified Person (i) whether or not Vendor disputes liability to the State Indemnified Person hereunder with respect to such Claim or Proceeding and (ii) notwithstanding any such dispute, whether or not Vendor desires, at its sole cost and expense, to defend the State Indemnified Person against such Claim or Proceeding, in which case Vendor shall assume all responsibility for such Claim or Proceeding. During the Claim Period, the State shall use reasonable efforts to extend the date on which a response to such Claim is due. Notwithstanding the assumption by Vendor of the defense of any Action, the State Indemnified Person shall be permitted to participate in such defense at the State’s cost and expense, provided that such participation shall be at Vendor’s sole cost if such participation is required due to any professional conflict which would prevent Vendor’s counsel from representing the State Indemnified Person. Nothing in this Section shall be construed to waive or otherwise modify the requirements set forth in IC 34-13-3 regarding filing of notice of claims against the State.

### 17.3.2 *No Settlement Without Consent*

Pending the resolution of any dispute by Vendor of its liability with respect to any Claim or Proceeding, such Claim or Proceeding shall not be settled (other than Claims or Proceedings which are settled solely by the payment of money) without the prior written consent of the applicable State Indemnified Person, which consent shall not be unreasonably withheld so long as the State Indemnified Person suffers no economic loss thereby and such settlement includes as an unconditional term thereof a release given by the claimant or plaintiff of the State Indemnified Person from all Liability with respect to the Claim or Proceeding in form and substance acceptable to such State Indemnified Person, provided that any consent of the State may be given or withheld in its discretion. Notwithstanding the foregoing, if it is reasonably likely that damages in such Proceeding would result in an injunction or other



equitable relief, then the State Indemnified Person may, by notice to Vendor, assume the right to defend, compromise or settle such Proceeding (at the State's sole cost and expense); provided, Vendor may participate in such Proceeding at its expense and; provided, further, no such Proceeding shall be settled without the consent of both the State Indemnified Person and Vendor.

#### **17.3.3**     *Vendor Right to Defend*

In the event that Vendor notifies the State Indemnified Person within the Claim Period that Vendor desires to defend the State Indemnified Person against such Claim or Proceeding, then, except as hereinafter provided, Vendor shall have the right and obligation to defend the State Indemnified Person by appropriate Proceedings, which Proceedings shall be promptly settled or prosecuted by Vendor to a final conclusion in such a manner as to avoid any risk of the State Indemnified Person becoming subject to Liability for any other matter; provided, however, Vendor shall not, without the prior written consent of the State Indemnified Person, consent to the entry of any judgment against the State Indemnified Person or enter into any settlement or compromise which does not include, as an unconditional term thereof, the giving by the claimant or plaintiff to the State Indemnified Person of a release, in form and substance satisfactory to such State Indemnified Person, as the case may be, from all Liability with respect to such Claim or Proceeding. If any State Indemnified Person desires settlement without the prior consent of Vendor, which consent shall not be unreasonably withheld, conditioned or delayed, it may do so at its sole cost and expense. Notwithstanding anything to the contrary, the State, at its expense, reserves the right to defend itself (whether through the Office of the Attorney General of the State of Indiana or outside counsel) in connection with any Claim or Proceeding.

#### **17.3.4**     *Vendor Election Not to Defend*

If Vendor disputes its Liability with respect to such Claim or Proceeding, the State Indemnified Person shall have the right to pursue all of its legal and equitable remedies against Vendor for indemnity hereunder. If Vendor elects not to defend the State Indemnified Person against such Claim or Proceeding required by this Agreement, whether by not giving the State Indemnified Person timely notice as provided above, or otherwise, then the Claim or Proceeding may be defended by the State Indemnified Person at Vendor's cost and expense (without imposing any obligation on any State Indemnified Person to defend any such Claim or Proceeding), in which case such State Indemnified Person may defend such Claim or Proceeding in such a manner as it may deem appropriate (including settlement); provided that if Vendor shall have disputed its Liability to the State Indemnified Person hereunder, as provided in Section 17.3.1 above, then such determination or settlement shall not affect the right of Vendor to dispute the State Indemnified Person's claim for indemnification.

## 17.4 Vendor's Liability

### 17.4.1 *Parameters*

- (1) SUBJECT TO ALL OF SECTION 17.4, IN NO EVENT, WHETHER IN CONTRACT OR IN TORT (INCLUDING BREACH OF WARRANTY, NEGLIGENCE AND STRICT LIABILITY IN TORT), SHALL VENDOR BE LIABLE FOR INDIRECT OR CONSEQUENTIAL DAMAGES (OTHER THAN AS EXPRESSLY PROVIDED IN SECTION 17.4.1(2)(B) AND SECTION 17.4.1(2)(C)) OR EXEMPLARY, PUNITIVE, OR SPECIAL DAMAGES, OR LOST REVENUE OR LOST SAVINGS, EVEN IF VENDOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES IN ADVANCE.
- (2) Except as expressly provided in Sections 17.4.2, 17.4.3, or 17.4.4, Vendor's total liability to the State, whether in contract, tort or otherwise (including breach of warranty, negligence and strict liability in tort) in the aggregate for all claims and causes of action arising under or related to this Agreement shall be limited by and only as expressly provided in Cap I, Cap II, Cap III, and Cap IV, as follows:
  - (A) As to direct damages, which shall include Reprocurement Costs, an amount equal to the greater of (i) One Hundred Twenty Five Million Dollars (\$125,000,000) and (ii) the Fees paid by State to Vendor hereunder during the twelve (12) months prior to the most recent Claim (the foregoing, "**Cap I**"), provided nothing herein shall relieve the State of its obligation to mitigate Reprocurement Costs;
  - (B) As to direct and consequential damages resulting from malicious misconduct of Vendor, any Subcontractor or any Project Employee in connection with, or related to, the performance of the Services, an amount equal to Thirty Million Dollars (\$30,000,000) (the foregoing, "**Cap II**"); provided, however, as to such direct damages, this limitation shall be in addition to the amount provided in Cap I, i.e., an aggregate amount of One Hundred Fifty-Five Million Dollars (\$155,000,000);
  - (C) As to (i) consequential damages resulting from other than malicious misconduct, of Vendor, any Subcontractor or any Project Employee in connection with, or relating to, the performance of the Services, (ii) damages of the State to the extent resulting from Vendor's actions or omissions in connection with performance of the Services which cause the State to fail to comply with any Laws applicable to the

Programs (such Laws being the “**FSSA Laws**”), (iii) Losses subject to indemnification in Section 17.2.1 that are specified as being subject to and within Cap III, and (iv) Vendor Federal Penalties to the extent described in Section 17.4.1(2)(D), an aggregate amount for clauses (i), (ii), (iii) and (iv) above equal to Three Million Dollars (\$3,000,000) as may be adjusted pursuant to Section 17.4.1(2)(E)) (the foregoing, “**Cap III**”); provided, however, Vendor shall be responsible for damages under clause (ii) above only to the extent that they accrue in a Region after each applicable Region Completion Date to the extent that such liability under clause (ii) above is not based on a state wide basis;

- (D) As to Vendor Federal Penalties, an aggregate amount equal to Twenty Million Dollars (\$20,000,000); provided that (i) Vendor shall not be liable for more than an aggregate amount of Ten Million Dollars (\$10,000,000) for all failures to meet each of the Federal TANF Targets or the Federal Food Stamp Targets, respectively, (ii) Vendor shall not be liable for more than the following amounts of Vendor Federal Penalties assessed by the federal government for each of the following Federal Fiscal Years: Zero Dollars (\$0) in each of FFY 2007 and FFY 2008, Two Million Dollars (\$2,000,000) in each of FFY 2009 and FFY 2010, and Three Million Dollars (\$3,000,000) in each FFY thereafter, and (iii) seventy-five percent (75%) of all Vendor Federal Penalties shall be counted against and used to fill up Cap III until Cap III is filled (all the foregoing, “**Cap IV**”); and
- (E) On the first day of Contract Year Six, regardless of the total amount of claims that were subject to Cap III during Contract Year One through the end of Contract Year Five, Cap III shall be re-filled to the extent necessary to have Three Million Dollars (\$3,000,000) in aggregate available to pay any and all claims that are subject to Cap III that may accrue in Contract Year Six and later. For clarity, at no time (before, during, or after Contract Year Six) shall Cap III be greater than Three Million Dollars (\$3,000,000). As an additional limitation only, Vendor’s total aggregate liability arising under or related to this Agreement for claims subject to Cap III that are attributable to any single Subcontractor shall not exceed Five Million Dollars (\$5,000,000).

#### **17.4.2**     *Additional Limitations on Vendor’s Liability*

- (1) Vendor shall have no obligations to indemnify any State Indemnified Person against any Losses for which a claim for indemnification has

not been made prior to the date which is six (6) years following the expiration of the Term or the applicable statute of limitations, whichever is earlier.

- (2) Vendor will not be liable to the State for any loss or damages attributable to or arising from:
  - (A) The failure of the State or any State agency or any other State contractor to perform a service, obligation or activity in connection with this Agreement; or
  - (B) Vendor's prudent and diligent performance of the Services upon written instructions, guidance or directions from the State Project Director or State Project Manager.
- (3) Notwithstanding anything to the contrary in this Agreement, (i) Vendor and its Subcontractors, and its and their directors, officers, employees, agents, representatives, and affiliates shall have no liability in contract, tort, or otherwise, for payments or other benefits to Clients pursuant to the Programs arising from or related to any final benefit eligibility determinations, and (ii) upon Vendor's request submitted through the Governance Procedures, Vendor (x) may obtain and rely on the State's written interpretation, guidance or administrative direction regarding FSSA Laws, and (y) will have no liability to the State if Vendor relies upon and complies with such interpretation, guidance or direction.
- (4) Vendor will have no obligations to indemnify the State under Section 17.2.1(2)(A) and Section 17.2.1(2)(B) to the extent such Losses are caused by benefit eligibility determinations.

**17.4.3**     *Exceptions to Indemnification for Infringement Claim*

Notwithstanding any other provision of this Agreement, Vendor will not indemnify, defend, or hold harmless the State or any State Indemnified Persons, to the extent an Infringement Claim is caused by or based upon:

- (1) modifications made to the item in question by anyone other than:
  - (A) Vendor or its Affiliates; or
  - (B) the State or its contractors working at Vendor's direction or in accordance with a modification expressly authorized in the specifications (unless such specifications were provided by the State);

- (2) the combination, operation, or use of the item with other items or services if Vendor did not supply or expressly approve for use with the items or services;
- (3) the State's failure to use any new or corrected versions of the item made available by Vendor;
- (4) Vendor's adherence to non-discretionary designs or specifications provided by the State;
- (5) materials, processes, resources or information provided by the State to Vendor pursuant to this Agreement or used by or for the State prior to the Effective Date and used by Vendor after the Effective Date; or
- (6) use of any items or services outside their specified operating environment;

provided that the exceptions in Section 17.4.3(4) will not apply in the case of a design or development choice made by Vendor in implementing or operating the System or a Deliverable (i) that was not specifically required by the State specifications or requirements, and (ii) where a commercially reasonable, non-infringing alternative to the design or development choice exists which still complies with the State specifications.

#### **17.4.4** *Exceptions to Liability Limitation*

- (1) The limitations described in Section 17.4.1 shall not apply (i) to any amounts paid to the State or properly withheld from Vendor as Liquidated Damages or (ii) to the amounts of any Claims for any of the following:
  - (A) Vendor's obligations under Section 11.9;
  - (B) any amounts that the State may recover at law from Vendor under an award arising from an Infringement Claim for the Katz Patents;
  - (C) unpaid State or local Indiana Taxes owed by Vendor;
  - (D) Losses subject to indemnification under Section 17.2.1 that are not specified as being subject to and within Cap III;
  - (E) damage to tangible personal property or for bodily injury, including death, due to the negligence or willful misconduct of Vendor, any Subcontractor or any Project Employee (except as arising from or related to eligibility benefit determinations); or

- (F) misappropriation of Personal Information or State Confidential Information by Vendor, any Subcontractor or any Project Employee.
- (2) The following amounts shall be excluded from any amounts aggregated to determine whether Cap I, Cap II, Cap III, or Cap IV has been exceeded: (i) any of the amounts under Section 17.4.4(1) and (ii) any Service Level Credits.

\* \* \* \* \*

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**ARTICLE 18**  
**ACTIONS AGAINST THE STATE**

**18.1** Limitations on Damages

THE STATE WILL NOT BE LIABLE FOR INCIDENTAL, INDIRECT, SPECIAL, EXEMPLARY, TREBLE, PUNITIVE OR CONSEQUENTIAL DAMAGES UNDER CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHER LEGAL THEORY OR FOR ANY EXPENSES (INCLUDING ATTORNEY FEES AND DISBURSEMENTS). THIS LIMITATION WILL APPLY REGARDLESS OF THE CAUSE OF ACTION AND EVEN IF THE STATE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

**18.2** Interest

Notwithstanding Section 18.1, Vendor may seek to recover from the State overdue payments under this Agreement, and interest thereon, as described in Section 4.7.

**18.3** No Waiver of Sovereign Immunity

The Parties expressly agree that no provision of this Agreement is in any way intended to constitute a waiver by the State of any immunities from suit or from liability that the State may have by operation of law. The State acknowledges and agrees that the foregoing sentence does not limit Vendor's rights against the State under IC 34-13-1.

**18.4** No Privity with the State

Vendor agrees and will inform Project Employees and Subcontractors that such Project Employees and Subcontractors have no right of action against the State for any duty, liability or obligation owed by Vendor to any such Project Employees or Subcontractors pursuant to or under this Agreement.

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## **ARTICLE 19 DISPUTE RESOLUTION**

### **19.1 Internal Mediation**

#### **19.1.1**     *Generally*

The Parties mutually agree that the interests of fairness, efficiency, and good business practices are best served when the Parties employ all reasonable and informal means to resolve any dispute under this Agreement prior to invoking a remedy provided elsewhere in this Article.

#### **19.1.2**     *Internal Mediation Process*

In order to facilitate good communication and systematic procedures for addressing potential and existing disputes in a fair, timely and efficient manner, the Parties will, with respect to any disputes that cannot be resolved through any informal problem resolution procedure to be developed by the Parties as part of the Governance Plan, comply with the informal dispute resolution process set forth in subparagraphs (1) through (3) below:

- (1) Vendor and the State will use their reasonable best efforts to resolve disputes arising in the normal course of business at the lowest organizational level between each Party's staff with appropriate authority to resolve such disputes. When a dispute between Vendor and the State cannot be resolved in the normal course of business, either the State Project Manager or the Vendor Senior Program Executive will notify the other in writing of the dispute, specifying the disputed issues. Thereafter the State Project Manager and the Vendor Senior Program Executive will use their reasonable best efforts to resolve the dispute within seven (7) Business Days of submission by either Party to the other of such a dispute notice.
- (2) If the State Project Manager and the Vendor Senior Program Executive are unable to resolve the dispute within such period, the matter will be elevated to the State Project Manager and the Vendor Senior Program Executive and they shall have twelve (12) Business Days following the seven (7) Business Day period in clause (1) above to resolve the dispute.
- (3) If the State Project Manager and the Vendor Senior Program Executive are unable to resolve the dispute within such period, the matter will be elevated to the State Project Director and Vendor's Relationship Partner (Industry Vice President). If the dispute cannot be resolved within a reasonable period of time thereafter, the provisions of Section 19.2 shall apply.



For any dispute subject to this Section 19.1.2 that involves the payment of any Fees in excess of Five Million Dollars (\$5,000,000), the time periods in (1) and (2) above shall be reduced to three (3) Business Days and five (5) Business Days, respectively.

**19.1.3**     *Compliance with Process*

A Party shall not resort to any formal Proceedings (except to pursue judicial resolution as provided in clause (ii) of Section 19.2) unless such Party has complied in good faith with the process set forth in Section 19.1.2, which process has resulted in such Party's reasonable determination that a negotiated resolution is not possible, or unless such Party has determined that compliance with the process could result in a waiver, loss or diminution of a Party's rights or remedies under this Agreement or applicable Law.

**19.1.4**     *Resolution Reduced to Writing*

The resolution of any dispute disposed of by agreement between the Parties will be reduced to writing and delivered to and signed by each Party within ten (10) Business Days of resolution.

**19.1.5**     *Time is of the Essence*

Time is of the essence in the resolution of disputes.

**19.2**     Judicial Resolution

Either Party shall be entitled to pursue any remedy available to it in any court of competent jurisdiction (i) as contemplated by Section 19.1, or (ii) at any time notwithstanding the availability or applicability of the Dispute Resolution Procedures in connection with any of the following: (a) seeking any equitable remedies, (b) protecting that Party's intellectual property or Confidential Information, or (c) in connection with the pursuit or defense of any third party claim.

**19.3**     Duty to Perform

Each Party agrees to continue performing its obligations under this Agreement while a dispute is being resolved except to the extent performance is prevented by the other Party or the issue in dispute precludes performance. For the avoidance of doubt, the State's withholding payment of disputed charges as permitted under the Agreement will not be considered to prevent Vendor from performing the Services, nor will this Section be interpreted to limit either Party's right to terminate the Agreement as provided in Article 16.

**19.4**     Tolling

Any statute of limitations and time limitation under IC 34-13 applicable to matters in dispute between the Parties shall be tolled during the pendency of the Dispute Resolution

Procedures prior to initiation of litigation, with such tolling commencing on the date that either Party submits a notice of a dispute and ending on the expiration of the period for pursuing a dispute resolution pursuant to this Article 19. Such tolling shall be applicable to each dispute resolution commenced pursuant to the provisions of this Article 19. The Parties will take such action, if any, required or reasonably requested by either Party to such dispute to effectuate tolling of the applicable statute(s) of limitation and time limitation under IC 34-13.

#### **19.5 Ripeness**

If either Party fails to follow the Dispute Resolution Procedures in all material respects, the matter in dispute shall not be ripe for consideration by any court which would otherwise have competent jurisdiction over the dispute and the parties.

#### **19.6 Implementation of Changes**

Any changes to this Agreement as a result of a resolution under the Dispute Resolution Procedure will be implemented in accordance with Section 3.11.

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## **ARTICLE 20**

### **CONFIDENTIALITY AND PRIVACY**

#### **20.1 Confidentiality Agreement**

The Parties agree that all Confidential Information is subject to the terms and conditions of this Section 20.1.

- (1) Each Party will treat the other Party's Confidential Information exchanged or disclosed pursuant to this Agreement confidentially, by using, and causing its permitted recipients to use, the greater of (i) the same care and discretion with regard to the Confidential Information it employs with regard to similar information of its own which it does not desire to publish, disclose or disseminate, or (ii) a reasonable standard of care used with similar confidential information by similar persons in the same or similar business or service environment. Each party will inform its permitted recipients of the confidential nature of the Confidential Information and to direct them to treat the Confidential Information confidentially and to use it only in connection with the provision or receipt of the Services. For purposes of this Section, "permitted recipients" means directors, officers, employees, attorneys, accountants, and advisers (with respect to the State, other than those entities listed in Schedule 20) of a Party who have a need to know the Confidential Information in connection with the delivery or receipt of the Services or the enforcement or defense of rights, remedies or claims under this Agreement.
- (2) Except as expressly provided in Article 11, each Party disclaims all title and interest in the other Party's Confidential Information, other than the right to use such Confidential Information to provide or receive the Services.
- (3) Each Party will use the Confidential Information solely in connection with the provision or receipt of the Services. Each Party will not make any commercial use, practice, disclosure, dissemination, publication or exploitation of the other Party's Confidential Information without the other Party's written consent or as permitted in this Agreement.
- (4) Within a reasonable time after Termination, each Party will deliver to the other Party all tangible documents and information to the extent containing the Confidential Information of the other Party, except as permitted under this Agreement.
- (5) The term "Confidential Information" does not include information (i) already in the possession of the recipient without obligation of confidentiality, (ii) developed independently of this Agreement, (iii) obtained from a source other than the discloser without obligation of

confidentiality, (iv) publicly available when received, or subsequently becomes publicly available through no fault of the recipient, or (v) disclosed by the discloser to another without obligation of confidentiality. Each Party may use in its business activities the ideas, concepts and know-how contained in the Confidential Information of the other Party which are retained in the memories of the recipient's employees who have had access to such information under this Agreement; provided that the foregoing shall provide Vendor no right to use State Client Data.

## **20.2 Personal Privacy Protection; Identity Theft Protection; Restrictions Regarding Social Security Numbers**

### **20.2.1 *General Obligations***

Vendor shall implement commercially reasonable and customary practices and, in any event, practices not less than Vendor takes to protect its own information of a similar sensitivity with respect to the protection of the privacy and security of all Personal Information, including implementing the safeguards reasonably required to prevent, identify and limit the consequences associated with identity theft and the improper usage of Clients' respective Personal Information.

### **20.2.2 *Social Security Number***

- (1) Vendor has read and understands IC 4-1-10 (Release of Social Security Number), and IC 4-1-11 (Notice of Security Breach), and the rules adopted by the Office of the Attorney General, which appear at 10 IAC 5.
- (2) Vendor shall not collect social security numbers ("SSN") of any Persons in connection with its performance of the Services pursuant to this Agreement unless the number is required by applicable Law in order to carry out its duties under this Agreement. Vendor and the State shall coordinate and cooperate in determining when, in the performance of Services under this Agreement, the collection of a SSN is expressly required by applicable Law as allowed by IC 4-1-10-5(a)(1). As an additional precaution, Vendor, in coordination with the State, shall obtain the express written consent of the individual as contemplated by IC 4-10-10-5(a)(2).
- (3) Vendor shall require each of the Subcontractors to sign an undertaking in substantially the form of Exhibit D [Form of Confidentiality Undertaking for Subcontractors], wherein the disclosure of SSNs is forbidden except for the express purpose allowed by applicable federal or State Law. The employer of the respective Project Employees shall require such Project Employees to enter into a confidentiality

agreement with such employer that is designed to ensure non-disclosure of SSNs and to protect Personal Information and other Confidential Information of the State.

- (4) Vendor will implement the security measures set forth in the Technology and Security Plan designed to ensure against the disclosure of SSNs to which it or the Subcontractors have access during the course of providing the Services under this Agreement.
- (5) Vendor and its Subcontractors shall comply with the Notice of Security Breach requirements set forth in IC 4-1-11.

#### **20.2.3** *Personal Information Protection Laws*

- (1) Vendor has read and understands IC 24-4.9 (Disclosure of Security Breach) and IC 24-4-14 (Persons Holding Customer Information).
- (2) In the event of a breach of the security of the System, Vendor shall comply with the disclosure requirements set forth in IC 24-4.9-3, including, as applicable, disclosure to each consumer reporting agency (as defined in 15 U.S.C. §1681a(p)).

#### **20.2.4** *Criminal Penalty for Disclosure of Confidential Information*

Vendor acknowledges that it has reviewed and is familiar with the provisions of IC 5-14-3-10 (a) regarding the disclosure of information classified as confidential under the Laws of the State.

### **20.3** Legal and Regulatory Compliance

#### **20.3.1** *Laws Governing PHI*

Without limiting the foregoing, and in addition to the provisions of Section 20.4, Vendor shall comply with all Applicable Laws containing provisions related to the protection of the privacy and security of Personal Information, including, as applicable, (i) Laws governing the Programs, including the federal regulations at 42 C.F.R. §431.300 *et seq.*, (ii) Laws concerned with the privacy and security of protected individually identifiable health information (“**PHI**”), including the Health Information Portability and Accountability Act and regulations promulgated thereunder (“**HIPAA**”) and all other Applicable Laws, including those Laws pertaining to Personal Information related to drug and alcohol treatment, mental health, dangerous communicable diseases and genetic testing (hereinafter collectively referred to as the “**Laws Governing PHI**”), (iii) the Federal Privacy Act of 1974, (iv) the Indiana Fair Information Practice Act, (v) Indiana Voter Registration Records Laws, (vi) Laws pertaining to criminal history background checks, (vii) IC 24-4-14, and (viii) Section 6103 of the Internal Revenue Code.

### **20.3.2** *Compliance Programs*

Vendor shall maintain a compliance program designed to ensure compliance with Laws Governing PHI.

## **20.4** Protected Health Information

### **20.4.1** *HIPAA*

The Parties acknowledge that the United States Department of Health and Human Services (“HHS”) has and will continue to promulgate certain regulations under HIPAA (“**Regulations**”) in order to safeguard the privacy and security of PHI. To the extent required by Laws Governing PHI, Vendor shall (i) perform all Services, obligations and other activities hereunder as a “Business Associate” as that term is defined by the Regulations, including execution of a Business Associate Agreement in the form of Exhibit F [Business Associate Agreement], and (ii) fully implement and comply with the safeguards and terms specified in this Agreement, the Business Associate Agreement, and HIPAA to assure full implementation and compliance of all safeguards reasonably required to assure the privacy and security of all PHI that is created or received by Vendor in the performance of the Services, any obligations or other activities pursuant to or related to this Agreement.

### **20.4.2** *Business Associate Agreement*

In addition to the confidentiality obligations in Section 20.1, Vendor acknowledges that all PHI created or received by Vendor in the performance of any Services, obligations or other activities pursuant to or related to this Agreement shall be subject to certain Business Associate obligations as required by HIPAA and the Regulations as set forth in the Business Associate Agreement in the form attached hereto as Exhibit F.

## **20.5** Privileged Communications; Work Product

### **20.5.1** *Protection of Protected Information*

- (1) Vendor acknowledges that the State may assert any applicable privilege, work product doctrine or other applicable Law that protects any Protected Information which qualifies as a privileged communication, work product, or is otherwise legally protected, including but not limited to writing of attorney’s factual investigation, research, impressions, opinions and conclusions that are related to or are prepared in anticipation of litigation or in connection with a governmental investigation but retains the right to waive any of the foregoing in its discretion.
- (2) Vendor shall promptly notify the State of any request from any Person for Vendor to disclose or produce any Protected Information. At the

request or direction of the State, Vendor shall comply with and shall assert any and all applicable privileges, work product doctrine or other requirements in accordance with applicable Laws, including but not limited to the Indiana Rules of Trial Procedure, the Indiana Rules of Evidence, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, to protect against the disclosure of any Protected Information.

**20.5.2**     *Required Release of Protected Information*

In the event Vendor believes it has a legal obligation to disclose any Protected Information in Vendor's possession or control, including obligations that arise from the issuance of a subpoena duces tecum, discovery request or court order, pursuant to any Law or the order or other directive from a Governmental Body pursuant to which Vendor believes the Protected Information must be released, Vendor shall notify the State as soon as reasonably practical after it learns of such obligation, and in any event within a time sufficiently in advance of the proposed release date such that the State's rights and interests would not be prejudiced.

**20.5.3**     *Objections to Release of Protected Information*

If the State objects to the release of such Protected Information, Vendor shall allow the State to exercise any legal rights or remedies which either the State or Vendor might have with respect to the release of the Protected Information and the Parties shall be responsible for their respective costs, expenses and attorneys' fees in connection therewith.

**20.5.4**     *Prior Notice of Proceedings*

Prior to the commencement by a Party of any Proceeding in respect to any unauthorized possession, use, knowledge, or access to Protected Information by any person or entity, which action or Proceeding identifies the other Party or pertains to the other Party's Protected Information, such Party shall provide notice thereof to the other Party and shall obtain such Party's consent thereto.

**20.6**     Return or Destruction of Protected Information

**20.6.1**     *Destruction of Protected Information on Termination*

Upon Termination, and to the extent permitted by applicable Laws, Vendor shall return to the State, or, at the State's direction, destroy, all Protected Information created or received by Vendor that Vendor maintains or stores in any form or medium. Vendor shall complete such return or destruction as promptly as possible, but not later than thirty (30) days after the effective date of a Termination (as extended by any Disengagement Period).

**20.6.2** *Treatment of Indestructible Protected Information*

Vendor shall document any Protected Information that cannot feasibly be returned to the State or destroyed, and will limit further access to or use of such Protected Information to those purposes that make return or destruction of that Protected Information infeasible. Within the thirty (30) day period set forth in Section 20.6.1, Vendor shall (i) confirm in writing to the State that such return has been completed to the extent of such return, (ii) deliver to the State the documentation related to any Protected Information for which return or destruction is infeasible and, (iii) for such Protected Information, confirm to the State that Vendor shall only access or use such Protected Information for those purposes that make return or destruction infeasible.

**20.6.3** *Continuing Obligation*

Vendor shall remain bound by the non-disclosure provisions of this Article 20, even after Termination, until such time as all Protected Information has been returned to the State, de-identified, or otherwise destroyed as provided in this Section 20.6; provided that the Parties understand and agree that certain unrecorded information cannot be returned, destroyed, or de-identified, so Vendor shall remain bound by the provisions of this Agreement so long as Vendor possesses such Protected Information.

\* \* \* \* \*

[Remainder of this page intentionally left blank]



## **ARTICLE 21 MISCELLANEOUS**

### **21.1 Notice**

All notices, requests, approvals, consents and other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given: (i) if delivered personally on the date received, (ii) if a Party has provided a facsimile number for delivery of notice and notice is so delivered, then on the date received or if received after the recipient's close of business on such day, then on the next Business Day, (iii) if delivered by overnight courier, on the next Business Day after deposit with the courier service absent persuasive evidence of the failure of delivery thereof on such date and then on the day of delivery indicated by such evidence, and (iv) if mailed, four (4) Business Days after mailing if sent by U.S. registered or certified mail. Any such notice shall be sent as follows:

If to Vendor:                      International Business Machines Corporation  
Attn: IBM Senior Program Executive  
2855 North Franklin Road  
Indianapolis, Indiana 46219

With a copy (which  
shall not constitute  
notice) to:                      IBM Global Services  
Attn: General Counsel  
Route 100  
Somers, New York 10589

If to the State:                      Family and Social Services Administration  
Attn: Secretary  
402 West Washington Street, Room W-468  
Indianapolis, Indiana 46204

With a copy (which  
shall not constitute  
notice) to:                      Office of the Attorney General  
Indiana Government Center South,  
Fifth floor, 402 West Washington St.  
Indianapolis, IN 46204-2770

- and -

Family and Social Services Administration  
Attn: Director of the Division of Family Resources  
402 West Washington Street, Room W-392  
Indianapolis, Indiana 46204

- and -

Family and Social Services Administration  
Attn: General Counsel  
402 West Washington Street, Room W-451  
Indianapolis, Indiana 46204

- and

Indiana Department of Administration  
Attn: General Counsel  
402 West Washington Street, Room W-479  
Indianapolis, Indiana 46204

- and -

Krieg DeVault LLP  
One Indiana Square  
Suite 2800  
Indianapolis, IN 46204-2017  
Attn: William R. Neale

If notice is specifically to be given to either the General Counsel of the Family and Social Services Administration or to the General Counsel of the Indiana Department of Administration, such notice shall be sent to their respective addresses shown above, with a copy (which shall not constitute notice) to the Office of the Attorney General at the address for that office shown above. Any Party sending notice by facsimile shall telephone to confirm receipt. A copy of any such facsimile notice shall also be sent on the date such notice is transmitted by facsimile by registered express mail or courier with the capacity to verify receipt of delivery. Any Party may change its address, facsimile number or contact person for notification purposes by giving the other Party notice of the new address or facsimile number and the date upon which it will become effective in accordance with the terms of this Section 21.1. The Parties acknowledge that delivery by electronic mail shall be invalid absent conclusive evidence by the Party delivering the notice of the actual receipt and opening of such electronic mail by the designated recipient thereof.

## **21.2 Governing Law**

This Agreement is governed by, interpreted, construed and enforced in accordance with applicable federal Laws and the Laws of the State (excluding any conflict of laws rules or principles that might refer such interpretation to the laws of another jurisdiction).

## **21.3 Jurisdiction and Venue**

Any Proceeding with respect to this Agreement shall be brought in the state courts in the State of Indiana in the County of Marion. Vendor irrevocably submits to the jurisdiction

of such courts with regard to any such Proceeding and irrevocably waives, to the fullest extent permitted by applicable Law, any objection it may have now or hereafter have to the laying of venue of any such Proceeding in such courts and any claim that any such Proceeding brought in such courts has been brought in an inconvenient forum. Service of process on the State may be made by those methods permitted by the Laws of the State. Service of process on Vendor may be made either by registered or certified mail addressed as provided for in Section 21.1 or by delivery on Vendor's registered agent for service of process in the State of Indiana, in addition to any other method permitted by the Laws of the State. The Parties irrevocably waive any right to a jury trial in any Proceeding between the Parties relating to or arising under this Agreement.

## **21.4 Assignment**

### **21.4.1** *Assignment by Vendor*

Except as provided in Section 21.4.2, neither Party shall assign all or any portion of its rights under or interests in the Agreement or delegate any of its duties without prior written consent of the other Party. Any written request for assignment or delegation must be accompanied by written acceptance of the assignment or delegation by the assignee or delegation by the delegatee. Except where otherwise agreed in writing by the other Party, any assignment or delegation by a Party will not release that Party from its obligations pursuant to the Agreement.

### **21.4.2** *Assignment by the State*

Vendor understands and agrees that the State may in one or more transactions assign, pledge, transfer, or hypothecate this Agreement to any State Agency performing the same or substantially similar functions as those under the auspices of FSSA without notice to or consent of Vendor.

### **21.4.3** *Assumption*

Each Person to whom an assignment or transfer of this Agreement is made must assume all or any corresponding part of Vendor's or the State's interests and obligations in this Agreement and any documents executed with respect to this Agreement, including, without limitation, its obligation for all or any portion of the performance or payment, in whole or in part.

## **21.5 Successors and Assigns**

This Agreement shall be binding upon, shall inure to the exclusive benefit of and shall be enforceable by the respective successors and permitted assigns of the Parties hereto. Otherwise, this Agreement is not intended to, nor shall it, create any rights in any other Person.

## **21.6 No Third-Party Beneficiaries**

Other than the indemnity rights under Article 17, (i) nothing contained in this Agreement is intended or shall be construed to confer upon any person or entity (other than the Parties hereto) any rights, benefits or remedies of any kind or character whatsoever, and (ii) no person or entity shall be deemed a third-party beneficiary under or by reason of this Agreement.

## **21.7 Negotiated Terms**

The Parties have negotiated this Agreement and all of the terms and conditions contained in this Agreement at arms' length, and each Party has had the opportunity to be represented by counsel during such negotiations. No term, condition, or provision contained in this Agreement shall be construed against any Party or in favor of any Party (i) because such Party or such Party's counsel drafted, revised, commented upon, or did not comment upon, such term, condition, or provision, or (ii) because of any presumption as to any inequality of bargaining power between or among the Parties.

## **21.8 Entire Agreement**

This Agreement, including the Preamble and all Attachments, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements, understandings, offers, proposals and responses, whether written or oral, between the Parties with respect to the subject matter hereof, none of which shall be of any force or effect. The only representations, warranties, understandings, assumptions or agreements between the Parties as to the subject matter hereof are those contained in this Agreement and in the Attachments.

## **21.9 Amendments**

No amendment to, or change, waiver or discharge of, any provision of this Agreement shall be valid unless in writing and signed by the Authorized Representatives.

## **21.10 Waivers**

No right conferred on either party under this Agreement shall be deemed waived, and no breach of this Agreement by Vendor or non-performance or breach by the State excused, unless such waiver or excuse is in writing and signed by the Party claimed to have waived such right. No failure on the part of any Party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right.

## **21.11 Standard for Consents, Discretion and Agreements**

Any consents, approvals, waivers, responses or similar actions contemplated hereby shall not be unreasonably withheld, conditioned or delayed, unless it is expressly provided that such action is discretionary. The term "discretion," unless expressly modified otherwise,

shall mean the sole discretion of the applicable Party. Any reference to an agreement by one of the Parties to be provided during the Term (such as changes to be made by mutual agreement) shall be an agreement made at the discretion of the respective Parties exercised in good faith. Subject to any other standard expressly stated herein to the contrary, the Parties actions, directions and requests hereunder shall be reasonable, and, with respect to the State, its actions, directions and requests shall be deemed to be reasonable if the State is acting reasonably in a manner consistent with its sovereign authority.

## **21.12 Publicity**

- (1) Except as provided in the paragraphs below, Vendor must not use the name of the State of Indiana, FSSA, or any other State Agency, or refer to the State, FSSA or any other State Agency, directly or indirectly, in any media release, public announcement, or public disclosure relating to this Agreement or its subject matter, including in any promotional or marketing materials, customer lists, or business presentations (other than proposals or reports submitted to the State, a State Agency, or a Governmental Body or unit of another state or the Federal government).
- (2) Vendor may publish, at its sole expense, results of Vendor performance under this Agreement with the State's prior review and approval. Any publication (written, visual, or sound) will acknowledge the support received from the State and any Federal agency, as appropriate. Vendor will provide the State at least three (3) copies of any such publication at least fifteen (15) days prior to the desired date of public release. Vendor will provide additional copies at the request of the State.
- (3) Vendor may include information concerning this Agreement's terms, subject matter, and estimated value in any report to a Governmental Body to which Vendor is required by law to report such information.
- (4) Either Party may indicate to third parties that Vendor is providing services to the State. With the State's prior written consent (given or withheld in the State's discretion), Vendor may use the State as a reference and may disclose any publicly available information.
- (5) Vendor shall not issue any press release, announcement, report, disclosure or filing with respect to the transactions contemplated by this Agreement without obtaining the prior approval of the State unless disclosure is otherwise required by applicable Law; provided, however, to the extent required by applicable Law, Vendor shall use its best efforts consistent with such applicable Law to consult with the State with respect to the text thereof prior to such filing and, to the extent the same are not inconsistent with Law or the applicable facts

with respect thereto, shall not unreasonably refuse to incorporate any suggestions or revisions proposed by the State.

- (6) The State may not use Vendor's or any Subcontractor's trademarks without the prior written consent of Vendor or such Subcontractor.
- (7) Notwithstanding any other limitation in this Section 21.12, nothing shall prohibit either Party from identifying the other Party in any pleading or other document related to a Proceeding to enforce the first Party's rights under this Agreement.

#### **21.13 Expenses and Attorney's Fees**

Except as otherwise provided herein, each Party will bear all expenses incurred by it in connection with this Agreement contemplated hereby, including fees and expenses of legal counsel, consultants, printers, financial advisors and accountants and the costs of obtaining required consents and approvals.

#### **21.14 Relationship of Parties**

Other than the limited agency expressly created hereby, the Parties agree that nothing in this Agreement shall constitute or be deemed to create a partnership, joint venture or principal and agent relationship between the State and Vendor, nor shall any term or provision hereof be construed in any way to grant, convey or create any rights or interests to any Person not a Party to this Agreement. Further, only the rights and licenses specified herein are granted.

#### **21.15 Counterparts**

This Agreement must be executed in the original and not by facsimile signatures but may be executed in any number of counterparts. Any Party hereto may execute any such counterpart, each of which when executed and delivered together shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument. This Agreement shall become binding when one or more counterparts taken together shall have been executed and delivered by the Parties.

#### **21.16 Severability**

Any provision of this Agreement which is held to be prohibited, unenforceable, or not authorized by any court of competent jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition, unenforceability, or non-authorization without invalidating the remaining provisions hereof or affecting the validity, enforceability, or legality of such provision in any other jurisdiction.

#### **21.17 Authorized Signatories**

Any reference in this Agreement regarding execution of any Change Order, consent or approval or any amendment of this Agreement shall require the execution thereof by any

Authorized Representative of the respective Party, unless the reference expressly requires the signature of any other signatory on behalf of such Party.

#### **21.18 Exculpation**

Vendor shall not seek to enforce or bring an action against any employee, elected or appointed official, agent, attorney or representative of the State in their individual capacity for any claim, loss, damage, or liability of the State under this Agreement or otherwise related to this Agreement. For purposes of clarity, this provision shall not apply to any relationship between Vendor and such individuals unrelated to this Agreement.

#### **21.19 Signature Attestation Regarding Authority and Non-Collusion**

Vendor shall deliver a Signatory Attestation in the form attached hereto as Exhibit H from each individual executing this Agreement or any other executed document delivered to the State in connection with this Agreement.

#### **21.20 Telephone Solicitation Certification**

As required by IC 5-22-3-7:

- (1) Vendor and any principals of Vendor certify that (i) Vendor, except for *de minimis* and nonsystematic violations, has not violated the terms of (i) IC 24-4.7 [Telephone Solicitation Of Consumers], (ii) IC 24-5-12 [Telephone Solicitations], or (iii) IC 24-5-14 [Regulation of Automatic Dialing Machines] in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and (ii) Vendor will not violate the terms of IC 24-4.7 for the duration of this Agreement, even if IC 24-4.7 is preempted by federal law.
- (2) Vendor and any principals of Vendor certify that an affiliate or principal of Vendor and any agent acting on behalf of Vendor or on behalf of an affiliate or principal of Vendor: (A) except for *de minimis* and nonsystematic violations, has not violated the terms of IC 24-4.7 in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and (B) will not violate the terms of IC 24-4.7 for the duration of the Agreement, even if IC 24-4.7 is preempted by federal law.

For purposes of this Section 21.20, the term “principal” shall have the meaning provided for such term in IC 24-5-12-5.

#### **21.21 Lobbying Activities**

- (1) Pursuant to 31 U.S.C. § 1352 and any regulations promulgated thereunder, Vendor hereby certifies that no federally appropriated funds (including federally appropriated funds paid under this

Agreement) have been paid, or will be paid, by or on behalf of Vendor, to any Person to influence or attempt to influence an officer or employee of any Governmental Body or a member of Congress in connection with the awarding of this Agreement or any extension, continuation, renewal, amendment or modification of this Agreement.

- (2) If any funds other than federally appropriated finds have been paid or will be paid to any Person for influencing or attempting to influence an officer or employee of any Governmental Body or a member of Congress in connection with this Agreement, Vendor shall complete and submit Standard Form–LLL, “Disclosure Form to Report Lobbying,” in accordance with the instructions thereon.

#### **21.22 Force Majeure**

In the event that because of Force Majeure Event, Vendor is unable to perform any of its obligations under this Agreement or such performance is rendered impractical, Vendor shall provide notice to the State as soon as practicable and shall use Commercially Reasonable Efforts to resume performance of the Services to the extent practicable, despite the Force Majeure Event. Subject to Section 16.3.4(1), Vendor will be excused from performance of its obligations affected by such Force Majeure Event (but only to the extent and for the time so affected) for as long as such Force Majeure Event continues and Vendor continues to use Commercially Reasonable Efforts to recommence performance. This Section does not affect Vendor’s obligation to perform under and in accordance with the Continuity Plan provided that such Force Majeure Event does not also prevent or render impractical Vendor’s provision of such Continuity Services. During the Force Majeure Event, the State will continue to pay Vendor’s Fees (adjusted in an equitable manner to reflect any avoided costs of Vendor in connection therewith, or the recovery of any insurance proceeds under a policy or policies that provide coverage for all or a part of the Fees applicable during the Force Majeure Event, or as the Parties may otherwise agree, but increased by any additional costs incurred by Vendor in performing responsibilities beyond the Services or those set forth in the Continuity Plan).

#### **21.23 Reservation of State Rights**

Nothing set forth in this Agreement, including Article 17, is intended, or shall be construed, to limit, restrict, or modify the rights, powers, or duties of the Attorney General under IC 4-6-2 or IC 34-13-3, or the power of the Governor under IC 34-13-3-14; provided that Vendor shall have no liability for any settlement subject to such provisions to which Vendor in its discretion has not consented or agreed.

#### **21.24 Survival**

In addition to any other provisions hereof which expressly provide for survival of Termination, each Party’s obligations, rights, duties and responsibilities which, by their nature, are not and cannot be fully performed prior to the Service Expiration Date or Contract Termination Date shall be deemed to survive any Termination.



\* \* \* \* \*

[Signature pages follow immediately hereafter]

**[SIGNATURE PAGE TO MASTER SERVICES AGREEMENT]**

Each of the undersigned executing this Agreement on behalf of Vendor attests, subject to the penalties for perjury, that he/she is the properly authorized representative, agent, member or officer of Vendor, that he/she has not, nor has any other member, employee, representative, agent or officer of Vendor, directly or indirectly, to the best of the undersigned's knowledge, entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she has not received or paid any sum of money or other consideration for the execution of this Agreement other than that which appears upon the face of this Agreement.

In Witness Whereof, Vendor and the State have, through their respective duly authorized representatives, entered into this Agreement effective as of the Effective Date.

**International Business  
Machines Corporation**

(Where Applicable)

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Attested By: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**State of Indiana**

By: \_\_\_\_\_  
Mitchell E. Daniels, Jr., Governor

Date: \_\_\_\_\_

**Indiana Office of Technology**

**Department of Administration**

By: \_\_\_\_\_  
Karl Browning, Chief Information Officer

By: \_\_\_\_\_  
Carrie Henderson, Commissioner

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**Office of Management and Budget**

**APPROVED as to Form and Legality:  
Office of the Attorney General**

By: \_\_\_\_\_  
Charles Schalliol, Director

By: \_\_\_\_\_  
Steve Carter, Attorney General

Date: \_\_\_\_\_

Date: \_\_\_\_\_